# Developing Statutes for Competence to Stand Trial in Juvenile Delinquency Proceedings: A Guide for Lawmakers

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National Youth Screening & Assessment Project

ModelsforChange
Systems Reform in Juvenile Justice

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ModelsforChange
Systems Reform in Juvenile Justice

## Models for Change

Models for Change is an effort to create successful and replicable models of juvenile justice reform through targeted investments in key states, with core support from the John D. and Catherine T. MacArthur Foundation. Models for Change seeks to accelerate progress toward a more effective, fair, and developmentally sound juvenile justice system that holds young people accountable for their actions, provides for their rehabilitation, protects them from harm, increases their life chances, and manages the risk they pose to themselves and to the public. Key states in the Models for Change initiative have been Illinois, Louisiana, Pennsylvania, and Washington, and through action networks focusing on key issues, in California, Colorado, Connecticut, Florida, Kansas, Maryland, Massachusetts, New Jersey, North Carolina, Ohio, Texas, and Wisconsin.

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# Contents

# Introduction

## The Need for Statutory Guidance

This document has been prepared to assist states that are considering developing or amending statutes pertaining to competence to stand trial[1] in juvenile court delinquency proceedings. The need for the development of statutes regarding the application of competence to stand trial (CST) in juvenile court proceedings arises from recent historical developments. The right of defendants to be capable of participating in their defense, as defined in *Dusky v. U.S.* (1960)[2] and all states' criminal codes, was rarely raised in juvenile court before the mid-1990s. In the past 10 years, however, it has been raised with increasing frequency in most jurisdictions.[3] Nevertheless, most states have not yet developed statutory guidance for the application of CST in juvenile court proceedings.[4] Furthermore, within the states that have juvenile competency statutes in place, some express frustration from the bench, defense, and/or prosecution and seek change in their current statutory scheme.

During the past 10 years, research on juveniles' capacities to participate in their defense has underscored the need for special care in applying the right to juveniles,[5] especially because youths' capacities for decision-making are still developing. The application of CST to juvenile cases raises special questions that are not found in criminal laws

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1 Different terms are often used to refer to this idea including competence to stand trial, adjudicative competence, fitness to proceed, and competence to proceed. While the terms used vary from jurisdiction to jurisdiction, these terms are generally used to refer the same concept.

2 362 U.S. 402 (1960).

3 *E.g.,*Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3 (1997); Richard Redding & Linda Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 Va J. of Soc. Pol'y & L. 353 (2001); Jodi L. Viljoen, Candice Odgers, Thomas Grisso & Chad Tillbrook, *Teaching Adolescents and Adults about Adjudicative Proceedings: A Comparison of Pre- and Post-Scores on the MacCAT-CA*, 31 L. Hum. Behav. 419, 420 (2007).

4 States that have not created juvenile specific statutes on competence to stand trial by legislation include, see e.g., Alaska Stat. § 12.47.100 (2011); Conn. Gen. Stat. §§ 54-56d (2011); Del. Code Ann. tit. 11, § 404 (2011); Haw. Rev. Stat. §§ 704-403 to 704-418 (2011); 725 Ill. §§ Comp. Stat. 5/104-10 to 5/104-25 (2011); Indiana Code Ann. § 31-32-12-1 (providing for mental health evaluation of juveniles) & In the Matter of K.G., 808 N.E. 2d 631 (Ind. 2004) (holding adult competency statutes do not apply to juveniles); Iowa Code §§ 812.3 to 812.9 (2011); Kan. Stat. Ann. §§ 38-2348 to 38-2350 (2011); Ky. Rev. Stat. Ann. §§ 504.100 to 504.110 (2011); Mass Gen. Laws ch. 123 §§ 15 to 17 (2011); Mich. Comp. Laws Ann. §§ 330.2020 to 330.2044 (2011); Miss. Rules of Circuit Court & County Court Practice, Rule 9.06; Mo. Rev. Stat. § 552.020 (2011); Mont. Code Ann. §§ 46-14-101 to 202, 206, 221 (2011); Neb. Rev. Stat. § 43-258 (2011); Nev. Rev. Stat. §§ 178.400 to 178.425 (2011); N.H. Rev. Stat. § 169-B (2011); N.J. Rev. Stat. §§ 2C:4-4 to 4-6 (2011); N.M. Stat. §§ 32A-2-13, 32A-2-17, 32A-2-21 (2011); N.Y. Fam. Ct. Act §§ 322.1-322.2 (2011); N.C. Gen. Stat. §§ 15A-1001 to 15A-1003 (2011); N.D. Cent. Code § 12.1-04-04 (2011); G.J.I. v. State, 778 P.2d 485 (Okla. Crim. App. 1989); Or. Rev. Stat. §§ 161.360-370 (2011); 50 Penn. Cons. Stat. §§ 7401-7407 (2011); R.I. Gen. Laws § 40.1-5.3-3 (2011); S.C. Code Ann. §§ 44-23-410 to 22-23-260 (2011); S.D. Codified Laws §§ 23A-10A-1 to -14 (2011); Tenn. Code Ann. § 33-7-301 (2011); Utah Code Ann. § 77-15-1 (2011); Wash. Rev. Code §§ 10.77.050-.070, .084, .095 (2011); W. Va. Code §§ 27-6A-1 to -3, -9 (2011); Wyo. Stat. Ann. § 16-6-219 (2011).

5 *See e.g.*, Kellie M. Johnson, *Juvenile Competency Statutes: A Model for State Legislation*, 81 Ind. L. J. 1067, 1079 (2006); David Katner, *The Mental Health Paradigm and the MacArthur Study: Emerging Issues Challenging the Competence of Juveniles in Delinquency Systems,* 32 Am. J. L. & Med. (2006); Thomas Grisso, et al. *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & Hum. Behav. 333 (2003) (hereinafter, Grisso, *Juveniles' Competence to Stand Trial*). *See also generally,* Thomas Grisso, Evaluating Juveniles' Adjudicative Competence: A Guide for Clinical Practice (2005) (discussing differences between juvenile and adult adjudicative competence) (hereinafter, Grisso, Evaluating Juveniles' Adjudicative Competence).

pertaining to CST, which were developed in the context of adult defendants in criminal court.[6] Thus, merely applying criminal law definitions and procedures for CST to juvenile proceedings has created ambiguity and controversy.

Events of the 1990s also increased the frequency with which youth are transferred (or certified) to be tried as adults in criminal court.[7] Often this is authorized by statutory exclusion of juvenile jurisdiction for certain serious offenses. When states' laws allow this exclusion for younger adolescents, criminal courts are increasingly faced with the need to determine youths' competence to stand trial in criminal court before proceeding to trial. This has raised a number of issues associated with the criminal code's deficiencies in providing developmentally sensitive evaluation procedures or remedies for incompetence.

Therefore, in many states, criminal statutes are in need of revision to manage these circumstances. The present document, however, focuses entirely on developing competence to stand trial legislation for juvenile court proceedings. Attempting to construct guidance for legislative change in both criminal and juvenile codes would have greatly increased the complexity of this guide, possibly detracting from the accessibility of the information that the guide provides.

## Purpose of the Guide

The purpose of this guide is to assist states in developing legislation that will provide clear assistance for juvenile courts when applying competence to stand trial to juvenile court proceedings. Toward this end, the guide seeks to clarify the decision process for policymakers and legislators. However, while the main intent is to provide guidance to drafting committees, the guide may also be useful to advisory rules committees that are developing recommended court rules or legislative committees that are reviewing a bill that has already been introduced.

The legislative process typically begins with meetings of juvenile justice administrators, judges, attorneys, clinicians — and often legislators — with the intention of developing draft legislation. With many perspectives at the table, these meetings often involve collaboration, negotiation, and compromise in working through the many issues that must be addressed. This manual provides a framework to guide those discussions regarding juveniles' competence to stand trial. It is our hope that the provision of an outline of important issues and possible resolutions of issues that policy-makers must consider in the creation of a statute will clarify and structure the issues that need to be addressed, thus saving a great deal of time in "locating" the issues. We anticipate that our outlines of optional resolutions for each issue will clarify conversations and debates regarding these key issues.

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6 Grisso, *Juveniles' Competence to Stand Trial, supra* note 5; Grisso, Evaluating Juveniles' Adjudicative Competence, *supra* note 5. For a more detailed discussion of the MacArthur Juvenile Competence Study methodology, please see John D. & Catherine T. MacArthur Foundation, Working Paper for the Research Network on Adolescent Development and Juvenile Justice: Methods, Measures, and Procedures for the Juvenile Adjudicative Competence Study (August, 2002), http://www.adjj.org/downloads/9213method_archival_and_tables.pdf (last visited Nov. 1, 2011).

7 Thomas Grisso, *Society's Retributive Response to Juvenile Violence: A Developmental Perspective*, 20 L. & Hum. Behav. 229 (1996).

# Development of the Guide

During the 1990s, for reasons discussed later in this guide, the juvenile defense bar increasingly began to raise the issue of competence to stand trial in juvenile courts.[8] However, at that time, there was little scholarship or empirical literature on the application of this concept within the juvenile arena.

Since that time, there has been a dramatic increase in the number of times the issue of competence has been raised in juvenile courts. Moreover, a body of empirical evidence has emerged. Nevertheless, many states continue to lack legislative guidance surrounding the application of this concept in juvenile courts. In attempting to help states who have undertaken this process, we have learned that legislation frequently stalls. This guide provides a framework for debates surrounding key issues that such legislative committees will need to consider in moving forward in their legislative process.

The current guide was developed through multiple reviews by parties representing all sides of the debates discussed in this guide. These reviews followed a five-step process:

- **External Review:** During January and February 2010, the guide was reviewed by legal scholars (Elizabeth Scott, Columbia Law School & Robert Schwartz, Juvenile Law Center of Philadelphia) familiar with the application of developmental psychological concepts in legal contexts who suggested a number of revisions. In March 2010, their feedback was incorporated into the current document, which was then reviewed by our first group of defense, prosecution, and judicial experts (as described below).

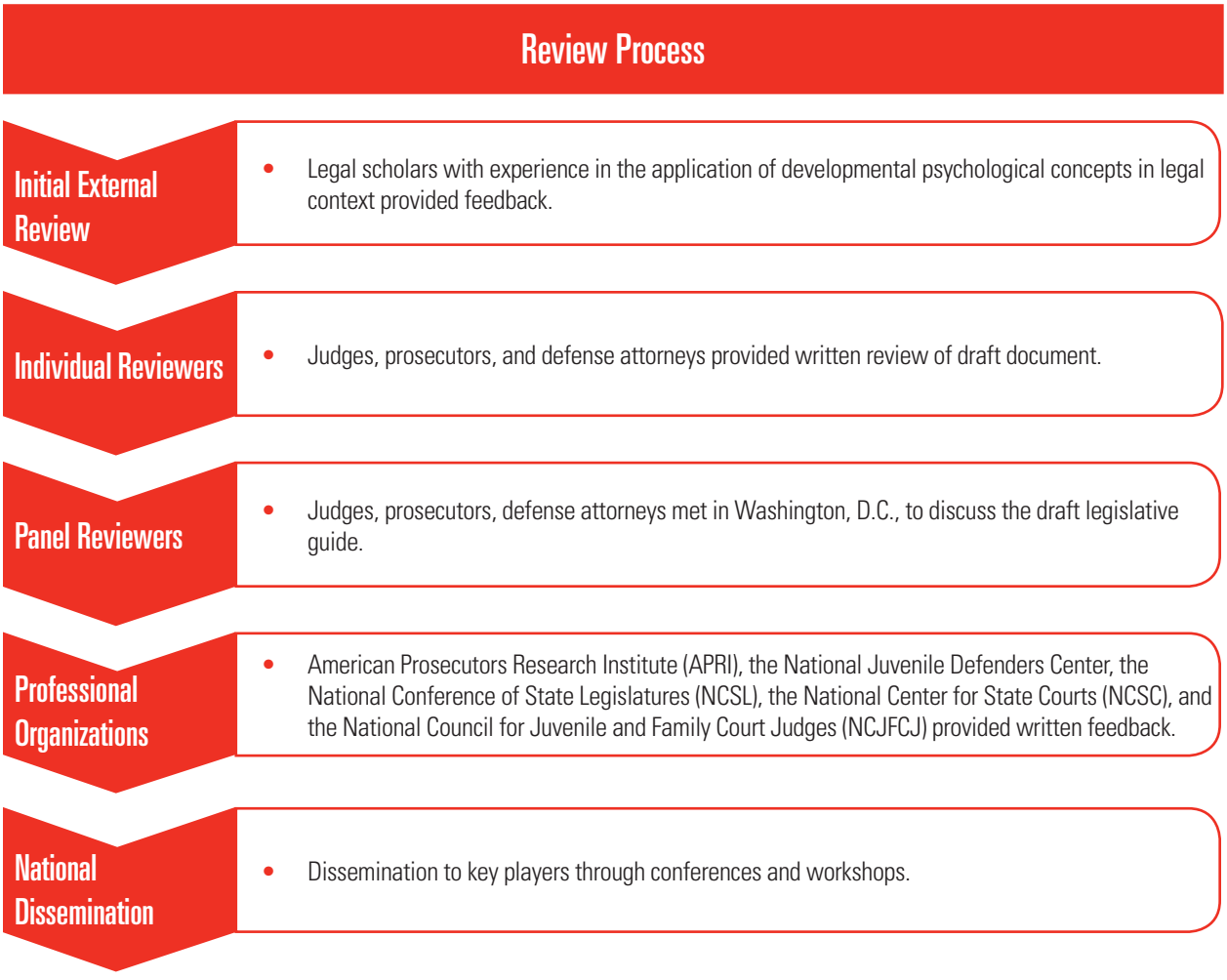
## A Note on Development of this Guide

The parties that reviewed the drafts of this document do not necessarily endorse the recommendations made by the authors. Each group was given the opportunity to review and provide input on this guide. It is unlikely that any group could endorse all views in this document, because the points of view taken by the authors fall on "both sides of the fence."

- **Defense / Prosecution / Judge Individual Review:** In July 2010, six highly experienced juvenile judges, defense attorneys, prosecutors (two judges, two prosecutors, and two defense) were mailed a copy of the draft document, which they reviewed individually in order to provide written feedback and highlight portions of the guide where they felt that their point of view could be better represented. These reviewers included Judge Irene Sullivan, Judge Andrea Janzen, Todd Dowell, J.D. (prosecutor); Ronald Rossitto (prosecutor); Kristin Henning, J.D. (defense); Ellen Marrus (defense).

8 Thomas Grisso, *Juvenile Competency to Stand Trial: Questions in An Era of Punitive Reform*, 12 Crim. Just. 4 (1997); Ivan Kruh & Thomas Grisso, Evaluations of Juveniles' Competence to Stand Trial (2009).

- **Defense / Prosecution / Judge Panel Review:** After the individual reviewers' feedback was incorporated into the document, in October 2010, a group of six highly experienced juvenile defense attorneys, prosecutors, and judges (two judges, two prosecutors, and two defense) reviewed the guide and then gathered together for a day-long discussion of the document. During this meeting, these experts provided suggestions and highlighted portions of the guide where they felt that their point of view could be better represented. These reviewers included Judge Thomas Lipps, Judge Michael Ryan, Sue Burrell (defense), Wendy Wolf (defense), Ben Roe (prosecutor), John Delaney (prosecutor).
- **Professional Organization Panel Review:** Following the incorporation of the feedback from the group meeting, key individuals from various professional organizations, who might have an interest in potential juvenile justice legislation, were invited to review the guide and provide comments. Professional organizations invited to review the draft included the American Prosecutors Research Institute (APRI), the National Juvenile



Defenders Center (NJDC), the National Conference of State Legislatures (NCSL), the National Center for State Courts (NCSC), and the National Council for Juvenile and Family Court Judges (NCJFCJ).

- **National Dissemination:** After we completely incorporated the feedback from both panel meetings and the individual reviewers, the guide was disseminated through national conferences and workshops.

## Design of the Guide

The document is divided into four modules. Each module outlines essential components for consideration when drafting statutes for competence to stand in juvenile court. The four modules are (1) Definitions; (2) Procedural issues; (3) Forensic Evaluations and Reports; and (4) Legal Dispositions and Remediation. Each module is further subdivided to include issues specific to that domain that must be considered and resolved when a state is creating juvenile competence legislation.

Each module contains multiple subsections. Each subsection first describes one of the "essential components" of a statute within that domain. In addition to describing each component, these sections explain why the component needs to be addressed and identify alternative possibilities for how to address it. The components, therefore, are not discrete "elements of a statute," but rather points that must be considered in the process of deciding what the statute will contain.[9]

After outlining each "Component," each subsection then describes the "Options," which provide detailed arguments regarding the benefits and possible detriments of handling the issue in several alternative ways. This section offers the perspectives of commentators whose viewpoints were solicited as outlined in the Development of the Guide section.[10] The purpose of this section is to identify for legislators the cogent arguments for and against the various ways of resolving the issues that each of the components raise. The intent is to provide policymakers and legislators with a balanced view of matters that need to be decided when creating legislation related to juvenile competence to stand trial by outlining the arguments on all sides of each issue.

Although we wish to provide a balanced view of each possible decision a state might make in creating juvenile competence legislation, individuals involved in the review of this document requested that we provide a "Recommendation" at the end of each section. As such, where we feel that it is within our expertise to advise states regarding a given issue, we have included a brief recommendation section. Thus, after the possible options are outlined in a given subsection of each module, we provide guidance regarding how we might resolve each component.

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9 These components were drafted by the authors after extensive review of existing statutes on CST in criminal and juvenile proceedings, as well as a comprehensive review of legal and research literature pertaining to juveniles' capacities and CST in juvenile court.

10 Please see *supra* pp. 3-5 (discussing guide development and contributing organizations).

When we offer a recommendation, we explain our logic so that it may be challenged and rejected by those who use the guide. It is our hope that states considering juvenile competence legislation will not view our recommendations as necessarily authoritative, but will consider each individual issue and determine what is best for their state. Each state differs in its history, legal structure, and culture, which may impact whether or not our recommendation(s) are workable or appropriate in their state. You are the experts regarding your state and its individual needs, and it is not practicable for us to include a discussion of all of these potential state variations.

The guide does not offer "model legislation." Instead, it provides examples of state statutes (accompanying figures) that have addressed the issues raised. These statutes are not offered as models, but are intended for illustrative purposes only, to provide examples of language states have used to address the various components.

# Background

This section provides an overview of CST as applied to adults in the criminal justice system, followed by a review of the law's more recent application of CST to juvenile delinquency proceedings. The first of these is important in order to grasp the concept of CST as it has evolved in criminal law. The review of CST in juvenile court demonstrates why those historical definitions and procedures require modification when applied to juvenile justice and adolescents.

## Competence to Stand Trial in the Criminal Justice Process

### A. The Purpose of Competence to Stand Trial

The roots of competence to stand trial (CST) in the criminal justice system can be traced as far back as 16th century English common law. The concept arose in response to persons with mental illnesses or mental retardation. The idea that a defendant must be competent to stand trial recognized that defendants' physical presence at trial was meaningless unless they were mentally present as well. Without the due process requirement that defendants be competent to stand trial, the legal system could not ensure the fairness of the process. Courts recognized that defendants with mental illnesses or significant cognitive disabilities would be unlikely to be able to participate in mounting an effective defense if they could not understand the proceedings against them. The inclusion of the requirement that defendants are competent to stand trial also recognizes that they are on unequal footing compared to the state and, without it, the process might appear unfair, damaging public respect for the law.[11]

As a consequence, common law arose with the notion that a defendant's trial should not go forward unless the defendant had sufficient mental capacity to understand the proceedings and participate in his or her defense. The concept was carried forward with the founding of the United States criminal justice system and was elevated to constitutional status with the landmark decision *Dusky v. United States*[12] and its progeny.[13]

### B. Criminal Court Standard and Process for CST

In most states, any party (defense, prosecution, or judge) may raise the issue of competence at any point in the proceedings.[14] Due process requires that the defendant be competent from arraignment to sentencing.

If, at any point, there is genuine doubt as to the competence of the defendant, the issue must be raised.[15] The court may then order an evaluation of the defendant's competence to stand trial and the proceedings are stayed while the evaluation is conducted and the court makes a determination with regard to the defendant's competence to proceed.

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11 For further discussion of the purposes of punishment and sentencing theory, please *see* Nora Demlietner, Sentencing Law and Policy (2007).

12 362 U.S. 402 (1960).

13 *E.g.*, Drope v. Missouri, 420 U.S. 162, 171 (1975); Godinez v. Moran, 509 U.S. 389 (1993); Indiana v. Edwards, 554 U.S. 208 (2008).

14 Stuart E. Eizenstadt, *Mental Competency to Stand Trial*, 4 Harv. C.R.-C.L. L. Rev. 379 (1969).

15 *E.g.*, Pate v. Robinson, 383 U.S. 375 (1966); Drope v. Missouri, 420 U.S. 162, 180-81 (1975).

Once the issue has been raised and the defendant has been evaluated, the court determines whether the defendant meets the state's standard for CST. In criminal proceedings, all states' definitions of CST must provide no less protection than the standard set forth in *Dusky v. United States*.[16] In *Dusky*, the Court held that a defendant is competent to stand trial if he or she "*has 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.*"[17]

Since its original declaration in *Dusky*, the Court has expanded upon its initial holding in several ways. It distinguished competence to stand trial from criminal responsibility (e.g., *Medina v. California*).[18] It also affirmed that whether or not a defendant was competent should be determined on the basis of the defendant's actual functioning. Thus, a diagnosis of mental illness and / or intellectual disability is not sufficient to determine whether an individual is competent to stand trial. A defendant's actual abilities to understand the proceedings and to assist counsel must be impaired in order for that defendant to be found incompetent.[19] In *Godinez v. Moran*[20], the court held that the defendants' decision-making abilities were included in determining whether defendants met the *Dusky* standard. Most recently, in *Indiana v. Edwards*,[21] the court clarified that competence to waive one's right to counsel is included within the *Dusky* standard, but if one wishes to actually represent oneself a higher level of ability would be required of the defendant.

If the defendant is found competent, the legal proceedings continue. For defendants who are not competent, most statutes provide for a period of treatment to restore competence. If the individual's competence cannot be restored, dispositions vary across states. The U.S. Supreme Court in *Jackson v. Indiana*[22] however, made it clear that treatment cannot be continued indefinitely. Most states specify a period of time after which the defendant must be dismissed if competence has not been achieved, although defendants may be civilly committed if they remain dangerous and mentally ill.

16 362 U.S. 402, 402 (1960).

17 *Id.*

18 505 U.S. 437, 448-49 (1992). This is a particularly important distinction. Practitioners, evaluators, and policymakers too often confuse the two concepts. Criminal responsibility is a retrospective concept. In such assessments, the evaluator looks at the defendant's state of mind at the time of the offense to provide the court with information related to his/her mental illness at that time, as well as any impact it might have had on the defendant's behavior when the alleged offense occurred (according to the jurisdiction's formulation of the insanity defense). In contrast, competence evaluates the state of the defendant's current mental health. In other words, the judge has a question about the defendant's ability to function at some point in the proceedings and the evaluator provides the judge with information related to any mental health symptoms and their impact upon the defendant's ability to function during the current proceedings.

19 Dusky v. United States, 362 U.S. 402 (1960).

20 509 U.S. 389 (1993).

21 554 U.S. 208 (2008).

22 406 U.S. 715 (1972).

# Competence to Stand Trial in the Juvenile Justice System

## A. Historical Review

*Absence of CST in Early Juvenile Courts*

In common law, a tiered system was employed with regard to juveniles. Juveniles ages 14 and over were treated in the same manner as adults within the criminal justice system. If the child was between the ages of 7 and 14, there was a rebuttable presumption that he or she was able to form the intent to commit a crime. If the child was under 7 years old, it was assumed that the juvenile could not form the intent to commit a crime, and he or she was not held legally culpable for the alleged act.

During the late 1800s, reformers wrote about their dissatisfaction with the fact that juveniles as young as seven were treated just as harshly as adults. Juveniles, they argued, were more malleable and, therefore, more amenable to interventions that could reform their behavior. They believed that, where parents had failed, the state should assume its traditional *parens patriae* role, to provide the rehabilitation that the child required.

The juvenile justice system was born out of these ideals with the founding of the first juvenile court in Chicago in 1899. Under this new system, juveniles were to be helped, rather than punished. Consequently, it was argued that the formal protections afforded defendants within the adult criminal system were not necessary. Because the court functioned to reform juveniles rather than provide retribution, the usual formalities and trappings of the adult system were forgone. Thus, no legal representation of youth was necessary, and there was no need to extend the right to be competent to stand trial to youth in juvenile courts.

*Extension of Rights to Juveniles: In re Gault and Its Progeny*

Despite the intended goals of the juvenile courts, the system that developed provided dispositional consequences that too often deprived youth of liberty without the benefits that the juvenile justice system had promised.[23] In 1967, in *In re Gault,*[24] the Supreme Court recognized the need to implement formal protections for juveniles and extended Due Process to the juvenile courts in delinquency cases. Since that time, with few exceptions,[25] the Court has reaffirmed its recognition of the vulnerabilities particular to juveniles within the justice system and upheld nearly the full panoply of Due Process protections for juveniles. Nevertheless, questions regarding youths' competence to stand trial were rarely raised in the three decades following the *Gault* decision.

23 In re Gault, 387 U.S. 1 (1967).

24 *Id.*

25 *See* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (stating juveniles need not be given the right to a jury trial); Schall v. Martin, 467 U.S. 253 (1984) (stating that juveniles liberty interests differ from those of adults because they are always in some form of custody).

*Legislative Changes in the 1990s and the Juvenile Defense Bar Response*

While due process rights were granted to juveniles through *Gault* as early as 1967, it was not until the 1990s that the juvenile defense attorneys began to raise the issue of competence to stand trial.[26] During the 1990s, a significant increase in homicides by juveniles created a public perception of a need for laws that would hold youth accountable in ways that more nearly approximated the law's application to adults. New laws also allowed juveniles to be transferred to the adult system for a wider variety of crimes and at increasingly younger ages.[27] With the development of this legislation, attorneys who were defending juveniles began to raise the issue of competence to stand trial in order to provide additional safeguards for their clients. At that time, however, there was little legal guidance regarding the proper procedures for juvenile competence to stand trial. Criminal justice standards and procedures for CST were often employed, resulting in significant confusion.

## B. Juvenile Capacities Relevant for Competence to Stand Trial: A Primer

It will be evident later in this guide that assessment of competency, as well as remediation of incompetence, is often more complex with juveniles than with adults. At the heart of these complexities are the three broad reasons underlying incompetence when it is encountered in juvenile cases: mental illness, intellectual disability, and developmental immaturity. Throughout the manual we will refer to these three domains as "predicates" — basically, reasons that might underlie a juvenile's incompetence. Each of the three sections below will provide the reader with a brief overview of basic clinical and research information in each area, which will help the reader to understand later portions of this legislative guide.

*Mental Illness*

Similar to their adult counterparts, juveniles with mental illness are overrepresented in the justice system. Some researchers have found that while approximately 20 percent of juveniles in the general population exhibit symptoms of mental illness, over 50 percent of the juvenile justice population suffer from some form of mental illness.[28] Many of these youth actually meet criteria for two or more disorders.[29]

The ways that mental illness presents itself in juveniles can be far more complex both diagnostically and with regard to treatment. Incompetence in adults in the criminal justice system is frequently due to serious mental illnesses that,

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26 Richard Redding & Lynda Frost, *Adjudicative Competence in the Modern Juvenile Court,* 9 Va. J. Soc. Pol'y & L. 353, 372 (2001).

27 *See e.g.,* Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 793, 805-808 (2005) (discussing legal reforms in response to perception of increase in juvenile crime rates).

28 *See e.g.,* Allen E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, *in* Youth on Trial 33–65. (Thomas Grisso & Robert Schwartz eds. 2000); Linda Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 Archives of General Psychiatry,1133,1133–43 (2002); Gail A. Wasserman et al., *The Voice DISC–IV with Incarcerated Male Youths: Prevalence of Disorder*, 41 J. Am. Acad. Child & Adolescent Psychiatry 314, 314–21 (2002).

29 *See* Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention,* 59 Archives Gen. Psychiatry, 1133, 1133–1143 (2002) (stating that about half of juveniles meet criteria for a mental disorder).

while very impairing, often respond to treatment with psychotropic medications relatively quickly. For juveniles, the picture is often more complex.

The reason for much of this complexity is that symptoms of mental illness are just emerging in adolescence and are complicated by ongoing developmental processes in several ways:

- What is considered a symptom of mental illness can vary by age. In other words, what is considered symptomatic of a disorder at one age, may not be at another age. For example, a child that throws a temper tantrum in preschool would not be considered to be exhibiting psychopathology, while the same behavior at a later age, such as high school, would be considered maladaptive or abnormal.
- While adults' traits are relatively stable across time, juveniles exhibit greater variability in behavior as they move through developmental stages. Thus, it is hard to predict what types of behaviors might simply be transient and desist when the juvenile enters adulthood, and which might persist and develop into life-long mental illness. For example, a juvenile that exhibits signs of depression may have those symptoms remit as they enter adulthood or the symptoms could desist with maturation.
- Many juveniles with a mental health diagnosis experience "comorbidity," or meet criteria for more than one mental health diagnosis. There are many hypotheses regarding why this comorbidity may occur. For example, it may be that adult diagnostic categories simply do not fit the ways that emerging mental illness in children expresses itself. Nonetheless, whatever the underlying reason, the result is increased diagnostic complexity with regard to juveniles.

Among juveniles with mental illness in the justice system, certain categories of juveniles with particular symptoms may be more vulnerable to problems that lead to findings of incompetence to stand trial (CST). For example, juveniles with Attention Deficit/Hyperactivity Disorder may be more likely to have difficulties in communicating with their attorney, conforming their behavior to that expected within the courtroom, or assisting in their defense, one of the key elements of the *Dusky* standard.[30] Juveniles with depressive symptoms may be less motivated to assist in their defense, or their cognitive functioning could be slowed or impaired due to these depressive symptoms. For adolescents, depression is more likely to be expressed as oppositional behavior or anger, which could also impair their ability to work with their attorney. Juveniles with anxiety may have difficulty providing testimony, communicating effectively, or following trial processes. Juveniles who have experienced traumatic events in their lives, such as abuse, that have resulted in posttraumatic symptoms may have difficulty asserting themselves in decisions regarding their case or trusting their lawyer.

30 Jodi L. Viljoen et al., *Legal Decisions of Preadolescent and Adolescent Defendants: Predictors of Confessions, Pleas, Communication with Attorneys, and Appeals*, 29 L. & Hum. Behav. 253, 253-77 (2005).

*Intellectual Disability and Other Cognitive Impairments*

Juveniles with intellectual disabilities (in some states, "mental retardation") are also prevalent in juvenile justice populations. Further, even when juveniles do not meet full criteria for a diagnosis of intellectual disability, they may exhibit other cognitive disorders that could impact their functioning in legal contexts. For example, the juvenile may have a low IQ, learning disabilities, and/or neuropsychological impairments.[31]

Regardless of the type of cognitive impairment the juvenile is experiencing, it can interfere with his or her competence-related abilities. In fact, some research has found that among juveniles found incompetent the reason (predicate) for the incompetence was intellectual deficit for 58 percent (compared to 6 percent of adults).[32] Such impairments often lead to difficulty with memory, learning, or processing information, making it difficult for these youth to absorb and retain the information necessary to meet the "factual" prong of the *Dusky* standard. Further, such disorders could lead to difficulty with abstract reasoning and executive functioning that would cause deficits in the juvenile's ability to have a "rational" understanding of the proceedings or engage in decision-making related to their case. Such juveniles may also experience deficits in communication or verbal abilities that could impair their ability to communicate effectively with, or assist, their attorney.

*Maturity and Immaturity*

A juvenile's current developmental stage can impact his or her trial-related abilities and capacities. Both mental illness and intellectual disability in juveniles are further complicated by their ongoing development, often with a combination of these factors impacting a given juvenile's competency abilities.

The picture of adolescent development that we will describe here focuses generally on the normal or "average" development of adolescents. But, as discussed above, these developments "on average" often do not apply to youth within the juvenile justice system because many of them may not develop on pace with their same-aged peers due to intellectual disabilities (mental retardation), long-term effects of mental disorders, or impoverished or traumatic

31 Janet I. Warren & Jeanette DuVal, *Developing a Forensic Service Delivery System for Juveniles Adjudicated Incompetent to Stand Trial,* 8 Int'l J. of Forensic Mental Health (2009) (outlining percentages of juveniles found incompetent due to mental illness, intellectual disability or both).

32 Anette McGaha et al., *Juveniles Adjudicated Incompetent to Proceed: A Descriptive Study of Florida's Competence Restoration Program*. 29 J. Am. Acad. of Psychiatry & L. 427, 427–437 (2001).

environmental conditions.[33] In such cases, the development of youths' capacities may lag behind the norms that are described in our discussion of intellectual and social capacities outlined below.

An examination of the developmental literature shows that human maturation can be divided into a number of domains that, while interrelated, may develop according to different patterns and rates. These developmental domains are briefly outlined here to help the reader conceptualize how developmental variables may change the competence analysis with regard to juveniles. While a full discussion of each domain is beyond the scope of this manual, references are provided for readers who wish to further explore each individual concept in more depth.

*Neurological Development.* Until recently, relatively little was known about the maturation of the brain in adolescence and early adulthood. This knowledge has increased dramatically with the development of advances in Functional Magnetic Resonance Imaging (fMRI) technology[34] during the last decade, which have allowed us to examine how different structures of the brain mature and develop.[35]

Several key fMRI research findings are relevant for understanding juveniles' capacities within legal contexts. Perhaps most notably, fMRI research demonstrates that the prefrontal cortex is still developing into our early 20s. The functions of the prefrontal cortex are particularly relevant to capacities for competence to stand trial because they are associated with higher-order cognitive abilities or "executive functioning."[36] For example, this area of the brain is associated with abilities to think abstractly (e.g., to imagine outcomes one has not experienced directly), to organize information, to plan ahead, to weigh potential consequences of decisions one is considering, and to delay impulsive and emotional reactions long enough to make a careful choice. Similarly, the limbic area of the brain, which is

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33 Approximately 2/3 of youth in the juvenile justice system meet criteria for at least one diagnosis, even after conduct disorder is excluded. *See* Karen Abram et al., *Comorbid Psychiatric Disorders in Youth Detention*, 60 Archives Gen. Psychiatry 1097, 1097-1108 (2003); D. Leanette Atkins et al., *Mental Health and Incarcerated Youth: I. Prevalence and Nature of Psychopathology*. 8 J. Child Fam. Stud. 193-204 (1999); Kathryn Skowyra & Joseph Cocozza, *Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth With Mental Health Needs in Contact With the Juvenile Justice System*. Delmar, NY: National Center for Mental Health and Juvenile Justice, Policy Research Associates (2006); Linda Teplin et al., *Psychiatric Disorders in Youth and Juvenile Detention*. 59 Arch Gen Psychiatry 1133, 1133-1143 (2002); Gail A. Wasserman et al., *The Voice DISC-IV with Incarcerated Male Youths: Prevalence of Disorder*, 41 J. Am. Acad. Child Adolesc. Psychiatry 314-21(2002). In the general population, rates are closer to 14-22 percent. Alan Kazdin, Psychotherapy for Children and Adolescents: Directions for Research and Practice (2000); Michael Rutter, *Isle of Wight Revisited: Twenty-five Years of Child Psychiatric Epidemiology*. J. Am. Acad. Child Adolesc. Psychiatry (1989).

34 Functional Magnetic Resonance Imaging or fMRI is a non-invasive procedure that uses powerful magnetic fields, radio frequency pulses, and a computer to measure tiny metabolic changes that are occurring in an active part of the brain to create a picture that allows us to see and study its functioning.

35 *See, e.g.*, Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 Nature Neurosci. 861, 861 (1999) (describing study of 145 children and adolescents scanned up to five times over approximately ten years); Tomáš Paus, *Brain Development, in* Handbook of Adolescent Psychology 95, 97-98 (Richard M. Lerner & Laurence Steinberg eds., 2009); Linda Spear, The Behavioral Neuroscience of Adolescence 108-111 (2009).

36 Antoine Bechara et al., *Characterization of the Decision-Making Deficit of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 Brain 2189, 2198-2200 (2000); Antoine Bechara et al., *Dissociation of Working Memory from Decision Making Within the Human Prefrontal Cortex*, 18 J. Neurosci. 428, 428, 434 (1998); Antonio R. Damasio & Steven W. Anderson, *The Frontal Lobes, in* Clinical Neuropsychology 404, 434 (Kenneth M. Heilman & Edward Valenstein eds., 4th ed. 2003). *See also* Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859, 860 (1999).

associated with reward and immediate satisfaction, is undergoing change during puberty.[37] This increases impulsive reactions, challenging youths' capacities to "stop and think" at a time in their development when the pre-frontal cortex has not yet gained its full capacity to do so.

*Cognitive and Intellectual Development.* Cognitive development, which is manifested through an individual's intellectual abilities, continues to develop well into adolescence. As part of this development, juveniles' abilities to process and organize information and maintain attention improve. They also make gains in verbal fluency as well as both long-term and short-term memory. In early adolescence, juveniles also gain the ability to think abstractly and engage in deductive reasoning. All of these abilities are necessary in order for the juvenile to fully participate in legal proceedings. For example, the accused must be able to reason regarding the probability of outcomes of each option available to them (i.e., plea bargain versus having a hearing) and imagine hypothetical future consequences of their decisions.[38]

*Psychosocial Development.* Psychosocial development refers to maturation in juveniles' emotional and social development. There are many ways to describe how youth mature emotionally and socially, but the factors that are most pertinent to a discussion of juveniles' capacities as trial defendants are those that influence their decision-making. Decision-making is not simply an intellectual process. What we decide depends also on our perceptions of risks, our preferences for various outcomes, and the degree to which we believe we can control what happens to us. These factors also are developing throughout adolescence, so that they are not the same for most 14- or 16-year-olds as they are for adults.[39]

The remainder of this section describes areas of social and emotional development that are relevant for youths' decision-making. It also provides examples of how social and emotional immaturity can affect some juveniles' legal decisions. Even if their basic cognitive and intellectual abilities are comparable to those of adults, juveniles might base their legal decisions on different, and often faulty, presumptions.

Youth enter adolescence with a relatively unstable *sense of self*.[40] Throughout adolescence they formulate and eventually stabilize their identity. Simply put, they are learning who they are, who they hope to become, and what they would like their lives to be like. This sense of self is constantly changing, as youth try different identities "on for size." For example, a particular youth at 14 might choose to have a Mohawk or piercings, but several years later may have traded in this image for a button down and khakis. Thus, youth may experiment with various identities

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37 Peter R. Huttenlocher, NeuralPlasticity: The Effects of Environment on the Development of the Cerebral Cortex 41, 46-47, 52-58, 67 (2002).

38 For a fuller discussion of adolescent cognitive development, see generally John H. Flavell, Patricia H. Miller, & Scott A. Miller, Cognitive Development (4th ed., 2001).

39 Thomas Grisso, Lawrence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, et al. *Juveniles Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants.* 27 L. Hum. Behav. 333 (2003).

40 *E.g.,* Alan S. Waterman, *Identity Development from Adolescence to Adulthood*, 18 Developmental Psychol. 341, 355 (1982); Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in* Youth on Trial 9, 27 (Thomas Grisso & Robert G. Schwartz eds., 2000); Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014-1015 (2003).

that are outside of mainstream society that will, for example, give way at 18 to an image of being a college graduate. Without a more stable sense of self, a younger juvenile may make trial-related decisions that could differ significantly from the choices their "older self" would make.

During this time of life, juveniles traverse a period of emotional instability and *impulsivity.* As they become adults, their emotions begin to stabilize and they become less impulsive than their younger self.[41] This ability to delay their response so that they are not simply responding to situations with their first impulse can be helpful as juveniles navigate the court process. For example, research has clearly shown that youth are more likely than adults to respond to a situation by selecting the option that will give immediate reward, without stopping to think about the longer range consequences.[42] As youth achieve greater maturity, their ability to delay, and to control emotional first impressions, allows them to outline their options more clearly, weigh the consequences of their decisions, and hopefully make better reasoned choices regarding their legal case.

Research also shows that juveniles' *perceptions of risk* — whether they perceive and how they consider the relative value of risks and benefits — differ from those their adult counterparts.[43] Juveniles may not see the same degree of risk in a given situation that an adult might identify and may more easily see the short-term consequences of an action, rather than imagining long-term consequences. Further, even if they identify the same risks and benefits as an adult, the relative value youth place on one possible option versus another may differ from that of adults. In fact, research bears out that juveniles tend to take more risks than adults, with risk-taking behaviors peaking between the ages of 16 and 19.[44] Even when they are not responding impulsively but are considering all of their options, juveniles tend to value short-term over long-term gain and underestimate the likelihood that a negative outcome will occur from their risk-taking behavior.[45] They may also place higher value than adults do on goals such as having fun and

41 *E.g.,* Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339, 339 (1992); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psychol. 1764, 1774-1776 (2008); see also Adriana Galvan et al., *Risk Taking and the Adolescent Brain: Who is at Risk?*, 10 Dev. Sci. F8, F13 (2007); Rotem Leshem & Joseph Glicksohn, *The Construct of Impulsivity Revisited*, 43 Personality & Individual Differences 681, 684-686 (2007). This is sometimes also referred to in the developmental literature as "temperance." Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-Making* 20 L. Hum. Behav. 249, 258-259 (1996).

42 *E.g.,* Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 Am. Psycholog. 739 (2009).

43 Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychol.1009, 1012 (2003); see also Arnett, *supra* note 41, at 350-353; Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Dev. Psychol. 257, 265, 268 (2001); Susan G. Millstein & Bonnie L. Halpern-Felsher, *Perceptions of Risk and Vulnerability*, in Adolescent Risk and Vulnerability 15, 34-35 (Baruch Fischoff et al., eds. 2001).

44 Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision-Making* 20 L. Hum. Behav. 249, 258-259 (1996).

45 Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Test*, 46 Dev. Psychol. 1, 11, 14 (2009).

generate fewer possible negative outcomes of taking a risk versus not taking a risk.[46] This could have implications for trial-related decisions. For example, it creates a greater risk that, simply because of a temporary preference for immediate gain, a juvenile might choose to take a plea bargain and be released from custody, rather than opt to wait for his or her hearing (and thus remain in detention longer), even though he or she might stand an excellent chance of prevailing and thus avoiding the consequences of a delinquency adjudication.

As part of their psychosocial development, youth gradually increase in their *autonomy*.[47] This can influence their decision-making in different ways at different times in their development. For example, preadolescents are accustomed to adults in their lives making decisions for them, and they are more susceptible to the influence of others, such as parents and other authority figures. Youth are socialized to accept that adults will make major life decisions for them and are more likely to be compliant when such decisions are made without their assent.

Around 13 to 15 years of age, however, most youth begin to favor their own ideas over those of adults, but at the same time become very dependent on the ideas of their peers. Thus for many adolescents, choices are made on the basis of what their friends would think or want, rather than on the basis of core values that are more personal.[48] Only in older adolescence do youth develop a greater sense of autonomy and the ability to make decisions independent of peers or parents.

As a result, younger adolescents may have difficulty conceptualizing themselves as able, or entitled to, make trial-related decisions independent of their parents, guardians, or attorneys. With regard to the legal proceedings they are facing, juveniles may, for example, believe that their parents or attorney can determine whether they should have a hearing or take a plea bargain independent of their possibly contrary wishes. By middle adolescence they may have difficulty making choices that they believe their peers would not make.

During adolescence, an individual's ability to take the *perspective of others* is still developing as well.[49] Juveniles may have difficulty seeing the world "through someone else's eyes." Thus youth will sometimes have difficulty

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46 Notably, however, while risk-taking is nearly normative behavior for adolescents, risk-taking behaviors such as engaging in crimes for the majority of individuals will not persist into adulthood. Such behaviors peak sharply around age 17 and then desist in young adulthood. Terrie E. Moffitt, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674, 685-686 (1993); see also Terrie E. Moffitt, *Natural Histories of Delinquency*, *in* Cross-National Longitudinal Research on Human Development and Criminal Behavior 3, 29 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 1994).

47 Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 Developmental Psychol. 608, 612, 615-616 (1979); Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 Child Dev. 841, 848 (1986); Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 38 (2008); see also Kristan Erickson et al., *A Social Process Model of Adolescent Deviance: Combining Social Control and Differential Association Perspectives*, 29 J. Youth & Adolescence 395, 420-421 (2000); Jeffrey Fagan, *Contexts of Choice by Adolescents in Criminal Event*s, *in* Youth on Trial 371-394 (Thomas Grisso & Robert G. Schwartz eds., 2000).

48 Scott & Steinberg, *supra* note 47, at 38-39.

49 In fact, this phenomenon is even more pronounced among children who have been maltreated. Jacob A. Burack, Tara Flanagan, Terry Peled, Hazel M. Sutton, Catherine Zygmuntowica, & Jody T. Manly, *Social Perspective-taking Skills in Maltreated Children and Adolescents*, 42 Developmental Psychol. 207 (2006).

appreciating the perspective and biases of others who might seek to influence their decision. They may also struggle to grasp the perspectives of others during the trial.

## C. Research on Youths' Capacities as Trial Defendants

A number of scientific studies have examined juveniles' psychological capacities specifically with regard to competence to stand trial. The most comprehensive examination of juveniles' trial-related abilities has been the MacArthur Juvenile Adjudicative Competence Study.[50] This study examined two ethnically and geographically diverse groups: (1) 927 adolescents (age 12-17) who were residing either in juvenile justice facilities or community settings and (2) 466 young adults (age 18-24) who were located in jails or in the community.

All juveniles and adults were given validated measures used to assess competence-related abilities (e.g., understanding of trial-related information, abilities associated with assisting counsel), as well as a measure of their judgment and reasoning about legally-relevant decisions.

This study reported the following important findings, and a majority of other studies examining youths' capacities as trial defendants have produced consistent results.[51]

- Juveniles below the age of fifteen performed more poorly, on average, than young adults, with regard to their understanding and reasoning about trial-related matters. For juveniles in detention centers, about 35 percent of 11- to 13-year-olds and 22 percent of 14- to 15-year-olds were significantly impaired. (As noted below, these proportions of youth with significant impairments increased for youth in those age groups who had IQ scores below 75. )
- On average, juveniles 16 to 17 years old scored similarly to their adult counterparts with regard to Reasoning and Understanding. Sixteen to seventeen-year-olds and young adults ages 18 to 24 were both significantly impaired 12 percent of the time.
- Intellectual ability was strongly related to competency abilities at all ages, with individuals with lower IQs being more likely to score lower than those with higher IQs. More than one half of 11-13 year-old youth with IQs between 60 and 74, and one third of those with IQs between 75 and 89 were significantly impaired. Among 14- to 15-year-olds, 40 percent of those with an IQ between 60 and 74 and over 25 percent of those with IQs between 75 and 89 were significantly impaired. This is important in light of the fact that among youth in detention centers, over 20 percent of those under 15 had IQ scores in the 60 to 74 range and 40 percent had IQs in the 75-89 range.

50 Grisso, *Juveniles' Competence to Stand Trial*, *supra* note 5.

51 *See e.g.*, Susan LaVelle Ficke, Kathleen J. Hart, & Paul A. Deardorff, *The Performance of Incarcerated Juveniles on the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA),* 34 J. Am. Acad. Psychiatry L. 360, 370 (2006).

- Juveniles and young adults were different in the ways in which they made legally relevant decisions. Youth between 11 and 13 years old were less likely to focus on the long-term consequences of their decisions. However, youth age 14 and above did not differ significantly from young adults. Young adults (18-24) also reported a higher likelihood of risk, compared to juveniles of all three age groups (i.e., 11-13, 14-15; 16-17).

The implications of this discussion of adolescent development, and the MacArthur research results, are important for later discussions of the "predicates" for incompetence to stand trial. As used in this manual, a "predicate" is a condition that can form the explanation for incompetence, although its mere existence does not necessarily mean that the individual is incompetent. While both adults and juveniles may be found incompetent due to mental illness or intellectual disability, the law in many states has established a third "predicate" — developmental immaturity — that may underlie juveniles' incompetence to stand trial. [52]

One more finding from research on juveniles' competence to stand trial is worth noting. Juveniles will vary in the amount of exposure they have had to court proceedings. One might imagine that, whatever their level of development, greater experience with juvenile courts will increase their ability to understand legal proceedings. While this appears logical, research points us to a different conclusion. Many studies have shown repeated exposure to the justice system (for example court hearings) improves understanding of these matters for some youth but not for others. [53] Especially among younger adolescents, or youth with limited intellectual abilities, exposure to something does not increase their knowledge if they are experiencing it with limited capacities to grasp its meaning. As a consequence, the mere fact that a youth has been exposed to legal proceedings may not be a good indicator of competence-related abilities.

52 Since the MacArthur Juvenile Competence Study, researchers have taken up the topic of juvenile competence to stand trial. Subsequently studies have replicated and expanded upon the outcomes of the MacArthur study, with no studies challenging the findings of this study. A full review of this research is beyond the scope of the main text of this document, but see *supra* note 42 and *infra* note 53 for additional studies.

53 *E.g.,* Thomas Grisso, Lawrence Steinberg, Jennifer Woolard, Elizabeth Cauffman, Elizabeth Scott, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. Hum. Behav. 333 (2003); Allison D. Redlich, Melissa Silverman, & Hans Steiner, *Pre-adjudicative and Adjudicative Competence in Juveniles and Young Adults*, 21 Behav Sci & L. 393 (2003); Susan LaVelle Ficke, Kathleen J. Hart, & Paul A. Deardorff, *The Performance of Incarcerated Juveniles on the MacArthur Competence Assessment Tool-Criminal Adjudication (MacCAT-CA)*, 34 J. Am. Acad. Psychiatry L. 360, 370 (2006).

# The Modules

## Introduction

The remainder of this manual focuses on guidance for the development of legislation pertaining to competence to stand trial in juvenile court delinquency proceedings. It is outlined as four modules:

Module 1: Definition of Competence to Stand Trial

Module 2: Procedural Issues

Module 3: Competency Evaluations by Mental Health Examiners

Module 4: Remediation and Legal Disposition of Incompetent Juvenile Defendants

Each module describes several "Essential Components" of any statute for Competence to Stand Trial (CST) in juvenile court. Each description defines the component and the reason for its importance. Each component is then followed by a description of options for addressing the component. As the two or three options for addressing the component are described, the pros and cons of each option are offered for discussion by legislative planners.

# Module 1: Definition of Competence to Stand Trial

Module 1 describes four components, and their options, that drafters of statutes should address regarding the definition of competence to stand trial in juvenile court:

A. Psychological Predicates[54] for Incompetence

B. Relation of the Predicate of Developmental Immaturity to Incompetence

C. Functional Abilities Associated with Competence (Incompetence)

D. Degree of Defendant Ability Required in Juvenile Court

All states except one[55] agree that competency is necessary in juvenile delinquency proceedings. This single state stands as an outlier in its position that competency is not required. The authors assume that if the reader is reviewing this guide, he or she has already decided that juvenile competency legislation should be adopted in his or her state. Thus, we begin from the proposition adopted by the vast majority of states that have considered the issue — that competence to stand trial is necessary to ensure fair and accurate proceedings (and thus should be applied to juvenile proceedings).

Presuming that competence to stand trial applies in juvenile delinquency proceedings, statutes typically should provide the standard or "test" that the court will use to determine whether the juvenile is competent or incompetent.[56]

States that have recognized competence to stand trial in juvenile court uniformly have adopted the standard or "test" for competence to stand trial that is used in the state's criminal proceedings. The competency standards of most states are similar to the standard that was offered by the U.S. Supreme Court in *Dusky v. U.S.* (1960): whether the accused has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and whether the defendant has "a rational as well as factual understanding of proceedings against him."[57]

54 As used in this manual, a "predicate" is a condition that can form the explanation for incompetence, although its mere existence does not necessarily mean that the individual is incompetent.

55 G.J.I v. State, 778 P.2d 485 (Ok. Crim. App. 1989). In the sole case in which it has not been affirmed, Oklahoma's Supreme Court reasoned that juvenile court proceedings are civil in nature.

56 However, the reader should note that this section does not discuss the *level* of ability required to meet this test. These considerations are discussed *infra* pp. 36–40 in Module 1, Part D., Degree of Ability Required in Delinquency Proceedings.

57 *Dusky*, 362 U.S. at 402.

**Standard for Competence to Stand Trial: *Dusky v. United States***

"…the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him.'"

*Dusky v. United States*, 362 U.S. 402 (1960).

# A. Psychological Predicates for Incompetence

## The Component

*Statutes should offer a definition of the allowable psychological predicates for incompetence to stand trial.*

The term "predicate" refers to a psychological condition that accounts for the defendant's incapacities in areas that are relevant for competence determinations.[58] One can also think of this as the "cause" of a defendant's relevant incapacities.

Competency laws in criminal courts have long recognized that not all conditions that cause poor understanding or reasoning about one's trial are allowable predicates for a finding of incompetence. For example, a defendant might be faking incapacity, or might simply not have been exposed to information about trials — a matter that can easily be remedied if the person has sufficient intellectual capacities. In general, incompetence is found when the defendant's substantial incapacities relevant for the legal standard are caused by conditions that are not easily remediable. States have had a variety of ways to refer to these predicate conditions, but typically they have constituted *serious mental illnesses* or *intellectual disability* (alternatively called *developmental disability* or *mental retardation*).

A competence to stand trial statute for juvenile court should specify, in a general sense, the allowable predicates for incompetence. States differ in their ways of identifying those predicates in criminal codes pertaining to competence. Some require that the defendant's incapacities must be due to "mental disease or defect," or "mental illness or mental retardation." Others define the mental condition even more broadly: for example, as "a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life."[59]

58 For a review of the literature relevant to the predicates or underlying causes of juveniles' incompetence, please see *supra* pp. 10-18.
59 Wis. Stat., § 51.01(13)(b) (2011).

Two primary matters must be decided regarding the specification of predicates in a competency statute for juvenile courts.

First, *some definition of allowable mental disorders and mental retardation should be specified.* The state's definition of these conditions in criminal statutes might be satisfactory for use with adolescents in juvenile court, as long as it uses general terms and phrases such as those described above.

Second, *drafters of the statute must decide whether "developmental immaturity" should be included among the allowable predicates for incompetence to stand trial in juvenile delinquency proceedings.* Developmental immaturity does not have a history of application in criminal law. But a growing number of states have recognized "developmental immaturity" (either by statute or case law) as a specific predicate for incompetence in juvenile court.[60] Moreover, there is substantial evidence (reviewed earlier in the "Background" section) that various cognitive and social characteristics of adolescents that might impair abilities associated with the standard for competence are still developing, especially in early adolescence. Certain immature abilities can impair youths' understanding or decision-making as defendants in ways that create incapacities no less serious than those created by mental disorders.

When considering the question of developmental immaturity as a predicate for incompetence, drafters should be aware that they are not deciding whether youth will be found incompetent merely because the predicate exists. The evolution of the legal concept of competence to stand trial has long held that the mere fact that a person is seriously mental ill does not constitute a basis for a finding of incompetence. The question is whether that illness actually causes the individual to have deficits in competency-related abilities. Similarly, *deciding that developmental immaturity is an acceptable legal predicate for incompetence does not imply that all youth who are developmentally immature are necessarily incompetent to stand trial.* How the predicate will apply is reserved for the component following this one (B. Relation of the Predicate of Developmental Immaturity to Incompetence).

## The Options

This discussion of the options focuses on the question of including developmental immaturity in juvenile competence to stand trial (CST) statutes as a predicate for incompetence.

> *Developmental Immaturity Should Be an Allowable Predicate for Incompetence to Stand Trial in Juvenile Delinquency Proceedings*

Proponents of developmental immaturity as a predicate for incompetence would argue that, without its inclusion, the ideals upon which the concept of competence to stand trial are based cannot be met. As discussed earlier in this document, due process requires that a defendant be competent. If a defendant is unable to adequately

60 *See e.g.*, La. Child. Code Ann. art. 832-838 (2010); *In re Hyrum*, 212 Ariz. 328, 332 (2006) ("…a juvenile may be found incompetent even if the juvenile does not suffer from a "mental disorder, or disability").

participate in his or her defense, that individual is at a disadvantage compared to competent defendants. Thus, regardless of the reason for such deficits, if a juvenile does not possess necessary competence-related abilities, his or her trial and conviction are unfair. This would be just as true if the deficits were due to developmental immaturity rather than mental illness.

**Example Statutory Language: *Developmental Immaturity Should Be an Allowable Predicate for IST Findings***

Upon suspension of proceedings, the court shall order that the question of the minor's competence be determined at a hearing. The court shall appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor's competency.

California welfare and institutions code § 709 (b). (West 2011).

Proponents of this position recognize that adding developmental immaturity as a predicate for incompetence may complicate the processing of juveniles accused of delinquencies. This increased complexity is due to the fact that remediation of incompetence due to immaturity is not as straightforward as remediation of the more traditional predicates of mental illness and intellectual disability.[61] Thus, some cases may not move forward to adjudication given the difficulties of remediating competence when it is based upon developmental immaturity alone. However, according to this view, when weighing the due process requirement that defendants must be competent to stand trial against the state's interest in trying defendants, due process must trump. This balance of state and individual interests is identical to that which has prevailed throughout modern law in adult criminal courts. Criminal courts often encounter cases in which defendants' charges can never be adjudicated because their mental illness or mental retardation prevents them from being restored to competence.

A number of courts have recognized that youth who are developmentally immature are disadvantaged no less than persons who are incompetent due to mental illnesses or mental retardation:

- "It is possible that a juvenile, merely because of youthfulness, would be unable to understand the proceedings with the same degree of comprehension an adult would."[62]
- "We see no significant difference between an incompetent adult who functions mentally at the level of a 10- or 11-year-old due to a developmental disability [mental retardation] and that of a normal 11-year-old whose mental development and capacity is likewise not equal to that of a normal adult"[63]

61 See *infra*, Module 4 pp. 69–81 for a additional discussion of remediation.

62 In re Carey, 615 N.W.2d 742 (Mich. Ct. App. 2000).

63 Timothy J. v. Sacramento County, 150 Cal. App. 847 (Cal. Ct. App. 2007).

- "We conclude that limiting determinations of incompetency in juvenile cases to those cases in which the ability to appreciate, understand and assist is based on a 'mental disorder' would offend rights to due process."[64]

*Developmental Immaturity Should Not Be an Allowable Predicate for Incompetence to Stand Trial in Juvenile Delinquency Proceedings*

Those opposing the inclusion of developmental immaturity as a predicate for incompetence support their argument based upon multiple grounds.

First, juvenile courts already compensate for youths' immaturity in all aspects of the court's functioning. It may be unfair to try a youth whose *serious mental illness or intellectual disabilities* compromise his or her competency abilities. However, the very existence of a juvenile court presumes that all youth are less mature than adults, and the proceedings, legal representation, and outcomes in the juvenile court are all designed to take account of that immaturity. The juvenile is also provided with an attorney to assist them in understanding the process. Moreover, the further addition of even more adult-like procedures to juvenile courts would cause decreased flexibility, thereby interfering with the juvenile court's ability to accomplish its goal of providing what is best for the child.

**Example Statutory Language: *Developmental Immaturity Should Not Be an Allowable Predicate for IST Findings***

If the juvenile is otherwise able to understand the charges against him and assist in his defense, a finding of incompetency shall not be made based solely on… the juvenile's age or developmental factors…

VA. CODE § 16.1-356 (2011).

If the court finds that a child has mental illness, mental retardation, or autism and adjudicates the child incompetent to proceed, the court must also determine whether the child meets the criteria for secure placement.

FLA. STAT. § 985.19(h)(3) (2011).

Second, remediation of incompetence caused by developmental immaturity may be prolonged because cognitive functions associated with competence are still developing. In this context, being held for competency remediation is likely to prolong the trial process for such youth, which itself has serious implications for their welfare. Especially if they remain in pretrial detention during their period of remediation, youth are deprived of educational and social resources that they might have in community or juvenile justice programs. This has an effect on youth more than on adults, because they are missing essential social and educational opportunities that are required for their growth. Youth might be better served by having their charges handled quickly in the *parens patriae* juvenile system without

64 In the Interest of A.B, 2006 Iowa App. LEXIS 189 (Iowa Ct. App. Mar.1, 2006). For similar views by other courts, see *In re* Hyrum H., 131 P.3d 1058 (Ariz. 2006); Tate v. Florida, 864 So.2d 44 (Fla. 2003); *In re* W.A.F., 573 A.2d 1264 (D.C. 1990).

the burden of protections that, as argued above, are less important in a court designed with a presumption that all youth are less mature than adults.

Third, provisions for a lower age of jurisdiction in some states offers juveniles additional protection that is not available to adults. Related to what is often referred to as an "infancy defense," juveniles in states that have these protections might, for example, preclude juveniles below age twelve from being adjudicated. Such legal provisions were created due to recognition of the special status of children and their still-developing capacities. Thus, children below such a specified age in these states are excused from facing either delinquency or criminal charges, as society recognizes their decreased culpability due to their developmental status. In states that have these exclusions, they add an extra layer of protection that renders inclusion of developmental immaturity as a predicate for a finding of incompetence unnecessary.

Finally, while cost can never, in and of itself, be a reason to forgo due process protections, economics are a reality of service provision and must be considered. The economic cost of adding developmental immaturity as a predicate is unknown and could be substantial. One could argue that it would increase the number of times that the issue is raised, thus increasing state costs for service provision.

Further, economic cost should play a larger role in policymaking when the argument for extending protections is weak. Given that psychological science does not have a firm basis for the assessment of psychosocial immaturity or remediation of youth incompetent on this basis, the economic cost considerations should trump the inclusion of immaturity as a predicate for incompetence. One could also argue that, in light of the rehabilitative goals of the juvenile system, such additional costs are not warranted.

## **Recommendation:** *Developmental Immaturity as "Predicate" for Incompetence*

Developmental immaturity should be a predicate for incompetence to stand trial in juvenile court. The question is whether or not a juvenile has the functional abilities required under *Dusky*. Research demonstrates that, even in the absence of mental illness or intellectual disability, some juveniles still may not be able to meet the *Dusky* standard due to developmentally related deficits.[65] Incapacities in understanding and reasoning that affect *Dusky* abilities are no different in their consequences when due to developmental immaturity rather than mental disorder. State courts and legislatures are increasingly acknowledging this. Thus, we recommend the inclusion of developmental immaturity as a predicate for findings of incompetence.[66]

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65 *See supra* pp. 17–18 (reviewing research related to juveniles' capacities as trial defendants).

66 The authors recognize that states differ in the degree to which juvenile courts are more rehabilitative (rather than retributively) focused and / or are developmentally sensitive. Therefore, we could imagine the argument for excluding developmental immaturity as a possible predicate might be stronger in those states with juvenile courts that have rehabilitative goals and take developmental factors into account. However, we believe that the benefits of its inclusion (ensuring that these developmental variables will consistently be accounted for) outweigh the minimal burden placed upon the adjudication process in having an additional factor to evaluate with regard to competence to stand trial and possibly redundantly account for developmental issues.

# B. Relation of the Predicate of Developmental Immaturity to Incompetence

## The Component

*If developmental immaturity is accepted as a predicate, states should consider how the predicate will be applied.* There are three possibilities:

- **Judicial Discretion:** Requiring a case-by-case decision regarding the effects of developmental immaturity on the youth's capacities related to competence to stand trial
- **Age-Based Presumption of Incompetence:** Providing an age below which youth are presumed incompetent to stand trial, requiring a hearing to demonstrate their competence if the presumption is challenged
- ***Per Se* Incompetence:** Providing an age below which youth are considered incompetent and therefore cannot be tried on delinquency charges

*The first approach (judicial discretion)* follows the historical approach of criminal competence law, in which it is clear that *the mere presence of a disability (in this case, developmental immaturity) does not determine incompetence.* It must also be shown that the individual has serious deficits in the specific abilities that are relevant for trial participation (as defined in the state's standard for competence), and that those deficits appear to be caused by the disability. The court would approach the matter of developmental immaturity as it already does with questions of mental illness or intellectual disability, weighing the evidence on a case-by-case basis, deciding whether the youth has significant competency-related difficulties and, if so, whether they are due to immature development of intellectual or psychosocial capacities.

*The second approach (age-based presumption of incompetence)* allows for age, as a developmental marker, to create a presumption of incompetence that must be overcome. Some states have used this approach for limited purposes. For example, an Arkansas statute allows for transfer to criminal court for youth as young as 11 years of age on first degree murder charges, but establishes that the youth must be competent to stand trial, and creates a presumption of incompetence to stand trial if the youth is younger than 14 years of age (placing the burden of proof on the prosecution to prove competence).[67]

*The third approach (per se incompetence)* would use a developmental marker such as age to determine that youth below that age cannot be tried because they are considered *per se* incompetent due to developmental immaturity.

67 Ark. Code. Ann. § 9-27-502 (2011).

We are aware of no state that has taken this approach specifically on the basis of competency logic, although (as discussed later) some states have done so in effect by setting age limits below which youth may not be tried on delinquency charges.[68]

## The Options

When considering the following arguments for each of the options, drafters should keep several things in mind.

First, as noted earlier, *the options are not mutually exclusive*. A statute could provide for judicial discretion for all cases, or it could provide it only for youth above a certain age. If an age limit were provided, the statute could apply either a presumption of incompetence approach or a *per se* approach below that age. Or it could apply both, offering an age below which youth are presumed incompetent unless challenged, and another, lower age below which they are unrebuttably incompetent. Therefore, the arguments for the various options do not exclude the possibility of accepting more than one of them.

Second, *scientific evidence does not provide an unambiguous basis for establishing an age for the second and third options*. As explained in the "Background" section of this document, the risk of deficits related to competence to stand trial is much greater among youth between ages 11 and 14, including serious incapacities among at least one-half of those youth when combined with intellectual deficits. But research does not provide evidence that all, or even a majority of, youth below 11 lack the abilities associated with competence to stand trial (although it is certain that they would not perform better than 11- to 14-year-olds on average).

### *Judicial Discretion Should Be Employed on a Case-by-Case Basis to Decide the Question of Incompetence Due to Developmental Immaturity*

There is no single age at which a child will necessarily be competent or incompetent. The current state of the research can only tell us at what ages a child is at greater or lesser risk of having serious impairments in his / her competence-related abilities. In other words, research can tell us how likely juveniles of a certain age are, *on average*, to have competence-related deficits. However, it cannot tell us a specific age at which a particular child will be incompetent.

Modern doctrines of legal competence are "functional." In other words, one must actually manifest deficits in competency-relevant abilities to be considered incompetent. The mere presence of mental illness or intellectual disability in an individual has never been considered the equivalent of incompetence, and immaturity should be treated likewise. A juvenile may be developmentally immature, but still competent to stand trial, just as a defendant might have a mental illness that does not affect his or her trial-related abilities. Therefore, each individual should be

68 Notably, the laws of some states, such as Pennsylvania, set the lower age of jurisdiction at ten years old, but still allow prosecution of a juvenile for murder regardless of age.

evaluated on a case-by-case basis to determine whether he or she has the functional abilities related to competence to stand trial.

A number of states have taken this approach. For example, Arizona's statute accepts developmental immaturity as a predicate for incompetence, but clearly states that "immaturity alone does not render a person incompetent."[69] This statement makes it clear that the mere fact that a youth is immature does not warrant a finding of incompetence. The youth must manifest actual inability to understand or perform functions that are relevant for the competency standard, in which case immature cognitive or social development may be an allowable explanation.

Empirical evidence offers additional support for this view. While recent research shows that early adolescents (e.g. ages 12-14) are much less likely than adults to possess adequate competency abilities, the same research shows that many youth of those ages do not show dramatic deficits in competence abilities in relation to adults.[70] Therefore, each individual should be examined on a case-by-case basis to determine whether he or she has the functional abilities necessary to be competent to stand trial, even if young or developmentally immature.

This case-by-case approach would protect juveniles adequately without the need to require an evaluation of all juveniles below a certain age or risking miscategorization of juveniles who might otherwise be competent by creating a *per se* rule. Defense attorneys under such an approach would thus simply continue to perform their customary role of raising the issue of competence when it is appropriate.

Regarding the option to create a specified age below which juveniles would be considered *per se* incompetent, no state has ever adopted such a rule for either juveniles or adults with regard to competence to stand trial.[71] Further, such *per se* rules have been rejected in some other areas pertaining to juveniles' competencies (e.g., capacities to waive Miranda rights).[72] Even in adult criminal law, no state has ever statutorily required that any type of disability automatically renders a person incompetent to stand trial.

*Youth Should Be Considered Rebuttably Incompetent Below a Certain Age.*

Juveniles below a certain age should be considered at higher risk of incompetence, and therefore should be presumed incompetent, thus requiring an examination and a hearing if their incompetence is challenged.[73] Such a system would provide maximum protection for youth of an age at which the risk of incompetence is greatest because

69 Ariz. Rev. Stat. §§ 8-291.01 to .10 (2009).

70 Grisso, *Juveniles' Competence to Stand Trial, supra* note 5.

71 While some states have created a lower age of jurisdiction below which juveniles cannot be charged — and this does have the same effect of juveniles below a certain age avoiding adjudication — it is not the same as creating a rule that juveniles below a certain age are incompetent solely due to their age. A lower age of jurisdiction establishes the age below which society does not want to hold children formally responsible for their actions through court proceedings. Competence on the other hand is a preliminary question regarding the defendant's ability to participate adequately in their defense.

72 Fare v. Michael C., 442 U.S. 707 (1979).

73 *See infra* Module 2, pp. 41–46 for further discussion of procedural mechanisms such as presumptions and burdens of proof.

of immaturity. It would decrease the risk that many such youth might be overlooked (and tried as competent) merely because no one raised the question. At the same time, the prosecution would have the opportunity to challenge the presumption of incompetence in cases in which it believes the juvenile is likely competent to stand trial. Such a scheme would allow for potential correction upon a motion for a judicial inquiry regarding competence.

Existing empirical research could be used to determine the appropriate age cut-off. Research briefly reviewed in the "Background" section of this document offers guidance regarding the degree of risk associated with various ages on average. Thus, states may determine for themselves what level of risk they deem acceptable, if they wish to establish an age below which incompetence is presumed and rebuttable.

Adopting a *rebuttable* presumption would not prevent the state from having its opportunity to seek adjudication. It would simply ensure that the juveniles who are most at risk are evaluated to ensure their competence to stand trial before moving forward with the adjudication.

Such a scheme would not necessarily result in increased costs. Defense attorneys are already more likely to raise the issue of competence for youth at ages below which research suggests greater risks of incompetence (e.g., below 14). Further, most youth below mid-adolescence (i.e., 14 and below) are arrested for minor offenses, thus reducing the state's motivation to challenge the incompetence presumption in most cases.

*Youth Should Be Considered Per Se Incompetent to Stand Trial Below a Certain Age.*

For youth below a certain age, the state should not be allowed to challenge the incompetence of a juvenile for purposes of delinquency proceedings. Juveniles below a certain age should be considered at such high risk of incompetence that the basic purposes of the concept of competence to stand trial cannot be satisfied.

Existing empirical research reviewed in the "Background" section of this document offers evidence that the risk of incompetence is already high among youth who are 11–13 years of age. While research has not studied the competency abilities of juveniles younger than this, developmental and educational research in general indicates that children in the first four or five primary school years clearly are not expected to have fundamental intellectual capacities of adolescents or adults.

The notion of applying a *per se* age below which the law automatically presumes developmental incapacity is already recognized in a majority of states for other purposes pertaining to delinquency. Many states provide an age (ranging from 6 to 10) below which youth cannot be charged with a delinquency, due to legal presumptions about the capacity to form intent or otherwise to be held morally responsible for their offenses.[74] The same age does not need to be applied to the matter of competence to stand trial. But, especially in states that have no lower age limit for delinquency charges, a *per se* protection, which excludes youth below a certain age from adjudication based on their

74 National Center for Juvenile Justice, State Juvenile Justice Profiles, http://www.ncjj.org/Research_Resources/State_Profiles.aspx (last visited Nov. 1, 2011).

presumptive incompetence, is more efficient than requiring evaluations of youth who will almost always be found incompetent.

### **Recommendation:** *Relation of the Predicate of Developmental Immaturity to Incompetence*

We recommend a multi-tiered system that combines all of the options outlined above. The division between these tiers would be age-based, with juveniles in different tiers receiving different levels of protection. Such a system would allow for increased protection for the youngest juveniles who are most at risk of being incompetent due to their developmental status. If adopting such a system, states will need to determine where the age limit for each proposed tier should lie, taking into consideration their own legal system's culture and history. However, we provide examples of how one might choose to make these divisions below, based upon existing psychological research.

Under this system, the lowest tier, incorporating per se protection, would be applied to the youngest children. This portion of the statutory scheme would establish an age below which legislative drafters believe that children's capacities to make decisions (such as pleading guilty or not guilty, or deciding to accept a plea bargain) are, on average, so immature that to accept their participation would be unfair. A similar logic has historically been employed in setting ages below which youth cannot be charged with a delinquency (because they lack the capacity to be culpable). We note that developmental research has not examined the average decision-making capacities of youth below age 12. But youth older than that — e.g., 12-13 — have been found, on average, to be at higher risk of having deficient decision-making capacities compared to adolescents and adults.[75] By inference, ages 10 and below might be considered for setting this first-tier non-rebuttable presumption of incompetence to stand trial.

For those juveniles that would fall into the lowest tier (e.g., below 10 years old), one should note that the statutory scheme could still afford other mechanisms for providing assistance, even if the juvenile is not formally adjudicated. For example, as discussed further in Module 4, Parts C and D, of this document, a statute might contain the option of providing help to the child and family through a mechanism such as finding that they are a "Family in Need of Services" (FINS) or through a Child in Need of Services (CHINS) petition.[76]

The second and third tiers would both require judicial discretion to determine incompetence. The second tier of youth would be considered rebuttably incompetent and, if challenged, would require a hearing on the matter of competence, with a finding of competence. Developmental research on youths' decision-making capacities regarding trials have shown that some youth at ages 11-13 have capacities typically associated with competence to stand trial, but that on average they are at substantially higher risk of having deficient decision-making capacities compared to adolescents and adults. This age group should be considered for the second tier requirement.

The third tier would simply allow for the question of competence to be raised in the same manner in which it is raised in criminal court: that is, any party may raise the question in any case in which it seems warranted, and the

75 About 30 percent of 11- to 13-year-olds were significantly impaired. *See supra* pp. 17-18.

76 For further discussion of potential dispositions, see *infra* Module 4, pp. 77-81.

court conducts a hearing on the matter. Following the above recommendations, this would apply to youth who are 14 years of age or older.

## C. Functional Abilities Associated with Competence (Incompetence)

### The Component

> *States should determine what degree of detail they should include with regard to the definition of competence to stand trial.*

Most states' definitions of competence to stand trial describe two broad capacities: the ability to assist counsel in a defense, and the ability to understand and/or appreciate the nature of the proceedings. Some states, however, have gone further in defining the abilities that are of concern in competency determinations, thus providing more specific guidance to courts and to forensic examiners.

One way of doing this has been to translate the two broad capacities to which legal definitions refer into more specific *functional abilities*. For example, Florida has listed six specific abilities (e.g., appreciates the charges or allegations, can disclose to his attorney facts pertinent to the proceedings at issue).[77] Many such lists of functional abilities related to competence to stand trial are available in the literature.[78]

A second approach is to identify what might be called *cognitive concepts*, rather than specific functional abilities, that help to define what a defendant should be able to do. Some statutes, for example, require not only "factual understanding" (e.g., the defendant knows that defense counsel is supposed to work for the defendant), but also "rational understanding" (e.g., the defendant believes that his own defense counsel is working for him, or grasps why counsel may be important to have). Although few statutes specifically mention it, *Godinez v. Moran*[79] made it clear that "decision-making capacities" are included among the concepts to be weighed when applying the competence standard. This, too, could be included in a statute that identifies cognitive concepts as guidance for the competency inquiry.

A third approach is to avoid statutory refinement of the competency standard altogether. This approach declines to interpret the two broad capacities found in most state's competency definition, leaving this to the courts' discretion and case precedent.

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77 Fla. Stat. § 985.19 (2011).

78 *See e.g.,* Thomas Grisso. Evaluating Competencies: Forensic Assessments and Instruments (2003) (providing multiple sources that include lists of such functional abilities).

79 509 U.S. 389 (1993).

## The Options

The question of the degree of specificity of types of abilities required can be addressed in three ways: (1) specifically defining the necessary functional abilities; (2) outlining broad concepts; or (3) not providing any further refinement beyond the state's definition similar to the *Dusky* standard.

*Statutes Should Specifically Outline the Functional Abilities Associated with Competence to Stand Trial*

Under this view, the statute would break down the broader concepts usually named in the *Dusky*[80] standard and further refine them to provide guidance to courts and evaluators regarding legislative expectations. For example, a state law might define the types of factual knowledge required of a defendant to properly function within the court system (e.g., knowledge of the charges, verdicts, possible penalties, roles of various courtroom players, and basic factual knowledge of the trial process). Similarly, a statute might explain the ways in which a defendant must be able to use this factual information to reason regarding legal decisions and to assist counsel (e.g., be able to provide relevant information to counsel, be able to testify if necessary).

Proponents of this view might argue that it is the job of the legislature to provide guidance to courts regarding how to interpret the otherwise somewhat amorphous *Dusky* standard.[81] Leaving an otherwise vague standard in place would promote inequity, as higher or lower standards of competence might be applied from jurisdiction to jurisdiction, or even from one judge to the next within a jurisdiction. By providing specific guidance in the form of functional abilities, state legislatures would promote increased uniformity and fairness across jurisdictions as the requirements for competence would be more consistent from one place to the next within that state.[82]

Proponents would also believe that it is the proper role of the legislature to provide this level of detail. They would purport that the legislature would not be invading the province of the judiciary because this level of detail is needed in order to provide clarity and uniformity, and judges would still interpret the law as it is written. In other words, the purview of the courts would be to further define concepts and interpret any ambiguity.

One can also argue that the legislature is best suited to such a task. While the attorneys in a case can synthesize materials and present them to the court, a legislative drafting committee might be better suited to reviewing numerous

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80 *See* the Background section *supra* pp. 7-8, which includes a section discussing the Criminal Court Standard and Process for competence to stand trial, including Dusky v. Unites States, 362 U.S. 402 (1960) and the test laid out by the Supreme Court for competence to stand trial in that decision.

81 One need only examine the multitude of formulations developed within the field of psychology and law in order to see how the deceptively simple *Dusky* standard might be interpreted in multiple ways. *See e.g.*, Thomas Grisso, Competency to Stand Trial Evaluations: A Manual for Practice 1, 97-100 (1988). *See also generally*, Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 Behav. Sci. & L. 291 (2006).

82 While this guide is directed at those writing legislation, one might also note that the same uniformity could be accomplished through a State Supreme Court decision addressing the issue of juveniles' competence and setting a standard for all jurisdictions within that state to follow.

**Example Statutory Language:**
***Statutes Should Specifically Outline the Functional Abilities Associated with Competence to Stand Trial***

In determining if the defendant is unable to understand the proceedings against the defendant, the court shall consider, among other factors considered relevant by the court, whether the defendant understands that the defendant has been charged with a criminal offense and that penalties can be imposed; whether the defendant understands what criminal conduct is being alleged; whether the defendant understands the roles of the judge, jury, prosecutor, and defense counsel; whether the defendant understands that the defendant will be expected to tell defense counsel the circumstances, to the best of the defendant's ability, surrounding the defendant's activities at the time of the alleged criminal conduct; and whether the defendant can distinguish between a guilty and not guilty plea.

In determining if the defendant is unable to assist in the defendant's own defense, the court shall consider, among other factors considered relevant by the court, whether the defendant's mental disease or defect affects the defendant's ability to recall and relate facts pertaining to the defendant's actions at times relevant to the charges and whether the defendant can respond coherently to counsel's questions. A defendant is able to assist in the defense even though the defendant's memory may be impaired, the defendant refuses to accept a course of action that counsel or the court believes is in the defendant's best interest, or the defendant is unable to suggest a particular strategy or to choose among alternative defenses.

Alaska Stat. § 12.47.100 (f)-(g) (2011).

journals, books, and book chapters. Further, given the complexities of juvenile development, judges facing the application of competence to stand trial in a new context, possibly with new "predicates," may desire additional guidance.

*Statutes Should Define Broader "Cognitive Concepts," Rather Than Specific Functional Abilities*

Under this view, states would provide the overarching concepts that comprise competence to stand trial, but would not specifically define the abilities necessary to meet each broader concept. For example, a state might require factual understanding, rational understanding, the ability to assist counsel, and the ability to make decisions. Courts would then further define these concepts through case law.

The value of this broader identification of concepts is that it offers protection for the integrity of the state's application of the legal standard. For example, the *Dusky* standard specifically refers to "factual" and "rational" understanding. The first refers to a basic understanding of various facts (e.g., "Defense attorneys work for the defendant"), while "rational understanding" refers to the individual's ability to apply that information without distortions created by mental illness or developmental immaturity. A statute should clearly separate and identify these concepts. This provides some assurance that defendants who have adequate factual understanding, but

**Example Statutory Language:**
***Statutes Should Define Broader "Cognitive Concepts," Rather than Specific Functional Abilities***

(ii) The capacity of the child to:

1. Appreciate the allegations against the child;
2. Appreciate the range and nature of allowable dispositions that may be imposed in the proceedings against the child;
4. Disclose to counsel facts pertinent to the proceedings at issue;
5. Display appropriate courtroom behavior; and
6. Testify relevantly; and

(iii) Any other factors that the qualified expert deems to be relevant.

MD. CODE ANN. COURTS AND JUDICIAL PROCEEDINGS § 3-8A-17.3. (2011).

delusional or immature ideas about their implications will not be found competent merely because they can offer rote definitions of terms.

Proponents of this view might argue that this approach follows the traditional purview of the legislature, providing guidance but leaving interpretation to the courts. In other words, the legislature should provide the broad contours for such concepts, but should leave the details (identified in the first Option) to the expertise of the judges who work with these concepts on a day-to-day basis. Going beyond such action could invade the traditional province of the courts.

*Statutes Should Not Provide Specific Refinement of the Concept of Competence to Stand Trial*

Proponents of this argument would hold that the *Dusky* standard has been generally accepted for years, and to make statutory provisions for its interpretation would disturb present law. They might purport that, in their state, the existing system is working adequately, and tinkering with the details of such laws would only serve to cause difficulties in a functioning system.

Others might believe that any interpretation of the meaning of the standard is best left to the courts. Specifically, the *Dusky* standard was created by judicial authority and its definition is best left to judicial discretion. Judges, who have more experience with the types of abilities defendants need to function adequately within the court system in order to receive a fair trial, are best able to make such determinations without legislative input.

**Recommendation:** *Functional Abilities Associated with Competence (Incompetence)*

Our preference for this component is Option 2, defining broader cognitive concepts, rather than specific functional abilities. While we believe that courts and evaluators desire more guidance than *Dusky* alone would provide, legislating in too much detail could run the risk of the definition employed becoming outmoded as the law and science in this area evolve.

# D. Degree of Defendant Ability Required in Delinquency Proceedings

## The Component

> *States should consider whether their juvenile statute should address the degree of ability required for competence.*

Most states' legal standards describe (generally or specifically) the *types* of abilities required. But few have addressed whether the same or a lesser *degree* of those abilities is required in juvenile court in comparison to criminal court. Should youth in delinquency proceedings be required to be "as competent as adults," or is a lesser degree of ability allowable for juvenile proceedings?

Note that this question presumes that the same standard (e.g., *Dusky* definition) would be applied in both juvenile and criminal court. Thus the same abilities would apply in both systems. The question here is about "how much of those abilities" is required. Do youth tried in juvenile court need to understand as well, or be able to assist counsel as well, as is required for adults in criminal court?

At the time of this document, no states' statutes had addressed this issue. Nevertheless, there are reasons to believe it is an important one. Our own observations suggest that judges, attorneys, and mental health professionals who perform competence evaluations often bring their own presumptions about a "juvenile court level of ability" to their deliberations about competence in juvenile court. Some will compare youth to an "adult level" of understanding and decisional capacity, while others will compare youth to the average youth seen in juvenile court. The latter presumes that defendants in juvenile court do not have to be "as competent" as adults in criminal court. Parties to the proceedings, therefore, might disagree about a youth's competence because they are applying different presumptions. Yet often those differences in presumptions are not acknowledged, resulting in confusion and misunderstanding about the parties' differences in judgment about a youth's competence to stand trial.

We construe the question as two levels or degrees of ability — a juvenile court level and a criminal court level — although a third level has been observed. In some cases, attorneys have argued that youth are competent if they have the "average" degree of ability compared to youth of their own age. This "age-peer comparison" is not discussed below, because it is simply illogical. An age-peer approach, for example, would find an 8- year-old competent if the 8-year-old had average competency abilities compared to other 8-year-olds. Such an argument

ignores the fact that children of age 8 would almost all have serious deficits in their competency abilities compared to the great majority of adolescents who are seen in juvenile court. Our consideration of Options, therefore, does not include this age-peer approach.

There are four possible approaches to this issue.

- **Same Level of Ability:** Statutes could require the same degree of ability for competence in juvenile court as in criminal court. In other words, any juvenile found competent to stand trial in juvenile court would be found competent in criminal court as well.
- **Lower Level of Ability:** Statutes could specify that the degree or threshold of competency-related abilities required for competence in juvenile court is lower than in criminal court. In other words, some youth might be competent to stand trial in juvenile court, even though they would not be competent to stand trial in criminal court.
- **Charge-Related:** A juvenile competence statute might specify that some types of juvenile court cases (e.g., involving more serious charges, or cases that may be transferred to criminal court) require a degree of ability typical for competence in criminal court, while others (e.g., involving lesser charges or lesser potential penalties) may use a lower threshold for competence.
- **No Guidance:** A juvenile competence statute may avoid specifying any level or threshold for competence, simply leaving the matter to the discretion of juvenile courts.

## The Options

*State Statutes Should Require the Same Degree of Ability for Juvenile and Criminal Court*

Proponents of the view that juvenile court should require the same level of ability as in criminal court would point out that allowing a lower level of ability decreases the degree of protection for youth in juvenile court. They would assert that this is unfair, because juveniles have as much at stake as their adult counterparts. Proponents of this view would point to legislative changes occurring over the last two decades as proof that juveniles often have as much at risk.[83] Juvenile sentences may now extend into adulthood due to "youthful offender" laws. Juvenile offenses can also be used under some sentencing guidelines in later criminal proceedings, to increase an individual's criminal history score, leading to longer sentences.[84] Some states have moved to determinate sentencing in juvenile courts, so that judicial discretion for purposes of rehabilitation no longer applies. Younger children may also be formally adjudicated as delinquent as young as ages six through ten, a period when their cases formerly would have been

83 *See e.g.,* Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 794, 805-808 (2005) (discussing legal reforms in response to perception of increase in juvenile crime rates).

84 Even though the sentencing guidelines in some states are now only advisory following *Booker* they are still largely followed. 543 U.S. 220 (2005) (making Federal Sentencing Guidelines advisory).

handled using more rehabilitative options.[85] Further, regardless of the immediate disposition faced, the outcome of a juvenile hearing can still be stigmatizing and have long term effects in the child's life. In light of the increasing seriousness of the consequences of delinquency adjudications, one can argue that a lower threshold for competence in juvenile court than in criminal court denies to youth the due process protections that would apply to adults in similar circumstances.

Even if juveniles did have less at stake, it would not decrease the need to adhere to the basic principles of justice. Our Constitutional values and basic principles of providing a fair and accurate hearing should be held out as inherently worthwhile. Nothing in criminal law provides less protection for adults facing less serious penalties than those facing more serious consequences. Liberty is a fundamental right within our legal system, which should be afforded its due protection.[86]

Finally, proponents of this view would argue that, while states are free to provide more protection, they may not provide less. Once a state has determined that *Dusky* applies, then not just the language but also the level of ability customarily associated with that language sets the Constitutional floor.

*State Statutes Should Specify a Lower Degree of Ability for Competency in Juvenile Court*

Proponents of this argument believe that creating a lower level of competency for all juvenile court charges allows us to balance developmentally relevant issues and unique aspects of the juvenile system, while still providing adequate protection. Juvenile courts were created based on rehabilitative ideals, aimed at reform rather than punishment. Juveniles in most cases face shorter sentences, and judges have more rehabilitative options available to them, so that juvenile court defendants have less at stake. Because the juvenile courts are more forgiving of youthful transgressions, a lesser standard for competence is allowable.

In many states, juveniles with the most serious charges often are tried in criminal court, where they are provided the protection of adult standards for competence. In fact, since the most serious cases are transferred to adult court, the types of cases adjudicated in the juvenile courts are less serious in terms of consequences, making a lower threshold for competence appropriate in this setting.

One of the consequences of applying a criminal court threshold for competence in juvenile court would be an increase in the number of juveniles found incompetent. This increases the number of youth who would be subject to various consequences of a finding of incompetence that could be detrimental to their development. In some states, juveniles may be held in a secure setting, possibly for months, while they undergo competence evaluations and possible remediation. Holding a juvenile for many months means the juvenile is away from the normalizing influences

85 Elizabeth Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 794, 805-808 (2005).

86 U.S. Const. amend. XIV.

of their parents, as well as missing needed education. Research demonstrates that separation from their normal environment through detention increases a juvenile's risk for future involvement in the justice system.[87]

Having a lower threshold for competence would allow juveniles to meet the competence to stand trial (CST) standard more easily, leaving only juveniles with serious deficits to be held for remediation. Such a system would allow juveniles to have their cases resolved rather than remaining in institutions during critical developmental stages, unless their functioning were so low that they could not even meet a very minimal standard.

The U.S. Supreme Court has determined that other rights, even Constitutional rights, are adjusted based upon a balancing test that considers the right involved as well as the context for exercising that right. It is a well-established principle of United States Constitutional law that what process is due depends upon context.[88] For example, more protection is provided in formal trial situations than in decisions about transfer from a prison to a hospital.[89] In the latter situation, while some process is provided, the full panoply of protections is not available. Just as procedural due process changes based upon a situation, competence might also be adjusted. Competence as it relates to juvenile and adult court could be handled in an analogous manner, with a lower standard for juvenile court as compared to adult criminal court competence determinations.

The State of Michigan offers an example of the logic for a lower threshold for competence in juvenile court. In the case of *In re Carey*, the State's Supreme Court held that "it is possible that a juvenile, merely because of youthfulness, would be unable to understand the proceedings with the same degree of comprehension an adult would. … Accordingly,… in juvenile competency hearings, competency evaluations should be made in light of juvenile, rather than adult, norms. … A juvenile need not be found incompetent just because, under adult standards, the juvenile would be found incompetent to stand trial in a criminal proceeding."[90]

*State Statutes Should Specify Different Thresholds of Competence for Different Types of Juvenile Court Cases*

Proponents of this view would argue that states should provide juveniles with protection equivalent to that of criminal court in some cases while allowing a lower threshold for competence in other cases. This approach would identify certain more serious charges as warranting the greater protection, while accepting a lower threshold for the majority of juvenile charges with less serious dispositional consequences.

Under this approach, where the potential for significant loss of liberty is involved, a juvenile would obtain full protection. Where a lesser charge is involved, the juvenile would benefit more from having their case proceed quickly

87 Handbook of Juvenile Justice Theory and Practice (Barbara Sims & Pamela Preston eds., 2006).

88 Matthews v. Eldrige, 425 U.S. 319 (1976) (establishing balancing test for procedural due process).

89 *Cf.,* Goss v. Lopez , 419 U.S. 565 (1975) *and* Vitek v. Jones, 445 U.S. 480 (1980) (demonstrating differences in procedure depending upon context and type of interest at stake).

90 *In re* Carey, 615 N.W.2d 742, 748 (2000).

and avoiding prolonged incarceration or institutionalization, unless their competency abilities were so poor that they required remediation even to meet the lower threshold.

Drafters of legislation can decide how to identify more-serious and less-serious charges. Typically this would be based on a consideration of the types of punishments available for each charge, whether the juvenile would face a deprivation of their liberty, the level of stigma one might suffer for such a conviction, whether he or she is likely to be held longer for remediation than he or she would be held as punishment.

*State Statutes Should Avoid Specifying a Level of Competence*

Those adopting this view would argue that the level of competence required is a matter best left to the judiciary under the totality of the circumstances, which already accounts for immaturity. Judges are best suited to make such determinations, and legislative involvement might "muddy the waters," preventing the courts from making effective determinations. Judges who work with juveniles on a day-to-day basis are best able to determine what level of competence ensures fairness and whether a lower level of competence might suffice in some cases. Allowing courts to make these determinations guarantees more flexibility for the judiciary, which is more consistent with the ideals of the juvenile courts. Providing statutory guidance might only interfere with the judiciary's ability to make effective and fair decisions by decreasing their discretion, thereby decreasing their ability to incorporate their experience and expertise in this area. Further, in states where this issue has been considered and decided by the judiciary, unless an incorrect or unworkable decision has been made, the legislature should respect and adhere to the courts' rulings, as they are the best arbiters of such decisions.

## **Recommendation:** *Degree of Defendant Ability Required in Delinquency Proceedings*

As advisors applying research results to assist legislation, we have no basis for recommending any of the options. Any choices will depend entirely on a state's sense of fairness, as well as practical considerations such as the current state of their laws with regard to the consequences for youth who are adjudicated delinquent.[91]

91 One of us (TG) has coauthored an analysis that does express an opinion on this issue. *See generally*, Elizabeth Scott and Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. Rev. 101 (2005). The opinion, however, is based on constitutional analysis, whereas in the present document we express an opinion only when we can address the issue as clinical and research scientists. In their earlier analysis, Scott and Grisso argue for a "relaxed competence standard" (a lower degree of required ability) for competence in juvenile proceedings. But it also recognizes that this is appropriate only to the extent that a state's laws and practices are aimed in part at promoting youth welfare. This might characterize many states' approaches to juvenile offending with regard to the majority of offenses. But in states in which juvenile proceedings and criminal trials are relatively alike in their consequences and purposes, this analysis argues that youth should receive the same protections as criminal defendants (that is, that the degree of ability required for competence should be no different). To the extent that some states provide for more adult-like consequences for youth charged with certain offenses of greater seriousness, those states could opt for a two-tiered approach within juvenile court: a "relaxed" standard for competence in most juvenile cases, and a standard that provides the same protections for youth as for adults in juvenile court cases involving adult-like consequences.

# Module 2: Procedural Issues

Module 2 describes two procedural components that focus on raising the competence question and the burdens/standards of proof that will be applied when competence is determined:

A. Raising the Question

B. Burdens/Standards of Proof and Related Presumptions

## A. Raising the Question

### The Component

*States should determine how and under what circumstances the question of a youth's competence to stand trial should be raised as a matter of inquiry for the court.*

A state's criminal codes typically allow the competence of a defendant to be raised by any party to a case, including defense, prosecution, and the court. Some states provide that any of these parties *must* raise the question when they have reason to believe that the defendant might lack relevant capacities related to competence to stand trial. These provisions could simply be drawn down from the state's criminal codes and applied similarly to youth in delinquency cases in juvenile court.

The particular circumstances of youth, however, could argue for augmenting this general provision with directives that require that the court inquire about the possibility of incompetence automatically in certain cases. Research described in the Background section of this document indicates that a greater proportion of youth, especially below certain ages, may be incompetent compared to the proportion of adult criminal defendants who are incompetent.[92] Moreover, adjudication on certain charges that could have particularly severe consequences may argue for a higher level of care to assure that the youth is competent before proceeding to adjudication. These concerns could argue that raising the question (seeking a competence inquiry) should be mandatory in certain circumstances. Examples of those circumstances could be: (a) any youth below a certain age; (b) any youth charged with some set of especially serious acts that, if in adult court, would be felonies; and/or (c) any youth petitioned for a judicial hearing on transfer/waiver to criminal court.

### The Options

*There Should Be No Special Precautions for Raising the Question of Competence*

Those supporting this view would point out that youth are well protected when the judge, prosecutor, and defense all have the option of raising the issue. If the defendant has questionable capacities, one of the parties to the trial will raise the issue without any special protections needed. Further, this allows defense attorneys more discretion

92 *See supra* pp. 16-18.

to make choices that are in the best interests of their clients in cases of borderline competence. For example, in some cases they may feel that they can still work with their client, even where a formal evaluation might reveal deficits great enough to find the juvenile incompetent. Thus, proponents of this view might believe that the defense is working in the child's best interests and will raise the issue if necessary, and requiring an evaluation only interferes with the defense's ability to perform this function.

*The Question of Competence Should Be Raised Automatically in Certain Cases*

Supporters of this view would point to research demonstrating that at certain ages, juveniles are at increased risk for being incompetent to stand trial, arguing for greater protection against the error of failing to raise the question when youth might be incompetent. While various stakeholders in the juvenile system are well-intentioned, without such protection, juveniles with serious deficits could be easily missed. Deficits in juveniles are not always obvious in the way that symptoms of acute mental illness or mental defect might be in adults. In juveniles, mental illness, which might be just developing, often presents more subtly. Intellectual disabilities in a child might yet be undiscovered. Developmental immaturity deficits also might be more easily masked or overlooked as part of childhood. For example, while an adult with a psychotic disorder may be easily discovered as they discuss their delusional beliefs regarding the court system openly, juveniles are unlikely to have obvious indicators that they perceive risks differently than adults. Further, simply because this additional protection is not currently provided in other situations does not mean that it should not be provided for juveniles.

A number of methods or combination of methods could be used to provide this additional protection. Juveniles could be divided (based upon available research) according to the ages at which they were most at risk. For example, juveniles below a certain age might be automatically evaluated, or at certain ages a presumption could be created that would have to be overcome (e.g., see "Age-Based Presumption of Incompetence" in Module 1, Component B). Each state would have to weigh the risk of improper adjudication of a juvenile against the added cost and particular considerations of their state's political climate and legal history. The Background section of this article can provide states with some guidance regarding the developmental stages of juveniles and the ages at which they are more or less likely to have necessary competence-related abilities.

Another possible division would be based upon the type of crime of which the defendant was accused or the type of disposition he or she was facing. For example, a state could require a competence evaluation whenever juveniles face the possibility of transfer or waiver to adult court. Those supporting this view would argue that due to legislative changes that occurred during the 1990s, juveniles are transferred to adult court at younger ages and for more crimes than in past decades. Consequently, if these juveniles are at risk for being sent to adult court, where they would face the same penalties as adult defendants, they should be evaluated to determine whether they are able to function effectively within the court process.

### **Recommendation:** *Raising the Question*

We suggest that statutes should not include special conditions under which the question of competence must be raised in juvenile court, other than a state's possible choice to include an age-based presumption of incompetence as discussed earlier in Module 1, B.[93] Criminal law statutes do not require that competence be raised merely because a person has a history of serious mental illness or developmental disability.[94] It is defense counsel's role to determine, in the interests of their client, when the issue should be brought to the attention of the court.

## B. Burdens/Standards of Proof and Related Presumptions

### The Component

> *States should determine the burden of proof, standard of proof, and any accompanying presumptions, required in juvenile competence to stand trial procedures. States should also determine which branch of government is best suited to make determinations regarding the appropriate procedural mechanisms for competence to stand trial in juvenile proceedings within their state.*

States vary in their requirements regarding burdens of proof and standards of proof in legal cases in which the question of competence to stand trial is raised. Depending upon the context, either the prosecution or the defense may bear the burden of proof. Generally, the party bearing the burden must do so by a "preponderance of the evidence," "clear and convincing evidence," or "beyond a reasonable doubt" (in order of increasing difficulty). The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision.[95] For example, rather than beginning in equipoise, the proceeding may start with a presumption that the defendant is either competent or incompetent.

The standard of proof a party is required to overcome bears a relationship to the risk involved should a mistake be made. As an overarching premise, with regard to proving the elements of a crime, in a criminal case, the elements

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93 *See supra* Module 1B pp. 27-32.

94 In another context, one coauthor (TG) has recommended several factors to consider when deciding whether to raise the question of a youth's competence to stand trial; these factors ask whether the youth: (a) is age 12 or younger; or (b) has had a prior diagnosis or treatment for mental illness or intellectual disability; or (c) is "borderline" level of intellectual functioning or has been identified as having a "learning disability"; or (d) has been observed to have possible deficits in memory, attention, or interpretation of reality. Thomas Grisso, Michael Miller, & Bruce Sales, *Competency to Stand Trial in Juvenile Court*, 10 Int'l. J.L. Psychiatry 1 (1987). This recommendation, however, was offered to courts and attorneys to guide their discretionary judgments when deciding whether to raise the question in individual cases. Were this recommendation employed as a statutory mandate for juvenile courts, it would obligate every court to obtain mental health and educational records on every youth arraigned, in order to determine whether the youth met the above criteria for raising the issue of competency. This is not recommended, because it would be impractical and would result in substantial delays of the adjudicative process. The protection is best offered by allowing for discretionary decisions by attorneys and the court to raise the issue.

95 Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 283 (1990).

must be proved "beyond a reasonable doubt." This idea is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[96] In civil cases, the party with the burden of persuasion must overcome their burden either by a preponderance of the evidence, or by clear and convincing evidence if the issue at stake is "more than mere money."[97] Thus, although (as discussed below) the Supreme Court has recognized states' right to place the burden on whichever party it deems best and, even create a presumption contrary to the defendant's interests,[98] the types of procedural mechanisms chosen reflect the value society places upon such rights or protections. In other words, we must ask, is the state's procedure for guaranteeing a constitutional right sufficiently protective of that right?

Pertaining to competence to stand trial in juvenile court, many states may simply wish to copy the burden of proof,[99] standard of proof, and any accompanying presumptions found in their criminal statutes for use in juvenile courts. Alternatively, one might wish to create a different set of burdens and standards of proof in juvenile court based on a consideration of differences in the consequences of delinquency dispositions.

As a general matter, drafters should be aware that states vary in their preferences for setting burdens and standards of proof by legislation as opposed to case law. They may want to seek advice regarding their state's preferences before considering the alternatives for this Component.

## The Options

States could consider using the procedural mechanisms discussed above to provide: (1) the same level of protection afforded adults; (2) less protection; or (3) increased protection in juvenile courts.

### *Juveniles Should Receive the Same Protection as Adults*

Proponents of this view might argue that in the context of competence to stand trial, the U.S. Supreme Court has already determined the constitutional floor for protection. In *Cooper*[100], the Court stated that the burden of proving incompetence may be placed upon the defendant by a preponderance of the evidence. This holding creates the standard for required protection in the competence to stand trial context. Thus, this standard should apply to juveniles as well as adults.

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96 *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

97 Due Process places a heightened burden on the state in civil proceedings in which the "individual interests at stake…are both 'particularly important' and 'more substantial than mere loss of money.'" Santosky v. Kramer, 455 U.S. 745, 756 (1982) (quoting Addington v. Texas, 441 U.S. 418, 423 (1979)).

98 Medina v. California, 505 U.S. 437, 442 (1992) (holding that due process is satisfied even if there is presumption of competence and burden is placed upon defendant to demonstrate his / her incompetence by preponderance of evidence).

99 The authors recognize that the term "Burden of Proof" is not a unitary concept, but instead often interchanged with both "burden of persuasion" and the "burden of production." As the term burden of proof is generally colloquially used to refer to the former, we use it interchangeably with burden of persuasion.

100 Cooper v. Oklahoma, 517 U.S. 348 (1996).

The notion that greater protection is needed for juveniles is contrary to the U.S. Supreme Court's conclusion that the 14th Amendment does not require that every possible protection be put in place, no matter the cost, in order to eliminate the possibility of convicting the innocent.[101] While our society has determined that some risk must be borne by the state (i.e., that an erroneous decision could let a guilty man go free), every procedural mechanism possible that will prevent an innocent man from being convicted need not be employed. Even when there is a "surer promise of protection,"[102] not all mechanisms must be used, and the State's interest in efficient delivery of justice, must also be weighed.

**Example Statutory Language:**
***Juveniles Should Receive the Same Protection as Adults***

A defendant is presumed to be competent. The party raising the issue of competency bears the burden of proving the defendant is incompetent by a preponderance of the evidence. When the court raises the issue of competency, the burden of proving the defendant is incompetent shall be on the party who elects to advocate for a finding of incompetency. The court shall then apply the preponderance of the evidence standard to determine whether the defendant is competent.

Alaska Stat. § 12.47.100 (2011).

*Juveniles Need Less Protection Than Adults*

While the Supreme Court has outlined the standard for adult competence to stand trial, it has not addressed the proper standard in juvenile courts. The type of process due is largely dependent upon the type of right, but it is also determined according to the context in which that right is exercised. Although the right is similar with regard to competence to stand trial, the juvenile court context in which it is exercised differs. Therefore, especially in light of the Court's recognition that States should be given wide latitude in such decisions, states could choose to reconsider the standard used in adult court. Further, it is not clear that the same protections apply in both juvenile and adult courts.[103]

In examining the differences in context, states could decide that juveniles require less protection than their adult counterparts.[104] Juvenile proceedings are civil and not criminal in nature. Traditionally, civil proceedings require lesser protections. Further, the intent of juvenile proceedings is rehabilitative. Therefore, considering the

101 Patterson v. New York, 432 U.S. 197, 208 (1977) (holding that states need not institute every due process precaution).

102 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (overruled on other grounds, Malloy v. Hogan, 378 U.S. 1, 3(1964) ("Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person. A state procedure does not run afoul of the fourteenth amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar.")).

103 *See e.g.,* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (stating juveniles need not be given the right to a jury trial); Schall v. Martin, 467 U.S. 253 (1984) (stating that juveniles liberty interests differ from those of adults because they are always in some form of custody).

104 Thus, for example, a state falling into this category might put the burden on the defendant by clear and convincing evidence.

rehabilitative rather than the punitive intent and civil context, possibly a lower standard is needed to appropriately balance the risk to the state.

*Juveniles Should Receive Greater Protection Than Adults*

It is a maxim of constitutional law that the Supreme Court sets a "constitutional floor" with regard to the protection of individuals and their rights, below which the states must not go. The states, however, are free to provide greater amounts of protection.[105] States, therefore, could decide to provide greater protection in juvenile cases compared to adult cases.[106]

States should examine the right and the context in order to determine what society would deem the appropriate amount of protection for such youth. For example, one can argue for greater protection based on a consideration of the psychological research in this area. As reviewed in the Background section of this article,[107] psychological research demonstrates that juveniles in general are at greater risk for being incompetent to stand trial.[108] Given this increased risk, juveniles could require increased protection. In other words, in light of this research, the adult standard does not provide enough protection, and the "constitutional floor" must be raised. Thus, one could argue for a of burden and/or standard of proof that exceeds that which is constitutionally required.

## **Recommendation:** *Burdens/Standards of Proof and Related Presumptions*

We are not aware of any research data or clinical experience that would indicate that any one type of standard of proof or burden of proof is more appropriate than another. Thus we have no basis for a recommendation. Such matters should be decided in accordance with a state's own legal history and culture.

105 *E.g.,* Bracey v. Gramley, 520 U.S. 899 (1997).

106 Thus, for example, a state choosing this option might place the burden upon the prosecution.

107 Please see Background section *supra* pp. 7-18 for further discussion.

108 Grisso, Evaluating Juveniles' Adjudicative Competence, *supra* note 5.

# Module 3: Competency Evaluations by Mental Health Examiners

Module 3 describes five components, and their options, that drafters of statutes should address regarding mental health examiners' process of conducting competence evaluations, as well as the content of reports resulting from those evaluations:

A. Appointment of Counsel at Time of Evaluation
B. Protections Against Self-Incrimination
C. Qualifications of the Examiner
D. Location of the Evaluation
E. Time Limits for Evaluation
F. Content of the Evaluation and Report

## A. Appointment of Counsel at Time of Evaluation

### The Component

*The statute should address the question of the juvenile defendant's right to assistance of counsel during the evaluation.*

Defendants have the right to counsel under both the 5th and 6th Amendments. The 5th Amendment[109] right to counsel attaches at the point of custodial interrogation and allows defendants to request appointed counsel if they are indigent. In *Gault*, the Supreme Court extended the right to counsel for the purposes of custodial interrogation where loss of liberty was possible.

The 6th Amendment,[110] also grants the defendant the right to an attorney. Under the defendant's 6th Amendment right to counsel, indigent defendants are allowed counsel at any "critical stage" of the proceedings that could incur a loss of liberty. Supreme Court precedent in adult cases has defined "critical stage" to include initial court appearances, preliminary hearings, return of an indictment, arraignment, trial, and first appeal as of right.[111] In many juvenile jurisdictions, youth proceed to competence evaluations without counsel, or with counsel but without

109 U.S. Const. amend. V.

110 *Id.* ("In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense.")

111 Bounds v. Smith, 430 U.S. 817 (1977) (defendant also has limited right to legal counsel in collateral proceedings). *See also,* Estelle v. Smith, 451 U.S. 454 (1981), in which the U.S. Supreme Court considered whether a psychiatric examination was considered a "critical stage" of legal proceedings. In that case, the defendant was being charged with murder and a psychiatric evaluation was ordered by the court at the request of the prosecution. The Court held that the defendant's 6th Amendment rights were violated because he had been appointed counsel and his attorney was not notified so that he attorney might help him in "making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed." The Court has never explicitly stated whether adults are entitled to this right in non-capital cases or whether this right also attaches in juvenile proceedings.

counsel's knowledge that an evaluation is being performed. States must determine whether juveniles should specifically be granted the right to counsel before and/or during competence evaluations.

## The Options

*Juveniles Should Be Entitled to Counsel Prior to and During Competence Evaluations*

Proponents of this view would argue that the same rationale applied in criminal cases should be applied in juvenile courts. As noted earlier, the U.S. Supreme Court held that adults should be allowed to have the assistance of counsel during evaluations, because determining whether or not they should submit to such an evaluation could have implications for the outcome of their case, including possible loss of their liberty.[112] Similarly, juveniles should be allowed to have the same right to have counsel, and counsel should be notified that an evaluation is occurring.

**Example Statutory Language:**
***Juveniles Should Be Entitled to Counsel Prior to and During Competence Evaluations***

When the question of the child's mental incapacity to proceed is raised, there shall be no further steps in the delinquency proceeding, except the filing of a delinquency petition, until counsel is appointed and notified in accordance with Article 809(B) and the child is found to have the mental capacity to proceed.

La. Child Code Art. 832. (2011).

They would similarly assert that juveniles might need additional protection during the evaluation itself and, therefore, should also explicitly have the right to have counsel present during the evaluation.[113] Further, they would also likely argue that the presence of counsel during a competence evaluation is actually helpful for the examiner. As the defendant's ability to interact with counsel is part of the *Dusky* standard, forensic examiners would benefit from the ability to directly observe the defendant's ability to interact with his or her attorney.

*Juveniles Should Not Be Entitled to Counsel Prior to and During Competence Evaluations*

Those believing that juveniles need not have the right to counsel prior to and during evaluations would argue that this is not a "critical stage" under previous Supreme Court precedent (see the discussion above under "The Component"). For example, one of the primary cases cited earlier requiring the availability of counsel during evaluation arose in a death penalty case involving an adult defendant. Therefore, whether it is required in juvenile

112 *See supra* note 111 and accompanying text.

113 For an example of one state that does explicitly require that juveniles be represented by counsel before a mental health evaluation may occur, see La. Child Code Ann. Art. 833 (2011).

cases is not clear, and whether it would be necessary in non-capital cases (juveniles are no longer subject to the death penalty)[114] is uncertain.

Notably, if competence evaluations are not considered a critical stage, making counsel unnecessary, states should ensure they are providing other protections for defendants' rights against self-incrimination. This will be discussed further in the next section.

### **Recommendation:** *Appointment of Counsel*

We recommend that statutes should provide juveniles a right to counsel prior to any evaluation of competence occurring, as well as during that evaluation. There would seem to be little compelling reason to provide juveniles less protection in these matters than are afforded to adults in criminal cases, because juvenile adjudications may have serious implications later in the same proceedings and / or later in life.

## B. Protection Against Self-Incrimination

### The Component

> *The statute should address the juvenile defendant's right established in In re Gault, to avoid being a witness against himself through the use of self-incriminating information that might arise during the evaluation in any proceedings other than the hearing on competence to stand trial in the current case.*

Under the *Dusky* standard, defendants must be able to assist counsel in their defense. Part of the ability to assist counsel is the ability to provide a coherent, logical account of facts, especially as they relate to the alleged offense. Consequently, mental health examiners often ask defendants to provide a recitation of the events that lead up to and include the alleged offense, in order to test the defendant's ability to relate events in a coherent manner.[115]

In making such inquiries regarding the facts surrounding an alleged offense, forensic examiners may obtain potentially incriminating information. That information could then be sought for use in later stages of the current proceedings or in future proceedings. Consequently, this portion of the examination creates a tension with the defendant's 5th Amendment right to avoid self-incrimination.

Most states' criminal laws (or case law) prohibit the use of such information in proceedings other than the hearing on the defendant's competence to stand trial. But few states have clear directives regarding the question in juvenile court. While it appears from *Gault's* extension of due process that juveniles do have this right, states may consider two approaches to protect this right. States might allow inclusion of the information in the reports of forensic

114 In *Roper v. Simmons*, the United States Supreme Court struck down the death penalty for juveniles. 543 U.S. 551 (2005).

115 Wilson v. United States, 391 F.2d 460 (D.C. Cir. 1968) (holding that having amnesia does not mean *per se* incompetence if facts can be independently recreated).

examiners, but preclude the use of this information in later stages of the current proceedings or future proceedings. Alternatively, states might allow examiners to make these inquiries, but prevent them from putting the details of these inquiries into their reports.

## The Options

*Forensic Reports Should Be Allowed to Include Self-Incriminating Information*

Proponents of this approach could assert that the inclusion of this information would allow the court and attorneys to examine the validity of the evaluator's opinions. For example, an evaluator might express the opinion that the youth was unable to provide a coherent account of the alleged event. If the youth's actual account is described in the report, the court and attorneys would be able to examine the youth's statement to determine for themselves whether they agree with the examiner's opinion as to whether the juvenile is able to assist counsel under the *Dusky* standard.

Those who would argue against such an approach would state that incriminating information could create bias in current or future proceedings if it were released. In reply, proponents of including such information would argue that courts do this all the time. For example, a judge may make an *in camera* review of evidence to determine its admissibility. The judge may then rule the evidence is not admissible. However, the judge has already seen or heard the evidence in question and disregards that information for those proceedings. Another possible procedural option that would have the same effect would be to have one judge preside over the competency hearing, and another hear the evidence for adjudication. Thus, the judge making determinations regarding guilt would remain uncontaminated by any incriminating evidence that might be included within the competency hearing.[116] States that have highly protective laws prohibiting the use of information from competency evaluations in other legal proceedings may also argue that this is enough protection, especially if it is clear that the rule applies in juvenile proceedings.

116 The authors recognize that the latter suggestion may not be practical in more rural jurisdictions where multiple judges may not be available for such a procedure.

*Forensic Reports Should Not Include Self-Incriminating Information*

Those arguing against the inclusion of incriminating information in forensic evaluations could assert that state laws prohibiting the use of competency information in other legal proceedings might not be sufficient protection. If the information is in the competency report, there is the risk that it might nevertheless indirectly harm the defendant. For example, although the report is meant to be sealed, it could accidentally be sent to future evaluators or judges, thus biasing their opinions.

It could also be argued that a juvenile court judge often makes a finding both regarding competence and later adjudication of guilt. It might be difficult for judges to disregard juveniles' statements made during the evaluation that they have read during the competency phase of the proceedings.

**Example Statutory Language:**
***Forensic Reports Should Not Include Self-Incriminating Information***

The report shall not include any statement of the child relating to the alleged offense, and no such statement may be used against the child in court proceedings on the offense.

La. Child Code Art. 835 D (2011).

A statement made by the defendant in the course of an examination into the person's competency under this section, whether the examination is with or without the consent of the defendant, may not be admitted in evidence against the defendant on the issue of guilt in a criminal proceeding unless the defendant later relies on a defense under AS 12.47.010 or 12.47.020.

Alaska Stat. § 12.47. 100(d) (2011).

## **Recommendation:** *Protection Against Self-Incrimination*

We recommend that statutes pertaining to evaluations of juveniles' competence should provide as much protection against the use of self-incriminating information in future proceedings as is afforded to adults in competency evaluations performed for criminal courts. That degree of protection will vary across states.

From a clinical perspective, we note that forensic examiners have a variety of ways to adapt their practices to a state's protections against self-incrimination, while still obtaining the information that is needed for their evaluation. For example, examiners must determine whether youth have the ability to describe events at the time of the offense to their attorney. If self-incrimination protections prohibit examiners from talking to the youth about events at the time of the offense, they can assess the youth's capacities to relate events by asking them to describe other events in their everyday life. If they are allowed to discuss the alleged event with the youth in order to obtain more direct evidence of the youth's capacities, they can omit the potentially incriminating information from their reports, while describing any difficulties the youth might have had in relating the story.

# C. Qualifications of the Examiner

## The Component

*The statute should offer specific requirements for the qualifications of mental health examiners who will be authorized to perform court-ordered evaluations of juveniles' competence to stand trial.*

The court's need for accurate and relevant information requires that examiners who perform mental health evaluations understand the legal definitions and requirements associated with competence to stand trial ("forensic expertise"). It also requires that they possess the professional expertise to perform psychiatric or psychological clinical evaluations ("clinical expertise") with children and adolescents.

The mere fact of psychiatric or psychological training in no way assures that a professional knows how competence to stand trial is defined, unless the professional has had special forensic training or experience beyond his or her general clinical training. Similarly, the professional organizations of psychiatrists and psychologists do not presume that all of those professionals are qualified to perform evaluations of children and adolescents. They require specialized training or experience[117] specifically in the assessment and treatment of children and adolescents.

It can be argued that courts should make similar distinctions when identifying professionals who are qualified to perform forensic evaluations of juveniles relevant for competence to stand trial. While formulating the codification of clinicians' qualifications for this purpose, lawmakers must also consider the likelihood that specialists with those qualifications will actually be available to the court. The more stringent a jurisdiction's requirements regarding qualifications, the more difficult it might be to find experts with those qualifications.

117 The most common requirement used in mental health professional specialty regulations refers to "training or experience" in the specialty. This recognizes that graduate or medical school preparation are not the only ways to obtain the necessary expertise. Many child forensic experts have obtained their qualifications through post-degree experience, continuing education and/or supervision by other specialty experts.

## The Options

*Mental Health Examiners Should Be Statutorily Required to Have Specialized Training to Perform Competency Evaluations of Juveniles*

Proponents of this view would argue that, without specialized training or experience, mental health professionals are unqualified to conduct these evaluations. Requiring only that the examiners be licensed mental health professionals does not guarantee that they have had experience or training in working with children and adolescents, nor that they understand the applicable legal standard.

Even within psychology and psychiatry, professionals do not consider themselves competent to work with children or adolescents unless they have been trained to do so.[118] Working with such populations without the proper training would be considered unethical. Thus, we cannot consider forensic evaluators who have only had experience working with adults to be able to competently assess juveniles in a forensic context.

**Example Statutory Language:**
***Mental Health Examiners Should Be Statutorily Required to Have Specialized Training to Perform Competency Evaluations of Juveniles***

A competency evaluation shall be conducted by a licensed psychiatrist or licensed psychologist who is experienced in the clinical evaluation of juveniles and trained in forensic competency assessments, or a psychiatrist or psychologist who is in forensic training and under the supervision of a licensed forensic psychiatrist or licensed psychologist with expertise in forensic psychology.

Colo. Rev. Stat. § 19-2-1302(4)(b) (2011).

"Qualified examiner" means a licensed psychologist or psychiatrist who has expertise in child development and has received training in forensic evaluation procedures through formal instruction, professional supervision, or both.

Ga. Code Ann. § 15-11-151(9) (2011).

Similarly, many psychologists and psychiatrists who are trained to work with children and adolescents are not trained to perform forensic evaluations. They would not be knowledgeable regarding how to conduct an evaluation of competence to stand trial and the types of abilities a defendant would need in order to be able to meet the *Dusky* standard.

118 Am. Psycholog. Ass'n, Code of Ethics (2003). *See also* Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 L. & Hum. Behav. 655 (1991).

*Mental Health Examiners Should Not Be Statutorily Required to Have Specialized Training to Perform Competency Evaluations of Juveniles*

Proponents for this view would argue that imposing too many requirements would create too small a pool of possible examiners. Some states, especially those encompassing rural areas, do not have specialized mental health professionals, especially examiners with both forensic and child specializations. Stringent requirements would reduce the availability of examiners, which in turn could reduce the legal system's attention to the question of juveniles' competence.

States contemplating taking this position would need to consider the risk that clinicians may practice outside the bounds of their professional ethics, as well as the risk of inadequate legal protections for juveniles in delinquency proceedings.

**Example Statutory Language:**
***Mental Health Examiners Should Not Be Statutorily Required to Have Specialized Training to Perform Competency Evaluations of Juveniles***

The court shall stay all proceedings and appoint at least one (1) examiner who shall be a qualified psychiatrist or licensed psychologist, or shall order the department of health and welfare to designate, within two (2) business days, at least one (1) examiner who shall be a qualified psychiatrist or licensed psychologist, to examine and report upon the mental condition of the juvenile.

IDAHO CODE ANN. § 20-519A (2011).

## **Recommendation:** *Qualifications of the Examiner*

We recommend that states should require at least a minimum level of training and/or experience in the area of child clinical psychology or psychiatry and in forensic practice. Psychologists or psychiatrists should practice only in areas in which they have had sufficient training.[119]

We recognize that in some states, such criteria could result in a lack of qualified examiners. As a remedy, we suggest that many communities will have child developmental professionals who can be provided continuing education opportunities that will allow them to understand the legal concept of competence to stand trial. A large number of states and communities have required continuing education programs for professionals who provide the courts with forensic evaluations.[120] Some of these states also require an examination that demonstrates a minimum level of competency or ongoing review of sample reports to ensure adequacy of reports.

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119 AM. PSYCHOLOG. ASS'N, CODE OF ETHICS (2003). Am. Psychiatric Ass'n CODE OF MEDICAL ETHICS WITH SPECIAL ANNOTATIONS FOR PSYCHIATRY (2009 Ed. Revised). *See also* Committee on Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 L. & HUM. BEHAV. 655 (1991).

120 *See e.g.,* Robert Fein, Kenneth Appelbaum, Richard Barnum, Prudence Baxter, Thomas Grisso & Naomi Leavitt, *The Designated Forensic Professional Program: A State Government-university Partnership to Improve Forensic Mental Health Services*, 18 J. OF MENTAL HEALTH ADMIN. 223-30 (1991) (outlining the creation of one program for continuing education in forensic services). *See also*, Richard Redding & Lynda Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L.353-409 (2001).

It is our opinion, however, that it would be much more difficult to train forensic clinicians without child clinical experience to perform juvenile competence to stand trial evaluations. By definition, such evaluations require expertise in diagnosing childhood mental disorders, which are quite different from adult mental disorders. The degree of training that would be required typically is not possible through continuing education mechanisms.

# D. Location of the Evaluation

## The Component

> *The statute should specify where the evaluation will be performed, including provisions for appropriate placement of the youth during the evaluation period.*

For many years, statutes pertaining to adult defendants routinely provided for their placement in forensic psychiatric inpatient settings (hospitals) during the period of time required to perform the competence to stand trial evaluation. In recent decades, however, many states have adopted a "least restrictive alternative" approach, so that newer statutes instruct examiners to perform competence evaluations in non-psychiatric settings (e.g., in the community or in jail while awaiting trial) if the defendant does not need psychiatric hospitalization. Mental health examiners are able to perform competency evaluations of juveniles in their offices in the community or in pretrial detention centers. Therefore, drafters are encouraged to include in the statute a "least restrictive alternative" provision.

## The Options

We provide no discussion of options, because we are not aware of any justification for any approach other than the one described above. However, the following comments are offered to clarify the matter of location of evaluations.

Juvenile forensic evaluations can take place in a variety of settings. Juveniles may be evaluated within an inpatient psychiatric unit, in pretrial detention centers if they do not require psychiatric hospitalization, or in the community if they do not need a secure setting.

### Example Statutory Language: *Location of the Evaluation*

If the court orders a competency evaluation, the court shall order that the competency evaluation be conducted in the least-restrictive environment, taking into account the public safety and the best interests of the juvenile.

Colo. Rev. Stat. § 19-2-1302(4)(a) (2011).

While not required in all states, many states do recognize the need for balance between individuals' liberty interests and the state's need to evaluate the individual. Thus, provision is frequently made for evaluations to occur in the least restrictive setting possible. While the state does have a right to evaluate the individual in order to determine whether

he or she is competent and move forward with the legal proceedings, it is best for the juvenile to be evaluated in a restrictive setting only when it would otherwise be allowed by law (e.g. civil commitment).

When youth are seriously mentally ill and are also a danger to others or themselves, such that they meet criteria for civil commitment, then they may be psychiatrically hospitalized for mental health treatment and stabilization. Such hospitalization would occur within a psychiatric unit designed for juveniles and the types of mental health problems they experience. Sometimes the staff at these facilities would be able to assess the juveniles' competence to stand trial, if they have the requisite forensic training or experience. If not, the examiner who will perform the competency evaluation can come into the hospital to do the evaluation, and can ask hospital staff about their observations of the youth as well.

If juveniles do not need psychiatric hospitalization (i.e., do not meet a state's criteria for civil commitment), there is no reason to hospitalize them for a competency evaluation, and many reasons to avoid it. First, competency evaluations can be performed well without hospitalization. Second, while many youth who are not mentally ill have special needs (e.g., youth with developmental disabilities or less serious mental illnesses), psychiatric hospitals are not designed to meet those youths' needs. Third, psychiatric hospitalization is very expensive, with estimates of the daily cost of treating one patient in an inpatient psychiatric unit ranging from $700 to over $1,000 per day.[121] Moreover, many states have only a handful of psychiatric hospital beds for children at any given time, and they are almost always occupied.

When juveniles do not require psychiatric treatment, courts in some cases will decide that they need a secure setting because they might otherwise endanger themselves or endanger others. This may lead to placement in a detention center or jail. Competency evaluations can be conducted effectively in such facilities.

If neither inpatient psychiatric hospitalization nor a secure, non-psychiatric facility is required, the juvenile can be evaluated in a community-based setting, such as the evaluator's office, at a community outpatient mental health center, or within the courthouse. This community-based option not only respects the juveniles' liberty interests by keeping them within the least restrictive setting when possible, but it is also much more cost effective and is associated with better outcomes for these juveniles.

121 *See e.g.,* Robert Fein, Kenneth Appelbaum, Richard Barnum, Prudence Baxter, Thomas Grisso & Naomi Leavitt, *The Designated Forensic Professional Program: A State Government-university Partnership to Improve Forensic Mental Health Services*, 18 J. OF MENTAL HEALTH ADMIN. 223-30 (1991) (outlining the creation of one program for continuing education in forensic services). *See also*, Richard Redding & Lynda Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L.353-409 (2001).

### **Recommendation:** *Location of the Evaluation*

Evaluations for juveniles' competence to stand trial should occur in the least restrictive setting appropriate for their psychological needs, typically while residing in the community or in pretrial detention. Specifically, psychiatric hospitalization for evaluations should be allowed only when the youth's psychiatric condition requires inpatient psychiatric care.

## E. Time Limits for Evaluation

### The Component

> *The statute should specify the time allowed for the examiner to perform the evaluation and submit a report to the court. The statute might offer specific conditions under which the court is authorized to allow an extension of this time limit.*

States vary considerably in the amount of time that they allow for completion of a court-ordered competence evaluation for adult defendants. Some are as short as 10 days, while others are as long as 45 days.[122] Often they allow the examiner to apply for an extension (sometimes even doubling the time allotted) with good cause.

Considerations of the length of allowable time generally need to take into account two concerns. On the one hand, the time must be of sufficient length to allow examiners to do a proper evaluation, including the collection of necessary historical records (e.g., mental health history, educational history) that are especially important in juvenile competence evaluations. On the other hand, lengthy time limits raise questions about speedy trial, unnecessary lengthening of pretrial custody, and potentially delaying resolution of the issue to the detriment of victims and youth alike.

States may wish to simply use the time limits employed in a state's criminal code to determine time limits for juvenile cases, or they might want to take into account special issues associated with the evaluation of adolescents. If a different approach is considered for juvenile cases, it is possible to argue for either longer time periods or shorter time periods.[123]

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122 While the authors do not endorse this particular language or time period, for an example of one state statute that uses a 30-day period, see La Child. Code Ann. Art. 835A (2011).

123 States may also wish to consider their states guidelines with regard to timeliness or speedy trial procedures to ensure timely justice. *See e.g.,* National Council of Juvenile and Family Court Judges, Juvenile Delinquency Guidelines (2005) available at http://www.ncjfcj.org/images/stories/dept/ppcd/pdf/JDG/juveniledelinquencyguidelinescompressed.pdf (last visited Nov. 1, 2011).

## The Options

*Longer Time Limits for Evaluation Are More Appropriate for Juvenile Competence Statutes*

One could argue that there are several advantages for statutes that provide longer time periods for competency evaluations for juveniles than for adults.

First, many juveniles have poor factual understanding, but might be capable of learning those matters that are relevant for trial participation. This is difficult to assess in a single evaluation session. A longer evaluation period would allow for a second evaluation session at which retention of information from the first session could be examined. This would give the evaluator information about the juvenile's capacity to learn and retain new information. It would better ensure that the evaluee is not only able to learn the information necessary to go to trial, but is also able to retain that information over time.

Second, a longer evaluation period allows the examiner more time to collect needed collateral information, such as school records and mental health records. These are more important in juvenile cases than in adult cases. Examiners need to be able to describe a youth's developmental history and progress, which is typically not necessary in adult cases. Moreover, children's mental health is often more complex and ambiguous than that of adults, requiring more collateral information.

Third, while adult competency evaluations typically involve only the adult defendant, competency evaluations of juveniles typically require an interview with the parent or guardian as well. This often results in greater difficulties in scheduling of interviews, which often translates into the need for a greater time period for evaluation of juveniles compared to adult defendants.

*Shorter Time Limits for Competency Evaluations Are More Appropriate for Juvenile Competence Statutes*

When defendants are in secure or psychiatric settings awaiting trial, typically their time in those settings is made longer if they are in the process of a competency evaluation. The fact that the evaluation might extend their secure time runs the risk of increased negative effects for adult and juvenile defendants alike. For juveniles, however, the negative impact can be especially important for developmental reasons. It extends their time away from normal social activities that are important for their growth, and they often return to school having "lost time," leading to an increased risk of failure. Any rule that would actually extend the time of the evaluation beyond the state's usual time limit runs the risk of such negative effects.

Regardless of where the competency evaluation is performed, such evaluations extend the time that the juvenile is in the pretrial legal process. A longer evaluation will result in more juveniles being held up within the system, unable to move on with their lives and obtain the services they may need (if incompetent) in order to move forward with their case. Further, the longer the juvenile is involved with the legal system, the more likely that they will suffer stigma in

their community as others learn of their criminal justice involvement. Therefore, moving juveniles through the system more quickly may also have the benefit of preventing them from being ostracized from the community to which they will return. Shorter time periods will help minimize the risk of such negative effects on youth.

### **Recommendation:** *Time Limits for Evaluation*

We recommend beginning with the state's length of time provided for adults' competency evaluations, then deciding whether legislation should provide the same, longer or shorter time for juveniles' evaluations. We cannot suggest which of those three options are best, because the answer will necessarily be different depending on states' time periods for adult evaluations. In our experience, however, we suggest that two to three weeks for a juvenile clinical forensic evaluation allows the clinician to perform a quality evaluation, while balancing the juvenile's and the state's interests in avoiding unneeded delay. Therefore, in a state that allows 10 days for adults' competency evaluations, one might wish to allow a longer period for juvenile evaluations, while in a state with a statutory period of 45 days, one would likely want a shorter evaluation period in their juvenile statute.

## F. Content of the Evaluation and Report

### The Component

> *The statute should describe the information that the examiner is expected to provide the court in the written report of the examiner's evaluation.*[124]

Until about four decades ago, competence to stand trial evaluations in criminal courts were little more than clinical evaluations addressing whether a person had a mental disorder; if so, the person would be incompetent to stand trial. In more recent decades, however, courts have recognized that competency evaluations should address competence to stand trial abilities more specifically, in a way that is more closely related to legal standards and judicial decisions about competency. It is recommended that statutes describing the contents of examiners' competency reports should reflect these modern requirements.

The application of competence to stand trial in juvenile court has raised the need to recognize that competency evaluations with juveniles may require special considerations regarding content. For example, competency evaluations traditionally have examined mental illness or intellectual disability as reasons for potential deficits in competency abilities. In juvenile cases, however, examiners should also identify the defendant's developmental status, because some youth may have deficits in competency abilities primarily due to developmental immaturity of cognitive abilities or psychosocial characteristics (e.g., impulsivity, inadequate decision-making capacities).

124 In this section, the authors have written example statutory language, as the use of existing statutory language from various states did not provide as good a comparison to demonstrate the point being illustrated for the reader.

As noted later, there are many ways that statutes could identify the types of information that CST evaluations and reports should include.[125] The following elements of a CST evaluation are provided so that drafters can grasp the domain of information that is relevant, *but does not necessarily represent the phrasing that should be used to communicate these ideas within a juvenile competence to stand trial statute*. Reports on juveniles' CST should include:

**A. Assessment of mental disorder and intellectual disability:** A description and, if relevant, a diagnosis regarding the youth's mental status, clinical conditions, and/or intellectual incapacities due to mental retardation.

**B. Assessment of developmental status:** A description of the youth's status with regard to cognitive and psychosocial characteristics that are a part of childhood and adolescent development.

**C. Assessment of functional abilities for CST:** A description of the youth's actual abilities associated with the legal standard for competence to stand trial. Typically this includes what the youth does and does not *understand* about the trial process and assisting counsel, the youth's *appreciation* of that information and its relevance, and the youth's capacities for *decision-making* about the waiver or assertion of various rights afforded to defendants.

**D. Causes of deficits in CST abilities:** An identification of the relationship between any deficits in specific CST abilities (C above) and any mental disorder, intellectual disability, or developmental characteristics (A and B above).

**E. Potentials for remediation/restoration (if serious deficits in CST abilities are found):** A description and explanation as to whether the conditions causing the deficits in CST abilities are likely to be remediated within the statutory time period, what remediation methods are required, and how those could be accomplished.

There are several ways that these requirements could be incorporated into statutes. One would be a simple listing of headings in A through E above. A second approach would elaborate on each: for example, providing a list of competency abilities under category C. A third would be to describe data collection methods that would be needed to obtain data for these five elements of a competency evaluation.

125 *See e.g.,* American Prosecutor's Research Institute, A Prosecutor's Guide to Psychological Evaluations and Competency Challenges in Juvenile Court 1, 6-14 (2006).

## The Options

*Statutes Should Outline Only the Basic Elements of the Forensic Evaluation and Report*

In this approach, states would provide only an outline of the basic content to be covered in the forensic evaluation without further definition. Following this method of addressing the issue, states might, for example, require the evaluator to examine the five factors set forth in the accompanying text box.[126]

**Example Statutory Language:**
***Statutes Should Outline Only the Basic Elements of the Forensic Evaluation and Report***

1. The juvenile's history and current status regarding any possible intellectual disabilities or mental illness,
2. The juvenile's developmental history and current developmental status,
3. The juvenile's functional abilities related to competence to stand trial,
4. The relationship between deficits in the juvenile's functional abilities related to competence to stand trial and any mental illness, intellectual disability, or developmental characteristics, and
5. If the evaluator believes the juveniles is in need of remediation / restoration services, the evaluator should discuss:
   a. whether the juvenile's abilities are likely to be remediated / restored within the statutory period; and
   b. any recommended interventions to aid in the remediation / restoration of the juvenile's competence to stand trial.

These guidelines would assure that the most basic essentials for competency evaluations are included in every report. This approach says that at minimum, such evaluations must show what the defendant can and cannot do that is relevant for competence (3), must describe the clinical and developmental conditions of the defendant (1 and 2), must describe the relevance of the latter for explaining deficits in the former (4), and whether anything can be done about the problem (5).[127]

There are certainly many more details that states could provide in outlining the content of juvenile competence reports (see below). States choosing to use this broader way of describing the bare essentials might argue that further definition of such issues should be left to examiners, whose specialization in child evaluations qualifies them to determine the more specific elements that are necessary. In addition, one might argue that providing too much structure and guidance would prevent examiners from fully applying their knowledge and training, potentially resulting in less accurate or inefficient evaluations.

126 In this section, the reader may note that no citations are provided for the example statutory language. This is because the authors have written this text for illustrative purposes.

127 Thomas Grisso, Evaluating Competencies: Forensic Evaluation of Juveniles, 91-98 (2d ed. 2003) (outlining the most basic essentials of forensic evaluations for competencies).

*Statutes Should List and Define Specific Content Areas to Be Addressed Within the Evaluation, While Still Leaving Some Discretion to Courts and Evaluators*

This approach uses the "basic essentials" outline of the first approach, but provides further guidance within each of those areas, while still allowing for considerable discretion by examiners. It would not provide an overly rigid structure, but would potentially create greater consensus about what is included within the "basic essentials." Such a statute might also attempt to define terms that are unique to that state's particular approach to competence to stand trial or statutory elements that legislators anticipate could lead to disparate results if left undefined.

The accompanying figure on page 63 shows what a state adopting this approach might require the evaluation and report to include.

States adopting this approach would attempt to anticipate courts' and evaluators' need for somewhat greater specificity in guidance than the "basic essentials" provides, while still allowing courts and evaluators the flexibility to apply their own expertise. States taking this position might argue that a statute that does not provide enough structure could result in inequitable or disparate results across cases.

*Statutes Should Specify the Areas to Be Considered in Substantial Detail, Including Data Collection Methods to Be Used.*

Under this approach, set forth in the figure on pages 64-66, a statute would provide considerable specificity regarding the definitions of the "basic essentials," as well as the methods that examiners must use to fulfill those requirements. The figure shows what a state adopting this approach might require the evaluation and report to include. States adopting this very detailed approach might argue that specificity assures uniformity and high quality throughout a jurisdiction and across examiners. By applying specific criteria, a state would better ensure greater uniformity in the way that examiners would interview juveniles, the types of methods they would apply, and the resulting reports. This uniformity in information input to courts might also be considered as a way to increase consistency in judicial decisions, thereby increasing fairness.

Adoption of this level of detail in a juvenile competency statute would be unique, in that no other state has done so. Were a state to do so, judges and examiners would have to make adjustments to their current practice.

Drafters should also consider that this level of specificity is unusual in statutes partly because one might be creating legislation that will become obsolete. Science and assessment methods are continuously evolving. For example, the list of "maturity factors" in 3a (page 64) are based on current developmental science, but some of those factors may, in the future, be found empirically irrelevant for explaining youths' performance related to competency. Some statutes have specified certain psychological tests or tools that have the largest research evidence base supporting them, but future research may develop much better assessment methods.

## Example Statutory Language:
### *Statutes Should List and Define Specific Content Areas to Be Addressed Within the Evaluation, While Still Leaving Some Discretion to Courts and Evaluators*

1. Assessment of the Mental Status of the Juvenile, including:
   a. Results of Mental Status Exam (MSE);
   b. A description of history and current status of any psychiatric symptoms and, if relevant, the youth's psychiatric diagnosis; and
   c. A description of history and current status of any intellectual incapacities or intellectual disabilities.
2. Assessment of the Developmental Status of the Juvenile
   a. A description of cognitive abilities of the youth associated with the youth's history and current level of development;
   b. A description of the youth's development of psychosocial characteristics that might be relevant for competence to stand trial
3. Assessment of the Juvenile's Functional Abilities Related to Competence to Stand Trial, including:
   a. Ability to consult with his lawyer with a reasonable degree of rational understanding and
   b. Having a rational as well as factual understanding of the proceedings against him
   c. A description of what the juvenile does and does not understand with regard to the legal process and assistance of counsel;
   d. Whether the youth is able to appreciate the applicability and relevance of that information to the juvenile's own case; and
   e. The youth's decision-making capabilities with regard to the various legal rights and protections afforded defendants.
4. The Relationship between the Juvenile's Mental Status and Developmental Characteristics and the Juvenile's Functional Abilities Related to Competence to Stand Trial, including:
   a. A discussion of the relationship between any mental disorder, intellectual disabilities, or developmental characteristics identified in sections (1) and (2) above and any deficits in the juvenile's functional abilities related to competence to stand trial.
5. Recommended Interventions to Aid in the Restoration / Remediation of Juvenile's Competence to Stand Trial, including:
   a. Any recommended interventions
   b. The likelihood of the success of these interventions; and
   c. The length of time anticipated to remediate these deficits.

## Example Statutory Language:
### *Statutes Should Specify the Areas to be Considered in Substantial Detail, Including Data Collection Methods to Be Used*

1. The Report Shall Describe the Evaluation Methods and Procedures, including:
   a. Identification of the Evaluator and the evaluator(s)' credentials,
   b. Assessment Methods including any testing administered,
   c. Whether and how the juvenile was apprised of the limits of confidentiality associated with the evaluation,
   d. A description of the sources of information relied upon, including any persons contacted or documents obtained. For example, school records, medical records, court records, psychiatric / psychological records,
   e. Relevant history of the juvenile
2. Assessment of the Mental Status of the Juvenile, including:
   a. Results of Age Appropriate Mental Status Exam (MSE) of the juvenile,
   b. Any medications, psychiatric or otherwise, that the juvenile is currently prescribed and any possible effects that medication may have upon the juvenile's competence-related abilities or demeanor, as well as whether those medications are required to maintain the juvenile's competence,
   c. Results of any assessment of the juvenile's intellectual capacities, including an intellectual testing,
   d. Any applicable diagnosis and a description of the data supporting that diagnosis
3. Assessment of the Developmental Status of the Juvenile. The evaluator shall consider the juvenile's:
   a. Age and maturity level, including:
      i. Responsibility (autonomy, self reliance, clarity of identity)
      ii. Temperance (the ability to delay action and think through issues, seeking advice where needed)
      iii. Perspective (ability to acknowledge the complexity of a situation and frame a decision within the larger context)
      iv. Developmental stage
      v. Judgment, reasoning, and decision-making ability
      vi. Future orientation
      vii. Risk perception
      viii. Peer influences
      ix. Influence of parental relationship
      x. Suggestibility and compliance with others

*Continued over*

## Example Statutory Language:
### *Statutes Should Specify the Areas to be Considered in Substantial Detail, Including Data Collection Methods to Be Used* *continued*

4. Assessment of the Juvenile's Present Functional Abilities Related to Competence to Stand Trial
   a. Ability to consult with his lawyer with a reasonable degree of rational understanding, including:
      i. The name of his / her attorney,
      ii. Relationship with his / her attorney,
      iii. Motivation to assist attorney,
      iv. Level of trust of his / her attorney,
      v. The ability to communicate with counsel,
      vi. The ability to recall and recount pertinent facts, events, and states of mind related to the alleged offense,
      vii. The juvenile's ability to testify relevantly if necessary,
      viii. The juvenile's ability to display appropriate courtroom decorum,
      ix. Ability to appraise the quality and quantity of evidence against the defense,
      x. Ability to attend to hearing and tolerate it emotionally,
      xi. Response to witness lying, and;
   b. Rational as well as factual understanding of the proceedings against him / her, including:
      i. Understanding that he / she has been charged with an offense,
      ii. Understanding the criminal conduct that is being alleged and the relative seriousness of the alleged conduct,
      iii. Understanding the of the range and nature of the possible penalties that could be imposed,
      iv. Understanding the roles of the courtroom participants including the judge, prosecutor, defense counsel, witnesses, and, if applicable the jury,
      v. The essential procedures of a trial process,
      vi. The meaning of a plea bargain and the benefits and detriments to each available plea option,
      vii. The rights a defendant gives up by accepting a plea bargain,
      viii. Understanding of his / her trial-related rights, including the right to avoid self-incrimination, and
      ix. Engage in a reasoned choice of legal strategies and options
   c. The report shall also contain a description of any specialized testing administered to aid in evaluating the juvenile's competence-related abilities, the appropriateness of any such instruments for a juvenile population, and the results of any such testing administration.

*Continued over*

**Example Statutory Language:**
***Statutes Should Specify the Areas to be Considered in Substantial Detail, Including Data Collection Methods to Be Used*** *continued*

5. The Relationship between the Juvenile's Mental Status and Developmental Characteristics and the Juvenile's Functional Abilities Related to Competence to Stand Trial, including:
   a. The juveniles' functional abilities with relation to competence to stand trial,
   b. Any limitations with regard to competence to stand trial,
   c. Any relationship between the juvenile's deficits in competency abilities and the youth's mental illness, intellectual disabilities, or developmental characteristics,
   d. Facts and reasoning upon which the examiner's opinions are based.
6. Recommended Interventions to Aid in the Restoration / Remediation of Juvenile's Competence to Stand Trial, including:
   a. What type of intervention can remediate existing deficits; If there are multiple deficits that each have a different likelihood of being remediated, the evaluator shall list each deficit and it's probability of being remediated separately,
   b. Where appropriate remediation services are located,
   c. The length of time the evaluator anticipates remediation will take,
   d. Recommendations for any adjustments in courtroom procedures that may aid the juvenile in functioning more effectively within the legal process.
7. Recommended Interventions to Aid in the Restoration / Remediation of Juvenile's Competence to Stand Trial, including:
   a. Any recommended interventions,
   b. The likelihood of the success of these interventions,
   c. The length of time anticipated to remediate these deficits.

## **Recommendation:** *Content of the Evaluation and Report*

We recommend something akin to Option #2 above, which provides a balance between too much and too little guidance. Option #1 does not provide a sufficient amount of detail, and Option #3 is likely to lead to difficulties due to its extreme level of detail.

Note that the three outlines we have provided do not include a requirement that the examiner offer a conclusory opinion stating that the defendant "is or is not competent to stand trial." Some states will want to include that element, while others might not. Arguments for including expert opinions on the ultimate legal question generally assert that courts are aided by such opinions and often desire them,[128] and that forensic examiners are qualified by their specialized expertise to do so.[129] Further, experts expressing their opinion does not preclude the court from disagreeing with that opinion and ruling against it if they believe the weight of the evidence indicates otherwise. Those arguing against it typically point out that (a) whether a defendant is or is not competent to stand trial is a legal interpretation concerning whether the defendant's disabilities are sufficiently serious to jeopardize the fairness of the trial, and (b) this is a legal judgment that should be construed as outside the expertise of clinical professionals.[130] Forensic clinicians appear to be divided on this issue,[131] and their ethical standards neither encourage nor prohibit their statements of opinion on whether the examinee "is or is not" competent to stand trial.[132]

128 Richard Redding, Marnita Floyd, and Gary Hawk, *What Judges and Lawyers Think about the Testimony of Mental Health Experts: A Survey of the Courts and Bar*, 19 Behav. Sci. & L. 583 (2001).

129 Richard Rogers and Charles Ewing, *The Prohibition of Ultimate Opinions: A Misguided Enterprise*, 3 J. Foren. Psychol. Practice 65 (2003).

130 Chad Tillbrook, Denise Mumley & Thomas Grisso, *Avoiding Expert Opinions on Ultimate Legal Questions: The Case for Integrity*, 3 J. Foren. Psychol. Practice 77 (2003).

131 Randy Borum and Thomas Grisso, *Establishing Standards for Criminal Forensic Reports*, 24 Bull. Amer. Acad. Psychiat. & Law 297 (1996).

132 Committee for Ethical Guidelines for Forensic Psychologists, *Specialty Guidelines for Forensic Psychologists*, 15 L. & Hum. Behav. 655 (1991).

# Module 4: Remediation and Legal Disposition of Incompetent Juvenile Defendents

Module 4 describes four components, and their options, that drafters of statutes should address regarding the remediation and disposition of cases involving youth found incompetent to stand trial:

A. Remediation Services

B. Remediation Period

C. Legal Disposition of Cases in Which Incompetence Cannot be Remediated

D. Provision of Services in the Event that Incompetence Cannot be Remediated

Most states' laws describe how the state will proceed if a criminal defendant is found incompetent in criminal court. The first step is a determination concerning whether the defendant can be restored to competence if appropriate treatment and services are provided. If it is believed that restoration services might be successful, restoration services are ordered. If it appears that the defendant cannot be restored to competence, or if restoration does not succeed within a stated period of time, then most states' criminal codes require that the charges must be dismissed (sometimes with various additional provisions, such as the potential for civil commitment).

With regard to the restoration services provided, and the disposition of incompetent defendants, there are four main issues that should be addressed:

- Where and how restoration services will be provided
- How long restoration services can be provided
- Conditions for the legal disposition of those persons whose charges are dismissed due to non-restorable incompetence
- If the restoration services are not likely to be successful (or if services are in fact unsuccessful) in restoring competence, provisions for additional services that might be needed after the legal case has concluded.

Several aspects of a state's adult competence procedures and laws can be employed to guide the drafting of legislation for incompetent defendants in juvenile court. But there are several ways in which they might require translation in light of the special characteristics of children and adolescents.

One translation involves the criminal law's tradition of using the term "restoration." The term "restoration" of competence arose in the context of competence to stand trial in adult criminal cases, in which it was presumed that the person's incompetence was the result of an episode of mental illness, but the person was competent before they became mentally ill. Youth who are incompetent to stand trial due to an episode of mental illness may be in the same situation. However, youth who are incompetent because of intellectual disability or developmental immaturity may never have been competent prior to their evaluation. Therefore, to speak of "restoring" their competence is somewhat inappropriate. *For this reason, we recommend that the term "remediation" be used to refer to efforts to improve youths' abilities when they have been found incompetent.*

Other differences between youth and adults suggest the need for special considerations in remediating incompetence in juvenile cases. For example, youth who are found incompetent due to mental illness may require different services and dispositions than those who are found incompetent due to intellectual disability or developmental immaturity alone. The former youth need clinical treatment to deal with their competence, while the latter youth do not. Therefore, no one legal provision for placement, and no single remediation strategy, will fit the circumstances of all youth found incompetent. *This fact requires that competency remediation statutes for youth will need to be constructed with sections that deal separately with the three broad types of youth noted above.*

Finally, differences between adults and juveniles need to be considered with regard to the requirement that the state must dismiss the charges for unremediably incompetent defendants. Adults are typically found incompetent due to mental illness, and if they are not restorable, typically their illness is quite serious. Thus, if they are not restorable, typically they can be ordered to undergo inpatient treatment at a psychiatric hospital under civil commitment laws. On the other hand, youth sometimes are non-remediably incompetent due to developmental immaturity, and without evidence of serious mental illness. Competence to stand trial laws for adults do not provide any guidance regarding how to deal with juveniles in these circumstances.

These are among the most difficult challenges for a state in developing a statute that can guide courts in dealing with juveniles' competence to stand trial. The following discussions look first at the types of services that may be needed for remediation of juvenile's incompetence, then at issues pertaining to youth found unremediably incompetent.

# A. Remediation Services

## The Component

If the juvenile's incompetence is believed to be remediable, *statutes should provide for placements and services that will accomplish remediation.* The types of services required will differ depending upon the reasons why the juvenile has been found incompetent. There are two main issues to deal with in this regard when developing a statute. One is matching the youth's condition with the setting for remediation. The second pertains to the appropriate nature of remediation services themselves, as well as requirements for remediation providers.

## The Option

In this discussion, we depart from the format that offers arguments for and against alternative approaches, because we believe that the "pro and con" format simply makes an already difficult issue increasingly complex. Instead, we simply offer discussions of the issues that must be addressed.

*Facilities or Settings for Remediation*

If a juvenile is found incompetent to stand trial and is considered to be capable of remediation, the remediation can be accomplished either in an inpatient or a community-based setting. It is difficult to identify specific settings for all communities, since communities vary in the availability of various types of inpatient or community-based services. Therefore, we offer some basic principles that a state might consider in determining the proper placement for youth who require remediation of incompetence.

First, *the setting should match the level of clinical treatment needs of the youth*. Thus, youth whose incompetence is related to a serious mental disorder that ordinarily would require inpatient treatment are appropriate for competence remediation in an inpatient psychiatric setting designed for children. This is appropriate because psychiatric treatment is likely to be needed in order to reduce the symptoms of disorder that are likely to be at the root of the youth's incompetence. *No other incompetent youth, however, should require placement in inpatient psychiatric treatment programs for competence remediation* — for example, youth whose incompetence is related to intellectual disability or developmental immaturity and for whom mental disorder is absent (or present only in a form that typically does not require hospitalization for treatment).

Second, for youth not requiring inpatient psychiatric treatment, *remediation should be accomplished in community-based settings that match the level of security required for community safety or for assuring that the youth will be available for later trial*. Youth presenting security issues can be remediated while in juvenile detention centers or staff-secure shelters. Youth not requiring those levels of security can be considered for remediation while living at home or other non-secure settings.

Third, *some youth who do not need psychiatric hospitalization may nevertheless have special needs that warrant special community-based arrangements during the time of their remediation*. Examples include: (a) youth who might need temporary placement in residential programs for youth with intellectual disabilities, if their own homes do not provide adequate care and supervision, or (b) youth who have less acute mental disorders who may need community-based mental health center contact while living at home or in some other protected residential program.

*Remediation Services and Remediation Providers*

There are two types of remediation services. Both are needed for some, but not all, youth who are found incompetent.

*Remedial psychiatric services* are required when the youth's incompetence is due primarily or in part to mental illness. This type of care focuses on treatment of the symptoms of a youth's mental illness, with the expectation that symptom reduction will then accomplish the remediation objective. This can be provided in an inpatient or a community-based setting (e.g., a community mental health center). Providers of this aspect of competency remediation must, of course, be child-trained psychiatrists or psychologists.

*Remedial competency education services* are required when a youth's incompetence is due in part to deficits associated with intellectual disability or developmental immaturity. These services might also be required for youth with mental illnesses, because often the source of their incompetence is related to both mental illness and developmental immaturity. Competency education services use specialized educational methods to focus on improving youths' factual and rational understanding of trials and their objectives, their ability to assist counsel, and their capacity to make decisions related to trials. Providers of this aspect of competency remediation typically must have special knowledge of the developmental capacities of children and adolescents, as well as knowledge of methods for teaching youth the information and abilities relevant for the state's definition of competence to stand trial (as outlined in Module 1).

There is very little research on competency education methods or services for youth who are incompetent to stand trial.[133] We can, however, offer some guidance based on our experience in consultation with various states where such methods are used. In those states, individuals or provider groups typically have been contracted by the state for this special practice. Often they are not forensic examiners, but rather professionals with backgrounds as educators. Thus, competency remediation counselors who have extensive experience teaching juveniles with learning disabilities would be particularly suited to the task of teaching juveniles skills and abilities related to competence to stand trial. For example, an individual with extensive experience teaching special education would possess skills appropriate for working with such youth.

Currently, there is insufficient research for any remediation program to be considered an evidence-based practice. However, a few states have developed and operated juvenile competency education/remediation programs for a number of years, some of which are in the process of collecting data regarding their program. Two of these are described below.

Two of the most long-standing juvenile competence remediation programs in the United States are located in Virginia and Florida. Virginia's program was initiated in 1999 and is state-funded with a contract to the University of Virginia. It is a community-based program.[134] The program's goal is to assist juveniles in attaining adjudicative competence whenever possible. Juvenile competency restoration services are provided in the least restrictive setting in which the court allows the juvenile to reside. As such, the program's restoration counselors travel to where the youth is located (e.g., the child's home, a foster home, detention facilities, hospitals). Many of Virginia's restoration counselors have a background in areas such as special education, social work, or psychology. All have specialized training in forensic issues and expertise in child mental health. Counselors meet with juveniles an average of three times per week for 1½ hours per session.

133 Jodi Viljoen & Thomas Grisso, *Prospects for Remediating Juveniles' Incompetence*, 13 Psychol., Pub. Policy, & L. 87 (2007).
134 Jeanette Duval, LCSW, Program Director, personal communication, January 14, 2010.

Restoration[135] services are individualized to meet the needs of each child, but are based upon a curricula developed in Virginia. The first curriculum series developed uses teaching aids involving a central character named Jamal. The "Jamal in a Jam" series of educational tools includes an interactive CD-ROM, board game, workbook/coloring book, and flash cards. The newer curriculum series involves two central characters, D.J. and Alicia. The "D.J. and Alicia" series currently includes an interactive CD-ROM and flash cards. Through the interactions of the story characters, juveniles are taught information related to the *Dusky* competence standard. For example, the juveniles learn factual knowledge, such as the roles of each of the courtroom participants and key legal terminology.

With regard to the "consult with counsel" juveniles are taught appropriate courtroom decorum and how they are expected to interact with their lawyer, such as telling their attorney important information related to their charges. As many of the counselors have a background in education, they also work with juveniles regarding the "rational" portion of the *Dusky* standard. For example, the counselors teach them about important decisions they might be asked to make during adjudication and assist them in learning abstract concepts using methods such as drawing analogies to more concrete concepts. In order to facilitate such learning, counselors may engage juveniles in role playing scenarios and practicing problem-solving about hypothetical legal scenarios as well as their own legal case. Although employed less frequently, counselors may take juveniles to visit courtrooms and / or observe legal proceedings. Counselors also involve the youth's family, other caretakers, or attorney as needed. If the youth requires additional services in order to restore his or her competence (e.g., mental health services such as psychiatric medication or psychotherapy), the counselor helps coordinate those services for the child.

Preliminary data collected through the Virginia program included a sample of 563 juveniles ranging in ages from 8 to 17 at the time of the alleged offense who were court ordered to be provided restoration services. In this sample, 72 percent were eventually found competent by the court. The sample was further divided into three age groups: 8 though 10, 11 though 13, and 14 though 17. Within this sample, 61 percent of the youngest group, 78 percent of the middle group, and 72 percent of the oldest group were found by the court to be restored to competence. The sample was also divided into groups based upon the predicate or underlying reason for the juveniles' initial incompetence finding. Juveniles with a diagnosis of intellectual disability (without a mental health diagnosis) were restored in 56 percent of cases. Youth with a diagnosis of mental illness were able to be restored in 84 percent of cases. Youth with both a diagnosis of an intellectual disability and mental illness were restored 58 percent of the time. However, the highest rates of restoration (91 percent) were found among juveniles who did not have a mental illness or intellectual disability diagnosis. Further, fiscal analysis demonstrated that this community-based program costs a fraction of what it would cost to provide the same services on an inpatient basis in Virginia.

Florida's juvenile competence restoration program was developed in 1997 as the result of juvenile competence remediation legislation passed in 1996. In Florida, remediation services are provided on both an inpatient and outpatient basis. By statute, a finding of incompetency can be based upon mental illness, mental retardation, autism,

135 The term restoration is used with regard to Virginia, rather than the term remediation, because this is the language employed in the Virginia juvenile competency statute. VA Code Ann. § 16.1-358 (2011).

or some combination of these. Competency restoration counselors all have at least a Bachelor's Degree and many have experience as teachers, mental health workers, or dependency case workers.

Outpatient services are provided by Twin Oaks Forensic Outpatient Services, a statewide network of independent providers who are approved by the state to provide services. Counselors meet with each of their clients for up to 25 hours per month. There is no set curriculum for counselors to follow in providing remediation services. Instead, counselors are told to adapt the services provided to the individual needs or specific deficits of each child. Regional case managers oversee the provision of services and coordinate any additional services needed to aid in restoration such as mental health services.

Of those juveniles who are receiving outpatient remediation services who have an IQ of 50 or higher, 60 percent are eventually recommended as competent by evaluators.[136] While the program's goal is to restore mentally ill youth within 6 months, counselor's frequently encounter issues with non-compliance of parents in facilitating services, leading to delays.

Inpatient restoration services in Florida are provided at Twin Oaks Appalachia Forest Youth Camp, a secure juvenile forensic facility with 31 male beds and 8 female beds. In addition to psychiatric, psychological, and medical evaluations and services, youth attend a 50-minute competency training class five days a week, which is run by Case Managers. The curriculum is flexible, but it employs methods such as lectures, videos, games and mock trials. Youth also receive individual counseling once a week, and forensic psychologists evaluate each youth on a monthly basis to determine whether the youth is ready to return to court for a competency.

Under this inpatient model, service provision lasts an average of 155–185 days and approximately 85 percent of youth are returned to the court as competent. Youth under age 11 and over age 16 were less likely to be restored to competence. Eighty-six percent of those who had a mental illness diagnosis were restored while 70 percent of individuals who had an intellectual disability diagnosis were found to be restorable.

## **Recommendation:** *Remediation Services*

*Statutes should provide for placements and services that will accomplish remediation.* The types of services required will differ depending upon the underlying causes of the juveniles' competence-related deficits, or why the juvenile has been found incompetent. The youth's condition should be matched with the appropriate remediation setting, with hospitalization being appropriate for juveniles who have a psychiatric condition warranting that level care. While there is little research on remediation services themselves, we have outlined the information that is available and two of the better-known programs that currently exist. Such services should be provided by individuals with

136 This is consistent with the data of McGaha and colleagues which found that 58 percent of youth were found incompetent in a Florida sample, compared to 6 percent of adults with an intellectual disability diagnosis in the same jurisdiction. Annette McGaha, et al., *Juveniles adjudicated incompetent to proceed: A descriptive study of Florida's competence restoration program*, 29 J. Am. Academy of Psychiatry & L. 427 (2001).

experience and training in providing educational services to juveniles with deficits similar to those that might be seen within this population.

# B. Remediation Period

## The Component

In *Jackson v. Indiana*,[137] the U.S. Supreme Court ruled that defendants cannot be treated indefinitely to restore competency. Thus, *Jackson* requires that states adopt rules that limit the amount of time allowable for restoration and provide for dismissal of the charges if competency is not restored within the time limit. States' approaches to the implementation of *Jackson's* mandates have varied. Many states have set a specific time limit (e.g., 6 months, 1 year, 2 years — varying from one state to another), and others offer a formula based on the offense (e.g., one-third the time of the sentence that would be served if the defendant were found guilty of the offense charged).[138] Often these are combined with a requirement for periodic review, so that defendants are not simply hospitalized for the full time allowed when they might have regained competence at an earlier time.

The *Jackson* time period defines how long the state is allowed to retain custody for purposes of advancing the restoration process. Thus, if a defendant is found potentially restorable, but then is not restored within the allowed period of time, most criminal codes require that the charges be dismissed.

Some states may wish to simply apply to juvenile cases the same restoration period that is specified in its criminal law. Other states may decide that the status of children calls for a different, either longer or shorter, restoration period than those currently authorized for adults.

## The Options

*States Should Use the Same Time Periods in Their Juvenile Statutes As in Their Criminal Statutes*

Those arguing this position would state that there is currently no body of research that has examined how juveniles might differ from adults in the length of time that they require to attain competence. As such, with both groups being similarly situated, fundamental fairness requires that defendants, regardless of their age, be subject to the risk of the same length of possible loss of liberty and mental health intervention.

137 406 U.S. 715 (1972).

138 *See e.g.,* Ohio Rev. Code Ann. § 2945.38(F) (2011).

*States Should Allow Longer Time Periods for the Remediation of Youth*

States adopting this position would argue that juveniles differ from adults in ways that may require more time for remediation. Youth are often diagnostically more complicated than adults due to their developmental status. Although there is little research guidance, they might argue that in theory it is reasonable to assume that it will take longer for youth than adults. For example, the process of remediation with youth is more likely to require that they learn not only information about trials, but also decision-making abilities that most adults would already possess. Further, they might argue for remediation periods that would be long enough to allow the child to attain competence by "growing up" if necessary, as there is not currently a strong, empirically based method for teaching some abilities that may affect competence to stand trial (CST) (e.g., abstract thinking).

Those arguing for longer remediation periods might also point out that a juvenile could be released sooner if competence was attained prior to the end of the maximum allowable period. Thus, in light of this safeguard, they could argue that it is not detrimental to the child to allow for longer remediation periods.

*States Should Provide for Shorter Remediation Periods for Youth*

States adopting this approach would argue that it is precisely because of their developmental status that juveniles' charges should be disposed of as quickly as possible. Proponents of this view would cite research demonstrating the detrimental consequences of removing youth from the normalizing effects of their community, so that juveniles should be returned to their normal environment as soon as practicable. Shorter statutory periods would ensure that juveniles' cases are moved through the justice system expediently.

They might also cite research indicating that children may be remediated within shorter periods of time those that are legislated for adult restoration. While adult statutes commonly allow at least six months to accomplish restoration, preliminary data from Virginia has shown that the majority of juveniles were either restored to competence or found to be incapable of attaining competence within 3 to 4 months.[139]

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139 The state of Virginia has begun to examine their juvenile competence remediation services. In this study researchers examined 520 youth who had been referred for remediation services and divided the juveniles into three categories: (1) those with a mental health diagnosis (2) those with an intellectual disability, and (3) those with neither a mental health diagnosis or intellectual disability who were nonetheless found to be in need of remediation services. As part of this study, researchers examined the juveniles to determine at what point they were likely to either be remediated or it was determined that the child could not be remediated. The results showed that, after services were provided for between 91 and 120 days, 52 percent of youth were remediated and 16 percent were determined to be unable to attain competence. After services had been provided between 121 and 150 days, the cumulative number of juveniles who had either been remediated or determined to be unrestorable was 78 percent. In that additional 30 days of service provision, an additional 7 percent of juveniles were remediated and 3 percent found unremediable. If services were provided up to 180 days, an additional 2 percent of youth were found to be unable to attain competence and an additional 5 percent were remediated Although these data must be interpreted with caution, due to the low base rate of juveniles who were not restorable, it does provide some indication of the rates at which remediation of juveniles can occur. *See* Janet I. Warren & Jeanette DuVal, *Developing a Forensic Service Delivery System for Juveniles Adjudicated Incompetent to Stand Trial,* 8 Int'l J. of Forensic Mental Health (2009) (outlining percentages of juveniles found incompetent due to mental illness, intellectual disability or both).

### **Recommendation:** *Remediation Period*

Currently we do not have a body of empirical evidence sufficient to guide us in determining whether youth in general, or specific types of youth, may require longer or shorter periods of remediation. In the absence of such data, we suggest that there is no reason to diverge from a state's criminal court provisions when developing remediation periods for juveniles.

One caveat is that states should also consider the frequency of periodic review when determining the appropriateness of a given length of time allowed for remediation. States wishing to allow for a longer remediation period, may wish to provide for more frequent periodic review. While it is true that competence may be raised prior to the end of the statutorily allowed length of time, we have observed in several states that this occurs infrequently and individuals are generally held for the full amount of time that the court order allows. Thus, we believe it is more appropriate to allow for more frequent review in cases where the statutory period is longer in order to ensure that defendants are not spending unnecessary time undergoing remediation.

Further, we recommend that states consider allowing different amounts of time for inpatient versus outpatient remediation. In states that use both methods, we recommend that the statutory period for inpatient evaluation of juveniles be shorter than those for outpatient evaluations. The rationale for this recommendation is both clinical and legal. Clinically, if one has day-long access to a juvenile and is able to work with him/her intensively, the mental health professional should be able to evaluate the juvenile more quickly than if the juvenile is seen on an outpatient basis where access for interview can be inconsistent. Further, legally, if a juvenile is deprived of his or her liberty, such deprivation calls for more protection such as a shorter statutory period and / or more frequent periodic review.

## C. Legal Disposition of Cases in Which Juveniles' Incompetence Cannot Be Remediated

### The Component

In some cases it may not be possible to remediate a juvenile's incompetence. This can occur in several ways. A juvenile may have such profound deficits that, upon presentation to the court, it is clear that such attempts would be futile. In other cases, attempts at remediation fail and the court determines that further efforts would not produce results. A judge might also find that the allowable time period for remediation has expired. At this point, states have some options regarding how they might direct courts to dispose of such cases. Given that charges must be dismissed, the options focus on whether this can be done with or without "prejudice." Dismissal with prejudice means that the state cannot re-file the case in the future, while dismissal without prejudice means that it can. In determining which option might be appropriate for their state, policymakers will want to consider how they wish to weigh the various interests involved such as protection of the public, managing risk, and ensuring the fairness of trials.

## The Options

*States Should Dismiss Charges with Prejudice*

Society punishes for four basic reasons: (1) retribution, or as punishment or reprisal on behalf of the victim and for violation of the rules of society; (2) rehabilitation, or to ensure that the individual receives treatment and healing that will allow them to rejoin society with greater success, avoiding such transgressions in the future; (3) deterrence (specific and general), or to discourage this person and others from committing similar offenses in the future; and (4) incapacitation or taking actions to ensure that this person cannot commit other offenses for a specified period of time by incarcerating or providing strict oversight.

Proponents of dismissal with prejudice (the case cannot be re-filed again in the future) would argue that the purpose of deterrence are not served by exacting a disposition potentially years after the alleged offense has occurred. For example, if states allowed dismissal without prejudice, a juvenile who was found incompetent at age 12 could have their charges dismissed and brought again when the child was, e.g., 16 years old. Such children are unlikely to appreciate why they are being charged at this later time. They are unlikely to connect this punishment potentially years later with their previous actions that occurred at a much earlier developmental stage (specific deterrence). Further, if the juvenile's case is not processed soon after the alleged offense, it does not stand as a lesson to others (general deterrence). Similarly, as the juvenile will have to wait to receive a disposition and, thus, will also likely wait for services, he or she is not benefitting from the rehabilitative effects that are often the stated purpose of juvenile proceedings. If charges are dropped and then reinstated later, the child is also not under the supervision of the courts at that time, thus, not serving the purpose of incapacitation that would prevent the child from committing other offenses during that time.

The only remaining rationale for dismissing without prejudice and bringing the charges at a later date if the juvenile regained competence would be retribution, or to seek redress on behalf of the victims and society for the juveniles' alleged wrongs against societal rules. This justification for punishment goes against the basic rehabilitative, *parens patriae* foundations of the juvenile system. We must also examine the value of this punishment against the fairness to the juvenile who, years later, will be at a disadvantage in their defense, as witnesses are likely to have moved away and evidence may no longer be available.

*States Should Dismiss Charges without Prejudice or "Nolle Pros"*[140] *the Charges*

Under this approach, either the judge would dismiss the charges or the prosecutor would withdraw the charges. The state, however, would retain the option to reinstate the charges at a later date, up until the statute of limitations tolled. States supporting this view would argue that, if the juvenile were to attain competence in the future, the

140 Under the doctrine of *nolle prosequi*, more commonly referred to as "*nolle pros*," the prosecutor declares that he or she does not intend to pursue the charges at this time. For the defendant, the effect is the same in that the charges may still be brought at a later time. The difference from dismissal without prejudice is that the prosecutor, rather than the judge, makes the determination that the charges will not go forward.

state should have the opportunity to provide a resolution of the charges for the victims and their families, as well as vindicate the state's interest in punishing the alleged offender. It is unacceptable to dismiss charges with prejudice if the juvenile could become competent at a later date, especially when the alleged offense was particularly serious.

Those supporting this view would also argue that the state has an interest in leaving the charges open so that it might seek to protect the public and manage any possible risk of recidivism if the defendant were to become competent at a later date and could be tried. Proponents of this view would also state that allowing for the charges to be reinstated would provide juveniles with the possible opportunity to have their case heard, and present his or her evidence to demonstrate their innocence and clear their name. Further, potential disposition of the case would allow the juvenile to be held accountable for their alleged actions, to help them become responsible and productive members of society.

A further argument against dismissing without prejudice is that to do otherwise might encourage youth to malinger mental illnesses in order to gain permanent dismissal of charges. There is no research on youths' malingering of mental illnesses in such circumstances. Thus the risk that this might occur in whatever proportion of cases must be considered in light of public safety and victims' interests.

Proponents of this view would also point out that dismissal with prejudice is an unusual remedy. As such, it should be left to the courts to determine when it is most appropriately used.

### **Recommendation:** *Legal Disposition of Cases in Which Juvenile Incompetence Cannot Be Remediated*

Readers will note that few of the arguments on either side are "clinical" in nature; most of them appeal to justice. Therefore, we make no blanket recommendation. However, we do recommend that states consider a compromise on this issue, based on the seriousness of the charges. The argument for dismissal with prejudice can be more easily accepted for less serious offenses, but is much more difficult to accept when the charges are very serious (e.g., murder). States could consider a compromise in which charges are dismissed without prejudice only for certain very serious offenses.

## D. Provision of Services in the Event That Incompetence Cannot Be Remediated

### The Component

Once a juvenile's charges are dismissed, states must determine what should happen to the child next. Even though a juvenile's delinquency case may come to an end due to the youth's inability to be remediated, the juvenile may still require services. Some juveniles may still require long-term residential placements, further inpatient hospitalization, or connections to outpatient treatment providers to ensure that they maintain any treatment gains that they have made. Often these matters will be weighed in the context of public safety, since some youth found non-remediably

incompetent and mentally ill might be at high risk of further delinquency. Some juveniles may meet the standard for commitment and states may choose to seek treatment under those provisions if a high level of care is required. However, for the majority of juveniles who do not meet this standard, states may wish to provide other options to the courts.

Historically this has not been a major issue in dealing with unrestorable incompetence of adults. Typically the reason for adult defendants' incompetence has been serious mental illness. Therefore, in most states, almost all adults defendants found unrestorably incompetent are found by courts to meet civil commitment criteria (typically, mental illness in need of treatment, and danger to self or others). Thus they are not merely released, but placed in the custody of the state's mental health system. With juveniles, however, this remedy might be available in cases in which their incompetence is due to a serious mental illness, but not when it is due solely to developmental immaturity or intellectual disability.

Some juvenile courts have authority not only in delinquency cases, but also in non-delinquent child welfare/protection cases. In others, these matters may be heard in different courts. In many states, welfare/protection cases are referred to by names such as Child In Need of Services (CHINS) or Family In Need of Services (FINS). Regardless of whether the court must transfer the case or may hear the CHINS/FINS case itself, some courts have used this mechanism to fashion outcomes that do not simply release the youth. The youth might continue to be under the jurisdiction of the court in its child protection role, allowing the court to order services and placements that will protect both the youth and the community. However, one must note that in both of these situations, the court must find that the child/family meets the standard for intervention under the courts' protection and welfare powers. For example, the child must be found to be truant, have persistently refused to follow the reasonable and lawful demands of their parent or guardian, or repeatedly run away from home.

In some cases, the youth may be in need of services, but may not meet the standard for a CHINS/FINS. In those circumstances, states may wish to provide guidance to courts regarding where these juveniles might be referred in order to provide for their continued needs. The options discussed below examine those two approaches.

## The Options

*States Should Provide for Judicial Authority to Transfer or Refer the Child for Services Under the States' Child Welfare and Protection Provisions*

States adopting this approach would argue that without this statutory power, some children may "fall through the cracks" and not obtain services. If the youth has a mental disorder related to their delinquency, the state could miss an opportunity to provide needed treatment and added protection of society. By providing such treatment, the state might avoid the future expense of the juvenile's continued involvement in the criminal justice system, while also providing the juvenile with a chance for better adjustment.

Under this approach, the child and family would still be afforded all of the protections that are allowed under a CHINS/FINS petition, as they would still have to meet the state standard for such procedures. However, allowing the court to choose to hear the case under its welfare and protection powers when a youth is incompetent or transfer the youth to the court with jurisdiction over such matters would ensure that the child is not simply released without intervention. This would allow the court to fashion a plan to assist the child, even though he or she cannot be adjudicated. Families who are only provided a referral to services may be unlikely to attend. Thus, the child will be benefitted by hearing the case as a CHINS/FINS as the leverage provided by court oversight will ensure better compliance with services. Moreover, public safety interests are served by assuring supervision of the youth.

*States Should Allow the Judge to Refer the Juvenile for Services, but Should Not Provide Authority for the Court to Transfer or Hear the Case Under Care and Protection Provisions*

Proponents of this view would argue that, while judges may make referrals, courts should not be given the power to make determinations regarding services. The court may refer children for services; however, determinations regarding what type of services the child should receive and oversight of those services are best made by mental health professionals without court involvement. They might argue that it is inappropriate for courts to be placed in the role of monitoring the provision of services by the mental health system and that it is best to keep these systems separate, rather than creating specific statutory mandates providing the courts with an intrusive role within the mental health system. Further, this type of court oversight would increase the risk that juveniles will be pushed into the delinquency system when other attempts at different methods of obtaining treatment for a juvenile have failed, since they will be monitored by the court.

Under this view, one might also argue that their state has an effective system in place to provide for the transition of such juveniles out of the legal system to appropriate mental health services. Therefore, in such a state, possibly with a long-standing history of such successful transitions without intervention, there may be no need to provide the court with this power.

## **Recommendation:** *Provision of Services in the Event That Incompetence Cannot Be Remediated*

We recommend that states provide a method statutorily for courts to either transfer the case or hear the case itself under its welfare provisions. This will allow the court to have oversight to ensure that the juveniles are receiving the maximum benefit of those services, and it will address public safety interests. The court can seek input regarding the juveniles' progress from mental health professionals providing the services. Such a system would help ensure needed services are provided and problems are addressed, potentially preventing a juvenile from recidivating and re-entering the system in the future.

# Summary of Recommendations

## Module 1: Definition of Competence to Stand Trial

### A. Psychological Predicates for Incompetence

Developmental immaturity should be a predicate for incompetence to stand trial in juvenile court.

### B. Relation of the Predicate of Developmental Immaturity to Incompetence

A multi-tiered system is recommended:

- **Tier 1:** For youth ages 10 and below, a non-rebuttable presumption of incompetence to stand trial.
- **Tier 2:** For youth 11-13, a rebuttable presumption of incompetence.
- **Tier 3:** For youth 14 and older, the question of competence would be raised in the same manner in which it is raised in criminal court (that is, by any party at their discretion with a rebuttable presumption of competence to stand trial once the issue is raised).

### C. Functional Abilities Associated with Competence (Incompetence)

Legislation should aim for a description of broad cognitive concepts associated with competence to stand trial, but not a highly specific list of functional abilities.

### D. Degree of Defendant Ability Required in Juvenile Court

No recommendation is offered. This section describes reasons for requiring lower or similar levels of ability for competence in juvenile court compared to criminal court. But there is insufficient clinical or research evidence to offer a recommendation. The approach will depend entirely on a state's policy choices and practical considerations.

## Module 2: Procedural Issues

### A. Raising the Question

A state should use age-based presumptions as discussed in Module 1, B, and should not require incompetence to be raised in specified circumstances.

## B. Burdens/Standards of Proof and Related Presumptions

No recommendation is offered. This section describes reasons for various possible combinations of burdens/standards of proof. But it finds no research data or clinical experience that would indicate that any one type of legal presumption or burden of proof is more appropriate than another. These determinations should be made in accordance with a state's own legal history and culture.

# Module 3: Competency Evaluations by Mental Health Examiners

## A. Legal Protections in the Evaluation Process

Juveniles should be provided a right to counsel prior to any evaluation of competence occurring, as well as during that evaluation.

## B. Protection Against Self-Incrimination

Statutes pertaining to evaluations of juveniles' competence should provide as much protection against the use of self-incriminating information in future proceedings as is afforded to adults in competency evaluations performed for criminal courts. That degree of protection will vary across states.

## C. Qualifications of the Examiner

Examiners performing competence to stand trial evaluations of juveniles should be qualified by way of training and/or experience in the area of child clinical psychology or psychiatry, as well as forensic specialization. When professionals with child clinical specialization do not possess necessary forensic experience, states should provide continuing education programs to assure their understanding of forensic issues associated with competence to stand trial evaluations.

## D. Location of the Evaluation

Evaluations for juveniles' competence to stand trial should occur in the least restrictive setting appropriate for their psychological needs, typically while residing in the community or in pretrial detention. Specifically, youth should only be evaluated as an inpatient in a psychiatric facility when such psychiatric care is necessitated by the youth's psychiatric condition, not merely to facilitate the evaluation.

## E. Time Limits for Evaluation

Fourteen to twenty-one days for a juvenile clinical forensic evaluation allows clinicians to perform a quality evaluation, while balancing the juvenile's and the court's interests in avoiding unnecessary delay.

## F. Content of the Evaluation and Report

Legislation describing the content of the evaluation and report should strive for a moderate degree of detail, rather than a very general or highly specific level of detail. Statutes should list and define specific content areas to be addressed, while leaving some discretion to courts and evaluators. (Three degrees of detail regarding specifications for juveniles' competence to stand trial evaluations and reports are provided in the discussion.)

# Module 4: Remediation and Legal Disposition of Incompetent Defendants

## A. Remediation Services

Statutes should provide for placements and services that will accomplish remediation of competency deficits for youth found incompetent. The types of services should differ depending upon the underlying causes of the juveniles' competence-related deficits (mental disorder, developmental disability, and/or developmental immaturity). The youth's condition should be matched with the appropriate remediation setting, with hospitalization only for juveniles who have a psychiatric condition warranting hospital level care.

## B. Remediation Period

Until clinical data exist regarding the time required to remediate incompetence in youth with various disabilities, states are advised to employ provisions for the length of time allowed for remediation that are used in their criminal codes for adults found incompetent to stand trial. Special attention should be given to specifying required times for periodic review of remediation progress.

## C. Legal Disposition of Cases in Which Incompetence Cannot Be Remediated

In the debate between dismissal with and without prejudice, factors that will arise are the seriousness of the charges and the age of the offender. The argument for dismissal with prejudice can be more easily accepted for less serious offenses, but is likely to sit less easily when the charges are very serious (e.g., murder). States could consider a compromise in which charges are dismissed without prejudice only for certain very serious offenses.

## D. Provision of Services in the Event That Incompetence Cannot Be Remediated

When youths' charges are dismissed due to irremediable incompetence, statutes should provide legal options for juvenile courts to hear the case under its care and protection provisions in order to provide necessary social and clinical services to those youth.

# Afterword: Youth in Criminal Court

## Background

During the final draft of this book, reviewers suggested to us that the concepts outlined in the main body of this document might be equally applicable in criminal courts. It is important for us to address this issue because some readers of this book may be considering the adoption of such procedures in their adult system. Further, from a developmental perspective, juveniles sent to adult court are not rendered adults merely by the fact of transfer. Thus, the application of this book might be expanded to include a discussion of competence to stand trial to juveniles in adult courts.

## Application of Legislative "Guide" Concepts within Criminal Courts

Below we briefly outline which concepts in this volume we see as potentially useful for consideration in adult court proceedings and/or potential legislative changes, as well as those that we do not think translate well to adult proceedings. We discuss each Module in turn, evaluating its appropriateness for adoption within criminal codes and procedures.

*Module 1: Definition of Competence to Stand Trial*

Just as in the juvenile court, adult courts must decide what should be the allowable underlying reasons or "predicates" for a finding of incompetence. In adult courts, these are traditionally mental illness or intellectual disability. In the main part of this document, we suggest that developmental immaturity could also be an underlying reason for a finding of incompetence. This conclusion is based on practice and logic. A significant number of states have come to explicitly recognize developmental immaturity as a predicate for legal incompetence in juvenile court. When extended to criminal court, the *Dusky* standard itself does not specify the *reasons* that must cause a deficit in trial-related abilities, but rather simply holds that if a deficit exists, regardless of the reason, the individual should be found incompetent. Juveniles, even in the absence of mental illness or intellectual disability, may lack the abilities necessary to function effectively in the legal process. The consequences of such deficits are the same regardless of whether the underlying reason is mental illness, intellectual disability, or some other reason. Thus, a juvenile who is incompetent due to developmental immaturity is at no less of a disadvantage than his or her adult counterpart who is incompetent due to mental illness.

This logic is equally applicable regardless of the setting in which the juveniles' competence is being evaluated. If a juvenile is developmentally immature, he or she is not rendered mature simply by virtue of being sent to adult court. His or her developmental status remains the same and he/she will still have the same difficulties due to developmental level. Therefore, adult courts should consider whether developmental immaturity is present in the juveniles under their jurisdiction, and whether this issue is impacting the juveniles' competence-related abilities. How this change in criminal law would come about — legislative or by case law — is likely to vary across states. In some states it may become part of the process often called "reverse waiver," requiring a criminal court hearing when a youth has been transferred by statutory exclusion of certain crimes from filing in juvenile court. In many states,

those hearings center on whether there are developmental reasons to remand the case to juvenile court jurisdiction. Incompetence due in part to developmental characteristics of the youth could be relevant in such hearings.

While one can argue that developmental immaturity is thus no less applicable in adult courts, consideration will need to be given to how this concept is applied in criminal court in contrast to juvenile court. Earlier in this guide, we suggest that in juvenile proceedings, requiring a lesser "degree of ability" to meet the *Dusky* standard can be an option considered by states. However, the application of this concept of a "lower degree" or "lower level" of ability would be unconstitutional as applied in criminal courts. One cannot require a lower level of ability for similarly situated defendants. If a juvenile is in adult court facing the same procedures and punishments, he or she should be entitled to the full protection afforded to others (i.e., adults) in that system. Thus, a defendant in criminal court, whether adult or juvenile, should be required to fully meet the *Dusky* standard, with the same degree of ability.

*Module 2: Procedural Issues*

When considering when and how the issue of competence should be raised in adult court proceedings involving juveniles, just as in proceedings involving adult defendants, it should be up to any party to raise the issue if there is an issue of genuine doubt as to the defendant's competence. Similarly, we do not know of any research or clinical evidence indicating that one standard or burden of proof is more or less appropriate, and thus, we have no basis for a recommendation on this issue in adult court. Such determinations should follow that jurisdiction's local history and legal culture for both juveniles and adults alike.

*Module 3: Competency Evaluations by Mental Health Examiners*

When one considers the processes customarily employed to evaluate adults' competence to stand trial, as well as the application of these processes to juveniles, there are some issues that could be resolved in precisely the same way. Others could be adjusted to account for the unique developmental characteristics of juveniles.

Just like adults in criminal court, juveniles in criminal court should have the same rights to counsel and against self-incrimination under the 5th and 6th amendment. We see no reason to provide juveniles less protection with regard to these matters when their case is heard in adult court.

Where we believe Module 3 has significant implications within the criminal system is in the use of mental health examiners, their procedures, the content of the evaluation, and the location in which such evaluations may take place. Examiners routinely used by the criminal court are generally well trained regarding the diagnostic and forensic issues of adults and the evaluation methods for these issues. However, the same clinicians may not be competent to conduct evaluations of juveniles. Although well versed in forensic concepts, such clinicians may have little or no expertise in assessing the clinical and developmental conditions of children and adolescents. The evaluation of juveniles requires a different set of skills:

- Clinicians evaluating juveniles must be familiar with the ways in which mental illness presents itself in juveniles, which can be far more subtle than for adults, as it is influenced by developmental processes. Juveniles are more likely to present with different types of mental illness (e.g., ADHD), whereas adults are on average more likely to exhibit other disorders that would be far less frequently seen in juveniles (e.g., psychosis).
- Clinicians evaluating adult defendants with mental illnesses often can obtain mental health records describing past observations of the defendant's disorder. In contrast, when youth are arrested, many times there has been no record of their mental disorder. Similarly, juveniles may manifest intellectual disabilities that have yet been unidentified and may just now be developing, both situations that adult examiners would be less accustomed to recognizing.
- In cases where psychological testing is indicated, entirely different psychological tests would be appropriate for this age group. Psychological tests must be developed for the age group with which they will be used. Adult clinicians are not generally trained to use child and adolescent instruments, and may be less aware of what testing would be appropriate because they are not accustomed to conducting such testing.
- Interviewing children and adolescents requires special clinical techniques and strategies that often are not part of the skill-set of clinicians who are not trained in the assessment of youth.

Therefore, the types of information collected and reports prepared by clinicians with child and adolescent expertise are likely to better provide information that can best aid the court in making a determination regarding the juvenile's competence. This suggests that even though the juvenile is in the adult system, the court may be better served by obtaining an evaluation by a juvenile-trained clinician (i.e., if the child is below approximately age 17).

Developmental considerations may also dictate differences regarding the location where competence evaluations occur and the length of time allowed for such evaluations. In traditional adult systems, defendants are held pretrial and evaluated on an inpatient psychiatric unit. Such a high level of clinical care is generally not required with juveniles, as they are less likely to be suffering from a psychiatric condition calling for inpatient hospitalization. Evaluations of juveniles can generally be conducted in non-patient settings (e.g., clinician's general offices or juvenile court facilities), unless the judge finds that juveniles' security needs are such that they should be held in detention pretrial due to concerns about community protection and safety. In such cases, the evaluation could be conducted in the detention facility. For juveniles who do require hospitalization during their competence evaluation, typically state laws will not allow the youth to be hospitalized in adult forensic psychiatric inpatient facilities where criminal courts often obtain competence evaluations. Hospitalization should be in a child and/or adolescent psychiatric facility. Finally, because juveniles are always undergoing developmental changes, they can be harmed by being removed from potentially normalizing social environments. Thus, for juveniles, it is particularly important to stress that they be held in the least restrictive setting possible and their contact with institutional environments be minimized.

It may also make sense to adjust the length of time allowed for the evaluation. Each jurisdiction must make such determinations based upon the practical aspects of its evaluation processes and services available. For example,

adults may be held on an inpatient unit, allowing the evaluator constant access to the evaluee, which often results in a faster evaluation process. If juvenile evaluations could be conducted on an outpatient basis, the evaluator may need additional time depending upon the availability and mechanisms for gaining access to records and the youth.

*Module 4: Remediation and Legal Disposition of Incompetent Juvenile Defendants*

Module 4 of the main text of this document, addresses two issues: (1) remediation or restoration[1] services appropriate for juveniles, and (2) dispositions for juveniles who cannot be remediated/restored.

## Remediation/Restoration Services for Juveniles in Adult Courts

There is very little extant research regarding juvenile competence remediation services. As discussed in the main body of this text, very few studies have addressed questions such as what type of services are appropriate, for which juveniles, and under what conditions. However, the services offered to adults for competence remediation are unlikely to be effective with children as they do not account for the unique developmental issues youth face.

Usually, adults are transferred to an inpatient psychiatric unit for competency restoration, where they are provided with group, and sometimes individual, competence services, as well as treatment for their mental illness where it is warranted. In most adult cases, adults require restoration services due to serious mental illness, such as a psychotic disorder. However, as discussed earlier, juveniles may be incompetent for reasons that differ from those of adults, so that the type of services that will successfully restore (or "remediate") their competence will differ. The underlying reason for the youth's competence-related deficits should be matched to the appropriate type of service and setting to address that need. Only juveniles who have a mental illness severe enough to warrant inpatient hospital-level care would be sent to a child or adolescent inpatient unit. Juveniles with more learning-based or intellectual deficits would be better served by professionals with experience educating juveniles with such difficulties.

As little is known about juvenile competence remediation services in the vast majority of jurisdictions, we cannot recommend any specific juvenile remediation program at this time. The main body of this text does outline the programs available as of the printing of this guide. However, as states begin to address this issue, they should explore the most up-to-date services available for juveniles' competence remediation to determine what type of services should be implemented for the youth within their jurisdiction, as the state of the science may have changed at that point. In states where juvenile competence remediation services have already been developed, criminal courts might consider utilizing these services located in juvenile jurisdictions in lieu of developing separate juvenile restoration services within the criminal system.

1 Just as in the main body of the text, the term "remediation" rather than the term "restoration" is used in this section. Restoration implies that one is re-creating an ability that previously existed. Thus, the term remediation is more accurate as applied to juveniles for whom this is the first time we are creating such competence-related capacities and abilities.

## Dispositions for Juveniles in Adult Courts

With regard to the second portion of this Module, which deals with dispositional options (e.g., dismissal of charges, eligibility for civil commitment), we believe that the same procedures and options would apply to juveniles within the criminal system as are applied to adults within that system. The differences between the juvenile and adult systems with regard to dispositional options are largely based upon the different purposes underlying these systems. The adult system is more retributively focused, while the juvenile system is intended to be more rehabilitative. Often, transferred juveniles have been sent to the adult system because it is felt that the types of services and dispositions available to juvenile judges are no longer appropriate for this individual. In other situations, society has deemed the type of crime this juvenile has been charged with as deserving of a more retributive focus, rather than the rehabilitative focus of the juvenile system.

# Closing Remarks

Early in the development of this legislative guide, it became clear that the outcome of a finding of incompetence — the need to provide services to remediate competence — often influenced how other issues within the competency process needed to be analyzed. Moreover, the question of remediation services has no easy answers in juvenile or adult court. The development of services in this area is in its infancy, with the vast majority of jurisdictions struggling to find and implement such services.

Many states are creating legislation that will better manage the legal definition and process of competence to stand trial in juvenile court and good progress is being made on that general objective. However, the question of how to develop methods to help youth attain competence remains one of the most crucial issues still to be faced. The state of the science continues to fall behind the need in this area. This issue must be addressed soon, if we are ever to achieve a legal process for juveniles' competence to stand trial that respects the interests of juveniles and the interests of the state in fair and timely adjudication of youths' offenses.

This project is one part of a larger systems reform effort in juvenile justice. In partnership with its grantees in the juvenile justice field, the MacArthur Foundation has developed a working framework for a model juvenile justice system. The framework is grounded in eight principles that reflect widely shared and firmly held values related to juvenile justice:

- Fundamental Fairness: All system participants — including youthful offenders, their victims, and their families — deserve bias-free treatment.
- Recognition of Juvenile-Adult Differences: The system must take into account that juveniles are fundamentally and developmentally different from adults.
- Recognition of Individual Differences: Juvenile justice decision makers must acknowledge and respond to individual differences in terms of young people's development, culture, gender, needs, and strengths.
- Recognition of Potential: Young offenders have strengths and are capable of positive growth. Giving up on them is costly for society. Investing in them makes sense.
- Safety: Communities and individuals deserve to be and to feel safe.
- Personal Responsibility: Young people must be encouraged to accept responsibility for their actions and the consequences of those actions.
- Community Responsibility: Communities have an obligation to safeguard the welfare of children and young people, to support them when in need, and to help them to grow into adults.
- System Responsibility: The juvenile justice system is a vital part of society's collective exercise of its responsibility toward young people. It must do its job effectively.

Building on these principles, the framework defines goals, practices, and outcomes against which actual systems can compare themselves. In areas in which actual systems fall short or depart radically from this concept of the ideal, it is hoped that the framework will both stimulate and give practical direction to reform efforts.

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ModelsforChange

Systems Reform in Juvenile Justice

www.modelsforchange.net

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