

# FORENSIC MENTAL HEALTH

## LEGAL ISSUES

### Chapter 1

## Incompetent to Stand Trial (IST) Commitment



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## **A. Introduction**

Trial and conviction of a person while legally incompetent violates the due process clause of the U.S. Constitution because an incompetent person is incapable of adequately defending against criminal charges. *Pate v. Robinson* (1966) 383 U.S. 375; *People v. Samuel* (1981) 29 Cal.3d 489.

A defendant is found Incompetent to Stand Trial (IST) and committed for psychiatric treatment when, as a result of a mental disorder or developmental disability, he<sup>1</sup> cannot: (1) understand the nature of the criminal proceedings against him, or (2) assist counsel in the conduct of a defense in a rational manner. Penal Code § 1367(a). An IST finding has no direct application to a defendant's criminal responsibility for the underlying crime, but focuses solely on his mental status at the time that he enters the criminal justice system. *People v. Lawson* (1918) 78 Cal. 722.

Incompetent to Stand Trial commitment to a state hospital or conditional release program (CONREP) may result in a far greater curtailment of an individual's liberty than if he had remained in the criminal justice system. (See Chapter 4 for a discussion of CONREP.) As discussed below, certain felony IST defendants can face perpetual extension of their commitment through application of a "Murphy" conservatorship. Although these defendants were never found guilty of a crime, and are not "gravely disabled" from a civil commitment standpoint, they may spend the rest of their lives confined in a state hospital. Therefore, defense attorneys should initiate all available motions and pre-competency procedures, including the preliminary hearing, to prevent inappropriate IST commitments.

## **B. Substantive Standards for Incompetency to Stand Trial**

### **1. What is the legal definition of IST?**

Under California law, a defendant is mentally incompetent to stand trial if, as a result of a mental disorder or developmental disability, he cannot: (1) understand the nature of the criminal proceedings; or (2) assist counsel in the conduct of a defense in a rational manner. Penal Code § 1367(a).

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<sup>1</sup> For the sake of readability, this publication uses the masculine and feminine personal pronouns in alternate chapters.

The United States Supreme Court has defined mental competence to stand trial as a defendant's "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him." *Dusky v. United States* (1960) 362 U.S. 402.

An assertion of incompetency to stand trial cannot be maintained solely because a defendant is being uncooperative, displays poor behavior in the courtroom, or appears odd or bizarre. *People v. Smith* (2003) 110 Cal.App.4<sup>th</sup> 492; *People v. Medina* (1965) 11 Cal.4<sup>th</sup> 694; *People v. Superior Court (Campbell)* (1975) 51 Cal.App.3d.459.

**2. What is the difference between competency to stand trial and competency to waive counsel?**

A criminal defendant has a Sixth Amendment right to represent himself at trial if he: (1) is mentally competent; (2) makes his request knowingly and intelligently, having been apprised of the dangers of self-representation; and (3) makes an unequivocal request to waive counsel within a reasonable time before trial. *Faretta v. California* (1975) 422 U.S. 806; *People v. Welch* (1999) 20 Cal.4<sup>th</sup> 701; *People v. Marshall* (1997) 15 Cal.4<sup>th</sup> 1.

The legal standard for determining competency to waive counsel is the same as the standard for determining competency to stand trial. However, in addition to determining that a defendant who seeks to waive counsel is competent, the trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. The focus of a competency inquiry is the defendant's mental capacity; i.e., whether he has the ability to understand the proceedings. The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is not coerced. *Godinez v. Moran* (1993) 509 U.S. 389, 401, fn.12; *Van Lynn v. Farmon* (9<sup>th</sup> Cir. 2003) 347 F.3d 735.

A finding that a defendant is not competent to knowingly and voluntarily waive counsel does not necessarily raise a doubt as to his competency to stand trial. *People v. Welch* (1999) 20 Cal.4<sup>th</sup> 70.

Despite the above standards, a trial court may deny or terminate self-representation by a defendant who deliberately engages in serious and

obstructionist misconduct. *Faretta v. California* (1975) 22 U.S. 806; *People v. Welch* (1999) 20 Cal.4<sup>th</sup> 701.

**3. *When is a defendant incompetent to make the decision to waive a jury trial?***

A defendant cannot effectively waive his right to a jury trial, or any other fundamental right, while incompetent. However, a jury waiver taken a few days before the defendant was found IST was valid because there was no evidence of incompetency at the time of the waiver. *People v. Smith* (2003) 110 Cal.App.4<sup>th</sup> 492.

**C. Initiating Incompetency to Stand Trial Proceedings**

**1. *Are IST proceedings initiated differently for people charged with misdemeanors as opposed to felonies?***

Penal Code section 1367.1 specifies that before a decision is made whether to hold a formal competency hearing for a defendant charged with only misdemeanors, the court must first refer him to a county-designated mental health facility for evaluation and treatment pursuant to Penal Code section 4011.6 (involuntary commitment to a county-designated facility for mental health evaluation under the LPS Act). Penal Code § 1367.1. Note, however, that the Second District Court of Appeal has held that this provision violates the constitution's Equal Protection clause because felony defendants are not required to undergo the same evaluation and treatment before IST proceedings can begin. *Pederson v. Superior Court* (2003) 105 Cal.App.4<sup>th</sup> 931.

**2. *Under what circumstances will a court initiate IST proceedings?***

A trial court must initiate IST proceedings when there is substantial evidence raising a doubt as to the defendant's competency to stand trial. Either the court or counsel may raise this issue at any time before judgment, including during probation violation hearings. When the doubt arises in the mind of the trial judge, the judge shall state the doubt on the record and ask for defense counsel's opinion regarding the defendant's competency. The court must then recess the proceedings for as long as reasonably necessary to permit counsel to confer with the defendant and to form an opinion as to his mental competency at that point in time. Penal

Code §§ 1368, 1369; *People v. Lauder milk* (1976) 67 Cal.2d 272; *People v. Kaplan* (2007) 149 Cal.App.4<sup>th</sup> 372; *People v. Ary* (2004) 118 Cal.App.4<sup>th</sup> 1016; *People v. Humphrey* (1975) 45 Cal.App.3d 32.

When a doubt regarding competency to stand trial is raised regarding a defendant with a developmental disability, the court will follow the procedures enumerated under Penal Code sections 1370.1 and 1370.4, including referring the defendant to a regional center for evaluation. These sections apply to all defendants with a developmental disability charged with either a felony or misdemeanor.

Even though Penal Code section 1368 is phrased in terms of whether a doubt arises in the mind of the trial judge and is then confirmed by defense counsel, once the accused has come forward with substantial evidence of incompetency to stand trial, due process requires that a full competency hearing be held as a matter of right. *People v. Young* (2005) 34 Cal.4<sup>th</sup> 1149; *People v. Sundberg* (1981) 124 Cal.App.3d 944.

The right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency determination. *People v. Johnwell* (2004) 121 Cal.App.4<sup>th</sup> 1267. However, because competency can fluctuate, it may be difficult to prove incompetency at the time of trial long after that time has passed. *Pate v. Robinson* (1966) 383 U.S. 375, 386-87; *People v. Ary* (2004) 118 Cal.App.4<sup>th</sup> 1016, 1025.

Once a defendant has been found competent to stand trial, a second competency hearing may be required when there is a substantial change in circumstances or new evidence is presented which casts serious doubt on the validity of the prior finding. *Drope v. Missouri* (1975) 420 U.S. 162; *People v. Kaplan* (2007) 149 Cal.App.4<sup>th</sup> 372; *People v. Jones* (1997) 15 Cal.4<sup>th</sup> 119 (modified on denial of rehearing); *People v. Duncan* (2000) 78 Cal.App.4<sup>th</sup> 765.

A court cannot require counsel to state his views as to a defendant's competency. *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465. Even when defense counsel believes and informs the court that the defendant is competent, the court may nevertheless order a competency hearing. Penal Code § 1368(b). See *People v. Skeirik* (1991) 229 Cal.App.3d 444.

Absent substantial evidence of a defendant's incompetence to stand trial,

the decision to order a competency hearing is left to the court's discretion. *People v. Ogelsby* (2008) 158 Cal.App.4<sup>th</sup> 818; *People v. Panah* (2005) 34 Cal.4<sup>th</sup> 395; *People v. Gallegos* (1990) 52 Cal.3d 115; *People v. Hale* (1989) 44 Cal.3d 531.

It is not appropriate to initiate IST commitment proceedings solely as a means of obtaining mental health treatment. When it appears that a mental health evaluation or treatment is needed, the LPS Act provides civil law mechanisms for obtaining voluntary and, if necessary, involuntary mental health services. Welf. & Inst. Code § 5000, *et seq.*; Penal Code §§ 4011.6, 4011.8.

### **3. What constitutes “substantial evidence” requiring a court to initiate IST proceedings?**

A competency hearing is mandatory when “substantial evidence” of incompetency exists. *Price v. Superior Court* (2001) 25 Cal.4<sup>th</sup> 1046; *People v. Danielson* (1992) 3 Cal.4<sup>th</sup> 691 (overruled on other grounds); *People v. Howard* (1992) 1 Cal.4<sup>th</sup> 1132; *People v. Stankewitz* (1982) 32 Cal.3d 80; *People v. Sundberg* (1981) 124 Cal.App.3d 944.

"Substantial evidence" has been defined as evidence that raises a reasonable doubt concerning the defendant's competency to stand trial. *People v. Frye* (1998) 18 Cal.4<sup>th</sup> 894, 951-952; *People v. Davis* (1995) 10 Cal.4<sup>th</sup> 463, 527. It has also been defined as evidence that is “reasonable, credible and of solid value.” *People v. Marshall* (1997) 15 Cal.4<sup>th</sup> 1, 31.

"If a psychiatrist or qualified psychologist, who has had sufficient opportunity to examine the accused, states under oath with particularity that in his professional opinion the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings being taken against him or is incapable of assisting in his defense or cooperating with counsel, the substantial-evidence test is satisfied." *People v. Pennington* (1967) 66 Cal.2d 508, 519.

Substantial evidence of incompetency is sufficient to require a full competency hearing even if that conclusion is contradicted by other reports or evidence. *People v. Young* (2005) 34 Cal.4<sup>th</sup> 1149; *People v. Murrell* (1987) 196 Cal.App.3d 822.

Evidence of defendant's irrational behavior, his demeanor at trial, and prior medical opinion, taken together, are all relevant in determining whether further inquiry is required as to his competency to stand trial. Under certain circumstances, even one of these factors standing alone may be sufficient to establish IST. *Drope v. Missouri* (1975) 420 U.S. 162. But see also *People v. Marks* (2004) 31 Cal.4th 197, 220 (Once a defendant is found competent to stand trial, "even bizarre statements and actions are not enough to require a further inquiry.")

A defendant's preference for the death penalty, propensity for violence, hoarding of medication for an alleged suicide attempt, and history of psychiatric treatment did not constitute substantial evidence requiring the court to initiate IST proceedings because they had little bearing on the question of whether the defendant could assist his attorney in his defense. *People v. Ramos* (2004) 43 Cal.4th 494.

Evidence regarding past events that does no more than form the basis for speculation regarding possible current incompetency is not sufficient for a finding of IST. *People v. Panah* (2005) 34 Cal.4th 395; *People v. Hayes* (1999) 21 Cal.4th 1211.

A defendant's chronic pain and associated symptoms did not render him IST. Therefore, the trial court was not obligated to suspend criminal proceedings, but only to reasonably accommodate his special needs to the extent practicable in light of courtroom security considerations and other legitimate constraints. *People v. Avila* (2004) 117 Cal. App. 4th 771.

**4. What is the effect of a court's failure to conduct a competency hearing in the face of substantial evidence of incompetency?**

Failure to hold a competency hearing pursuant to Penal Code section 1368, when there is substantial evidence that the defendant has a mental disorder that prevents him from assisting counsel in his defense, is reversible error. *People v. Standewitz* (1982) 32 Cal.3d 80.

The failure of a trial court to employ procedures to order a competency hearing despite substantial evidence of incompetency requires reversal of the conviction and remand to the trial court. On remand, the state has the burden of establishing that a retrospective competency hearing can be held to cure the error. *People v. Ary* (2004) 118 Cal.App.4th 1016.

It was reversible error for a trial court to refuse to appoint the regional center director to evaluate the defendant's competency after defense counsel had submitted substantial evidence that that defendant was developmentally disabled and IST. The error deprived the court of jurisdiction to proceed, and required reversal of the sentence and adjudication of guilt unconditionally, since a retrospective determination of competency would not have sufficed. *People v. Castro* (2000) 78 Cal.App.4<sup>th</sup> 1402.

## **D. Competency hearings: Procedural Issues**

### **1. *What procedural rules apply to IST hearings?***

If IST proceedings are initiated at the beginning of trial, some pre-trial procedures are available to test the sufficiency of the criminal charges. These include a preliminary hearing for defendants charged with felonies, and various motions including demurrers, motions to dismiss, and motions to suppress evidence. Penal Code § 1368.1. The outcome of these proceedings may obviate the need for a determination of competency to stand trial.

IST proceedings begin with the court appointing one or two psychiatrists and/or licensed psychologists to examine the defendant and make a recommendation to the court. Penal Code § 1369. See, "*What role do expert evaluations play in competency hearings?*" below.

Although arising in the context of a criminal trial, a competency hearing is governed generally by the rules applicable to civil proceedings. *People v. Johnwell* (2004) 121 Cal.App.4<sup>th</sup> 1267; *Bagleh v. Superior Court* (2002) 100 Cal.App.4<sup>th</sup> 478.

All criminal proceedings are suspended pending a resolution of competency to stand trial. If a jury has been impaneled and sworn, the jurors may be discharged if necessary to avoid undue hardship. Penal Code § 1368 (c).

It is unclear whether a defendant has a personal right to be present at a section 1368 hearing, or whether his attorney can waive his presence on his behalf. However, defense counsel cannot waive the defendant's right to testify at the hearing over his objection, unless the court separately determines that the defendant is incompetent to testify. *People v. Harris*

(1993) 14 Cal.4<sup>th</sup> 984.

If the competency trial is by jury, a unanimous verdict is required to certify the defendant as incompetent to stand trial. Penal Code § 1369(f). However, despite the jury's finding, the provisions of Code of Civil Procedure section 629 (judgment notwithstanding the jury verdict) may apply. *People v. Conrad* (1982) 132 Cal.App.3d 361.

If the hearing is conducted in front of a jury, the defendant is only entitled to the number of peremptory challenges available in a civil trial. *People v. Stanley*, (1995) 10 Cal.4<sup>th</sup> 764, 42 Cal.2d 543

## **2. What is the burden of proof in a competency hearing?**

A defendant is presumed to be competent to stand trial unless incompetency is established by a preponderance of the evidence, regardless of whether the defense or the prosecution raises the issue. Penal Code § 1369(f). See also, *Medina v. California* (1992) 505 U.S. 437; *People v. Rells* (2000) 22 Cal.4<sup>th</sup> 860; *People v. Skeirik* (1995) 10 Cal.4<sup>th</sup> 764, 808.

Placing the burden of proving incompetency by a preponderance of the evidence on the defendant is not a violation of due process. *People v. Skeirik* (1991) 229 Cal.App.3d 444.

When neither party seeks an incompetency finding, and instead the trial court assumes the burden of producing evidence of incompetence, the court instructs the jury on the applicable legal standard without giving the burden of proof to either party. *People v. Skeirik* (1991) 229 Cal.App.3d 444.

The standard of proof for a second competency hearing is the same substantial evidence standard as for an original hearing. *People v. Kaplan* (2007) 149 Cal.App.4<sup>th</sup> 372.

It was erroneous for a trial court, at a defendant's competency hearing, to issue a modified instruction that not only placed on the defendant the burden of producing evidence that his incompetence was more convincing than not, but also added the burden of disproving every rational conclusion and reasonable interpretation of the evidence except that which pointed to incompetency. *People v. Johnwell* (2004) 121 Cal.App.4<sup>th</sup> 1267.

**3. What role do expert evaluations play in competency hearings?**

Evidence Code section 730 authorizes a court to appoint a mental health expert to examine a defendant and issue a report as to whether a formal competency hearing is necessary. Evidence Code § 730.

If the defendant is seeking a finding of incompetency, IST proceedings begin with the court appointing a psychiatrist or licensed psychologists, and any other expert the court deems appropriate, to examine the defendant. If the defendant is not seeking an incompetency finding, the court will appoint two such experts. If the defendant appears to have a developmental disability, the court will appoint the director of the regional center as an expert. The appointed expert(s) will evaluate the defendant to determine if he is competent to stand trial, whether treatment with anti-psychotic medication is medically appropriate and likely to restore the defendant to competency, whether the defendant has the capacity to refuse anti-psychotic medication, and whether the defendant is a danger to himself or others. Penal Code § 1369.

It was reversible error for a trial court to refuse to appoint the regional center director to evaluate the defendant's competency after defense counsel had submitted substantial evidence that that defendant was developmentally disabled and IST. The error deprived the court of jurisdiction to proceed, and required reversal of the sentence and adjudication of guilt unconditionally, since a retrospective determination of competency would not have sufficed. *People v. Castro* (2000) 78 Cal.App.4<sup>th</sup> 1402.

When a defendant claims that he has mental retardation, he must submit to pretrial examinations in order to determine the claim's validity. Defendant has limited immunity during these examinations, which are limited to tests reasonably related to the determination of his mental retardation. *Centeno v. Superior Court* (2004) 117 Cal.App.4<sup>th</sup> 30.

The admission of written reports from two examining psychologists did not constitute a denial of due process for failure to allow a third expert to determine whether the defendant was competent to stand trial. *People v. Lawley* (2002) 27 Cal.App.4<sup>th</sup> 102.

Examinations to determine competency are governed by the Civil

Discovery Act. Therefore, the 5th and 6th Amendment privileges against self-incrimination and right to counsel do not apply. *Baqleh v. Superior Court* (2002) 100 Cal.App.4<sup>th</sup> 478.

**4. *What happens if a defendant and his attorney disagree on issues that arise during incompetency proceedings?***

The defendant's right to a jury trial is statutory, not constitutional, and counsel may waive the right to a jury trial even over a defendant's objection. *People v. Masterson* (1994) 8 Cal.4<sup>th</sup> 965; *People v. Harris* (1993) 14 Cal.4<sup>th</sup> 984.

Defense counsel did not violate a defendant's due process rights by seeking to prove incompetence over the defendant's objections. However, when defense counsel seeks to prove the defendant's incompetence over his objection, and the defendant wants to testify that he is competent, counsel should let the defendant testify unless the court separately determines that the defendant is incompetent to do so. *People v. Bolden* (1979) 99 Cal.App.3d 375.

A defendant cannot veto his attorney's decisions to seek a competency hearing. He implicitly waives his right to attend the competency hearing by his absence. *People v. Jernigan* (2003) 110 Cal.App.4<sup>th</sup> 131.

It is unclear whether defense counsel has the right to waive a defendant's presence at an IST hearing over the client's objections. *People v. Harris* (1993) 14 Cal.App.4<sup>th</sup> 984.

While IST proceedings are pending, a court's refusal to hear the defendant's *Marsden* motion for substitution of counsel may require the reviewing court to reverse the judgment and grant a new trial. Even though Penal Code section 1368 mandates the suspension of all proceedings in the criminal prosecution once the court has ordered a hearing into the mental competence of the defendant, the Sixth Amendment right to effective representation compels a hearing and an order granting a motion for substitution of counsel when there is a sufficient showing that the defendant's right to the assistance of counsel will be substantially impaired if his request is denied. Hearing a *Marsden* motion during a competency hearing does not reinstate criminal proceedings against the defendant. *People v. Solorzano* (2005) 126 Cal. App. 4<sup>th</sup> 1063. (See also *Marsden Motions*, Chapter 1.)

**5. What happens to the criminal charges during and after IST proceedings?**

Following an IST filing, a court may dismiss any misdemeanor charge pending against the defendant on 10 days notice to the district attorney. Penal Code § 1370.02.

All criminal proceedings are suspended pending a resolution of competency to stand trial. Penal Code § 1368 (c).

The trial court should not have appointed a “next friend” for an IST defendant rather than granting a stay of the federal habeas corpus proceedings until competency was restored. *Rohan v. Woodford* (9<sup>th</sup> Cir. 2003) 334 F.3d 803.

When a defendant returns to court because he or is unlikely to regain competency, or remains incompetent after the maximum term of confinement, the court may dismiss the criminal charges in the interests of justice. Penal Code §§ 1370(d),1385.

**6. Can statements made by a defendant during an IST evaluation be used against him during the criminal trial?**

The Fifth Amendment privilege against self-incrimination prohibits the prosecution’s use of statements made by a defendant during a competency evaluation to prove its case-in-chief at the guilt or penalty phase of the criminal trial. *People v. Arcega* (1982) 32 Cal.3d 504; *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465.

The Fifth Amendment privilege against self-incrimination prohibits the prosecution’s use of statements made by a defendant during a competency evaluation to impeach his testimony at the criminal trial. *People v. Pokovich* (2006) 39 Cal.4<sup>th</sup> 1240.

**E. Duration of Incompetency to Stand Trial Commitment**

An IST commitment ends when either: (1) the maximum time for confinement runs out; or (2) the defendant obtains certification that he has regained competency pursuant to Penal Code section 1372 (discussed under *Restoration of Competency*, below). However, other types of psychiatric commitment can be used to extend the term of hospitalization

for certain IST defendants.

**1. What is the maximum length of an IST commitment?**

Under the due process clause of the U.S. constitution, a defendant found incompetent to stand trial has a right not to be confined for longer than is reasonably necessary to restore him to competency or determine that his competency cannot be restored. *Jackson v. Indiana* (1972) 406 U.S. 715.

California law limits IST commitment to a maximum of three years, or up to the maximum term of imprisonment provided by law, whichever is shorter. Penal Code § 1370(c)(1).

The statutory three-year limit for commitments to regain trial competency applies to the aggregate of all commitments ordered on the same set of criminal charges, not separately each time a commitment was ordered. *In re Polk* (1999) 71 Cal.App.4<sup>th</sup> 1230.

The maximum commitment for a misdemeanor incompetent to stand trial defendant is one year or the longest permitted prison sentence for the crime charged, whichever is shorter. Penal Code § 1370.01(c)(1). At the end of this time, civil conservatorship proceedings may be initiated under the LPS Act. Penal Code § 1370.01(c)(2).

**2. Does time spent on an IST commitment count toward a prison sentence if the defendant is tried and convicted?**

An IST defendant receives credit for actual time spent in a hospital, treatment facility, or outpatient program toward any prison time he must serve for the underlying offense. Penal Code § 1375.5. However, the IST defendant does not receive good conduct or work credits for pre-sentence commitment to a hospital, treatment facility, or outpatient program. *People v. Waterman* (1986) 42 Cal.3d 565.

**3. How can the commitment of an IST defendant with a mental illness be extended?**

**a) Murphy Conservatorships**

An IST defendant may have his commitment extended beyond three years or the maximum term of incarceration under a unique type of LPS commitment known as a “Murphy” or “Hofferber” conservatorship. This

type of conservatorship technically lasts for one year but can be extended indefinitely.

Under Penal Code section 1370(c)(2) and Welfare and Institutions Code section 5008(h)(1)(B), an extension beyond the maximum period of commitment is permitted when a court makes written findings that an IST defendant: (1) remains incompetent to stand trial; (2) is charged by an undismissed indictment or information with a violent felony; and (3) represents a substantial danger of physical harm to others.

*Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 176-177.

The court may order the county public guardian's office to initiate Murphy conservatorship proceedings at any time after the defendant has served the maximum term of confinement, or when the treatment facility indicates that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future. Penal Code §§ 1370(c)(2), 1370(b)(1).

The standard of proof used to determine dangerousness in a Murphy conservatorship is beyond a reasonable doubt. However, unlike an LPS confinement for grave disability, which must be established beyond a reasonable doubt, the standard of proof to find that the defendant is still incompetent for purposes of a *Murphy* conservatorship is merely preponderance of the evidence. *Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 178-179.

Murphy conservatees have the right to a yearly judicial review, a jury trial with a unanimous verdict, and the same procedural protections as other LPS conservatees. *Conservatorship of Hofferber* (1980) 28 Cal.3d 161,172.

### ***LPS Conservatorship***

When an IST defendant does not qualify under the narrow Murphy conservatorship provisions, he may still be committed under LPS conservatorship provisions for persons who, because of chronic alcoholism or mental disorder, are "gravely disabled" (unable to provide for food, clothing or shelter). Welf. & Inst. Code §§ 5008(h)(1)(A), (h)(2).

***How can the commitment of an IST defendant with a developmental disability be extended?***

IST defendants diagnosed with mental retardation or another developmental disability may be committed to the State Department of Developmental Services (DDS) under the LPS Act or section 6500 of the Welfare and Institutions Code if they are a danger to themselves or others. Welf. & Inst. Code §§ 5000 *et seq.*, 6500 *et seq.*; Penal Code § 1370.1(c) (2). See also *In re Hop* (1981) 29 Cal.3d 82. The definition of dangerousness to self or others in section 6500 includes being found incompetent to stand trial on charges of enumerated violent felonies. If the individual is confined in a facility, there is no requirement of a recent overt act to make a finding of dangerousness. Welf. & Inst. Code § 6500.

DDS may place the individual in a state hospital, a developmental center, a licensed community care facility or a health facility for “suitable treatment”, which is defined as the least restrictive residential placement necessary to achieve the purposes of treatment. Welf. & Inst. Code § 6509. The commitment lasts for a year and can be renewed. Welf. & Inst. Code § 6500.

**F. Placement of IST Defendants**

After a defendant is found incompetent to stand trial, the next step is a placement hearing to determine where the defendant is to be treated. The community program director or the regional center (when the IST defendant has a developmental disability) must submit a written recommendation to the court at least 15 court days before the placement hearing. Penal Code §§ 1370(a)(2); 1370.01 (a)(2); 1370.1 (a)(2).

***Where will misdemeanor defendants found IST on the basis of mental illness be placed for treatment?***

Misdemeanor IST defendants are usually placed in local mental health treatment facilities. They cannot be committed to state hospitals unless there are no less restrictive placements available, and a contract for state hospital treatment exists between the county and the Department of Mental Health. Penal Code § 1370.01 (a)(2)(A).

Misdemeanor IST defendants may also be placed directly in the Conditional Release Program (CONREP) for outpatient treatment. Penal

Code § 1601(b). (See Chapter 4 for a discussion of CONREP.)

***Where will felony defendants found IST on the basis of mental illness be placed for treatment?***

Felony incompetent to stand trial defendants usually receive evaluation and treatment at state hospitals.

When an IST defendant is charged with a “violent felony,” inpatient treatment is mandatory for at least a period of 180 days. Penal Code § 1601(a); *People v. Superior Court (Lopez)* (2005) 125 Cal. App. 4<sup>th</sup> 1558. These defendants cannot be placed in a state hospital, developmental center, or treatment facility unless it is secure and the court determines that the public safety will be protected. Penal Code §§ 1370 (a)(1)(D), 1370.1 (a)(1)(E).

After 180 days at a state hospital, a defendant charged with a violent felony may be placed in the CONREP outpatient treatment program if the court finds that such placement would not pose a danger to the health or safety of others. Penal Code §§ 1370(a)(1)(F), 1370.1 (a)(1)(G), 1601(a).

IST defendants charged with a felony requiring registration as a sex offender under Penal Code section 290 may be required to stay in a state hospital or secure treatment facility unless the court determines that alternative placement would provide more appropriate treatment and the defendant would not pose a danger to others. Penal Code §§ 1370 (B)(ii)-(iii), 1370.1 (B)(ii)-(iii).

IST defendants charged with nonviolent felonies may be placed directly in outpatient treatment through CONREP, without spending any time as an inpatient. Penal Code §§ 1601(a) & (b), 1603.

***Where will defendants found IST on the basis of a developmental disability be placed for treatment?***

IST defendants with a developmental disability charged with misdemeanors or nonviolent felonies are eligible for immediate outpatient care. Penal Code §§ 1601(b), 1370.4.

If a person with a developmental disability is committed as IST, the regional center will make a recommendation to the court as to where the individual

should be placed. Penal Code § 1370.1(a)(2). In the meantime, the defendant is in the care of the sheriff, who is to deliver him to a state hospital, developmental center, or other specified residential or outpatient setting that has been approved by the regional center for treatment. Penal Code §§ 1370.1(a)(1)(B)(i), 1370(a)(2). If the defendant is charged with certain offenses requiring registration as a sex offender or offenses considered a violent felony, options for placement may be restricted. Penal Code § 1370.1(a)(1)(B)(ii-iii).

IST defendants with a developmental disability charged with a felony that causes serious bodily injury must be committed to a locked residential facility for a minimum of 180 days before they can achieve outpatient status. Penal Code § 1600; *People v. Amonson* (2003) 114 Cal.App.4th 463.

## **G. Treatment of Individuals Committed as Incompetent to Stand Trial**

### ***Do IST defendants have a right to treatment?***

Treatment facilities are required to care for and treat individuals committed as IST in a way that will “promote the defendant’s speedy restoration to mental competence.” Penal Code § 1370(a)(1)(B)(i).

While IST defendants are waiting for a bed to become available at a state hospital, they often find themselves in a county jail receiving inadequate mental health treatment for long periods of time. This failure to provide adequate treatment may be challenged as a violation of the individual’s right to treatment under the due process clause of the U.S. Constitution. See *Oregon Advocacy Center v. Mink* (9<sup>th</sup> Cir. 2003) 322 F.3d 1101. For more information on mental health services in jails, see *County Jails: Mental Health Services* (June 2004), Disability Rights California Publication # 5181.01 (English), #5181.02 (Spanish).

### ***Do IST defendants have a right to refuse treatment with psychotropic medication?***

Individuals who are committed as IST have a constitutionally protected liberty interest under the due process clause of the Fourteenth Amendment to refuse the administration of antipsychotic medication. *Sell v. United States* (2003) 539 U.S. 166. This interest has also been codified under

California law. Penal Code § 1370(a)(2)(B)(iii).

There are generally four situations under which the state may try to force an IST defendant to take antipsychotic medication:

**a. *Involuntary Medication in Response to an Emergency***

Penal Code Section 1370(a)(2)(B)(iv) provides that the state may involuntarily medicate an IST in an emergency, as defined by Welfare and Institutions Code section 5008(m).

California Department of Mental Health (DMHI) Long Term Care Division Special Order No. 333.04 (DMH Special Order 333.04) sets forth DMH's standards and procedures for involuntarily medicating individuals found IST. Citing Penal Code section 5008(m), the DMH Special Order provides that state hospitals can prescribe antipsychotic medication for emergency situations, for the preservation of life or for the prevention of serious bodily harm to the individual or others. "Emergency" is defined as an imminent danger to self or others as a result of mental disease, defect or disorder. The Special Order specifies that involuntary medication can be administered only for as long as the emergency exists, and must be provided in the manner least restrictive to the individual's personal liberty. DMH Special Order 333.04.

**b. *Involuntary Medication Because the IST Defendant Lacks Capacity to Consent***

Involuntary medication may be administered if the court determines that: the individual lacks capacity to make decisions regarding antipsychotic medication; the individual's mental disorder requires medical treatment with antipsychotic medication; and, if the individual's mental disorder is not treated with antipsychotic medication, it is *probable that serious harm to the physical or mental health* of the individual will result. Penal Code § 1370(a)(2)(B)(ii)(I).

*"Probability of serious harm to the physical or mental health"* of the defendant requires evidence that the defendant is presently suffering adverse effects to his physical or mental health, or that the defendant has previously suffered these effects as a result of a mental disorder and his condition is substantially deteriorating. The fact that a defendant has a diagnosis of a mental disorder does not alone

establish probability of serious harm to the physical or mental health of the defendant.” Penal Code § 1370(a)(2)(B)(ii)(I).

Note that DMH Special Order 333.04 does not mention lack of capacity to consent as a potential basis on which state hospitals may administer involuntary medication to an individual committed as IST.

**c. *Involuntary Medication because the IST Defendant is a Danger to Others***

Under the Penal Code, involuntary medication may be administered if the court determines both: (1) that the defendant is a danger to others, in that he has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm on another while in custody, or that resulted in his being taken into custody; and (2) that the defendant presents, as a result of mental disorder or mental defect, a *demonstrated danger* of inflicting substantial physical harm on others. Penal Code § 1370(a)(2)(B)(ii)(II).

“*Demonstrated danger*” may be based on an assessment of the defendant's present mental condition, including a consideration of past behavior of the defendant within six years prior to the time the defendant last attempted to inflict, inflicted, or threatened to inflict substantial physical harm on another, and other relevant evidence.” Penal Code § 1370(a)(2)(B)(ii)(II).

Although the Penal Code requires a court order for the involuntary administration of medication due to dangerousness, DMH Special Order 333.04 establishes internal procedures for authorizing such medication on an interim basis while a court order is pending. Under the Special Order, interim authority for involuntary medication due to dangerousness can be established by referring the patient to a medical staff Psychotropic Medication Review panel to determine the necessity for psychotropic medication. A social worker or nurse must act as the patient's advocate. At least two of the three members of the panel must find that the patient meets criteria for involuntary psychotropic medication. Medication may then be ordered for 14 days. After 14 days, the panel must review the treatment outcome again and may order continued treatment for up to 180 days, or until court review has been obtained, whichever occurs sooner. To obtain long-term authority to administer involuntary medication on the

basis of dangerousness, the Special Order states that when the patient has been referred to the Psychotropic Medication Review panel for the interim administration of psychotropic medication, the state hospital must concurrently file a letter with the court signed by the Medical Director of the facility and the treating psychiatrist attesting to the fact that the patient is a danger to self or others and requesting a court order for involuntary medication. The Special Order specifies that it is not necessary for harm to become unavoidable or take place prior to treatment. DMH Special Order 333.02.

**d. *Involuntary Medication to Restore Competency***

A court may issue an order to medicate an IST defendant in order to restore competency to stand trial only if the defendant does not meet any of the other criteria for involuntary treatment, as discussed above. Penal Code § 1370(a)(2)(B)(iii).

California Penal Code Section 1370(a)(2)(B)(ii)(III) and DMH Special Order 333.02 delineate the requirements that must be met before medicating to restore competency. The statutory provision is modeled after the U.S. Supreme Court decision in *Sell v. United States* (2003) 539 U.S. 166, which sets forth the constitutional requirements under the Due Process Clause. The Special Order requires that the state hospital file a letter with the court signed by the treating psychiatrist and the Medical Director of the facility attesting to the fact that the statutory criteria for involuntary medication to restore competency are met.

Below is a comparison of the *Sell* requirements, their California statutory counterparts in section 1370(a)(2)(B)(ii)(III), and some of the significant judicial interpretations of the statutory provision to date. A trial court issuing an order to medicate under this subsection must comply with all of these constitutional, statutory, and common law requirements.

For more information on the right to refuse psychotropic medication for all forensic mental health clients, see, *The Right to Refuse Psychotropic Medication for Forensic Mental Health Clients* (October 2005), Disability Rights California Publication #5455.01.

Involuntary Medication for the Purpose of Restoring Competency

<i>Sell v. United States</i> Requirement	California Penal Code § 1370(a)(2)(B)(ii)(III) Requirement
Important government interest is at stake (i.e., timely prosecution and ensuring a fair trial)	Serious crime against property or person has been charged
Judicial Interpretations of <i>Sell</i> and Penal Code § 1370(a)(2)(B)(ii)(III)	
<p>Merely listing the serious crimes committed is insufficient. A court must consider the facts of the individual case for “special circumstances” that weigh against the government’s interest. For example, if the defendant refuses medication, he will likely be confined to an institution for a long period of time, thus diminishing the risk attached to freeing him without punishment. <i>People v. O’Dell</i> (2005) 126 Cal.App.4<sup>th</sup> 562.</p> <p>Given that three out of the four <i>Sell</i> factors require the consideration and balancing of important governmental interests, the state must provide input to the court concerning its interests and how they will be affected by the involuntary medication. <i>Carter v. Superior Court</i> (2006) 141 Cal.App.4<sup>th</sup> 992.</p>	
<i>Sell v. United States</i> Requirement	California Penal Code § 1370(a)(2)(B)(ii)(III) Requirement
Medication would substantially further those government interests	Administration of the drug is substantially likely to render the defendant competent;  <i>and,</i>  Medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner
Judicial Interpretations of <i>Sell</i> and Penal Code § 1370(a)(2)(B)(ii)(III)	
The expert report must specifically state which condition the hospital is proposing to treat. It is insufficient to simply list a mental disorder without explicitly mentioning that it is the condition being treated. <i>People v. O’Dell</i>	

(2005) 126 Cal.App.4<sup>th</sup> 562.

The expert report must indicate a clear and specific diagnosis. *Carter v. Superior Court* (2006) 141 Cal.App.

A court must also consider the actual medication proposed, not just the *class* of the antipsychotic medication (e.g. antidepressants, mood stabilizers, etc.). *Carter v. Superior Court* (2006) 141 Cal.App.4<sup>th</sup> 992; *People v. O'Dell* (2005) 126 Cal.App.4<sup>th</sup> 562.

Evidence showing that, at best, the defendant has a fifty to sixty percent chance of “improving” if given the recommended medications is not enough to support a court’s finding that the medications are substantially likely to render him competent to stand trial. *People v. McDuffie* (2006) 144 Cal.App.4<sup>th</sup> 880.

<i>Sell v. United States</i> Requirement	California Penal Code § 1370(a)(2)(B)(ii)(III) Requirement
Medication is necessary to further the government interest	Less intrusive treatments are unlikely to have substantially the same results
Judicial Interpretations of <i>Sell</i> and Penal Code § 1370(a)(2)(B)(ii)(III)	
A hospital’s letter simply stating that there are no alternatives is insufficient for a trial court to satisfy this requirement. The hospital opinion must be substantiated with facts relating to alternatives. <i>Carter v. Superior Court</i> (2006) 141 Cal.App.4 <sup>th</sup> 992; <i>People v. O'Dell</i> (2005) 126 Cal.App.4 <sup>th</sup> 562.	
<i>Sell v. United States</i> Requirement	California Penal Code § 1370(a)(2)(B)(ii)(III) Requirement
Administration is in the defendant’s best medical interests	Medication is in the defendant’s best medical interest in light of his medical condition.
Judicial Interpretations of <i>Sell</i> and Penal Code § 1370(a)(2)(B)(ii)(III)	
A trial court must consider the actual medication being proposed to make this determination. <i>Carter v. Superior Court</i> (2006) 141 Cal.App.4 <sup>th</sup> 992; <i>People v. O'Dell</i> (2005) 126 Cal.App.4 <sup>th</sup> 562.	

<p>Other Evidentiary Considerations</p>	<p>Although constitutionally permitted, orders for antipsychotic drugs are disfavored and should be issued only on a compelling showing. <i>Carter v. Superior Court</i> (2006) 141 Cal. App. 4<sup>th</sup> 992; <i>U.S. v. Rivera-Guerrero</i> (2005) 426 F.3d 1130.</p> <p>A court that is asked to approve involuntary medication must be provided with a complete and reliable medically-informed record, based in part on independent medical evaluations, before it can reach a constitutionally-balanced <i>Sell</i> determination. <i>Carter v. Superior Court</i> (2006) 141 Cal. App. 4<sup>th</sup> 992; <i>U.S. v. Rivera-Guerrero</i> (2005) 426 F.3d 1130.</p>
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## **H. Review of IST Status and Restoration of Competency**

### ***How is IST status reviewed?***

After a defendant is found incompetent to stand trial, the treatment facility, regional center, or CONREP outpatient program to which he is committed must submit periodic reports to the court about the defendant's progress. The first progress report must be submitted within 90 days of the defendant's commitment. Penal Code § 1370(b)(1). If the defendant has not regained competency within 90 days, but the report indicates a substantial likelihood that he will regain competency in the foreseeable future, the defendant will remain committed to the treatment facility or outpatient program. Thereafter, the facility or treatment program must submit written progress reports to the court every six months. An IST defendant may contest the recommendations found in the periodic progress reports presented at the 90-day or 18-month status review hearings. See *In re Davis* (1973) 8 Cal.3d 798, 810.

When a progress report indicates that there is no substantial likelihood that an IST defendant will regain competency in the foreseeable future, he must be returned to the committing court for civil commitment proceedings. Penal Code §§ 1370(b)(1), 1370.01(b), 1370.1(b). See also *People v. Superior Court (Lopez)* (2005) 125 Cal.App.4th 1558. If the IST defendant is not eligible for conservatorship and not likely to become competent, or the maximum term of confinement has been reached, the court must release the defendant from further confinement.

Whenever an IST defendant has been detained for 18 months, the law requires a new competency trial pursuant to the procedures set forth in Penal Code section 1369. Penal Code §§ 1370(b)(2); 1370.1(b)(2). At the 18-month competency hearing, the court may also consider alternatives such as LPS or "Murphy" conservatorship proceedings.

### ***How does the court determine whether a defendant has been restored to competency?***

If during the course of commitment the treating facility or community program director determines that the defendant has regained competency, a Certificate of Restoration of Competency must be filed with the court by certified mail. The defendant must be returned to the committing court no later than ten days after the filing for a restoration hearing pursuant to

Penal Code section 1372. This is necessary because at that point, the state will only pay for ten days of additional state hospital treatment. Penal Code § 1372(a)(2).

At the competency restoration hearing, the court will decide whether to accept the Certificate of Restoration of Competency and also whether the defendant can post bail or be released on his own recognizance. The defense or the prosecution can also request a competency restoration hearing. Penal Code §§ 1372(c), (d). There is no right to a jury trial at the competency restoration hearing. *People v. Murrell* (1987) 196 Cal.App.3d 822.

A defendant is presumed to be mentally competent at the competency restoration hearing and the party who claims that the defendant remains incompetent has to prove otherwise by a preponderance of the evidence. *People v. Rells* (2000) 22 Cal.4th 860.

***What happens after a defendant is determined to be restored to competency?***

After competency is restored, criminal proceedings are resumed – not begun anew. For example, an IST defendant who has already held to answer on felony charges is not entitled to a new preliminary hearing, absent special circumstances. *Booth v. Superior Court* (1997) 57 Cal.App.4th 91.

When the time of incompetency is relatively short and the trial court is able to resume proceedings, it is not required to declare a mistrial and assign the matter for a new trial. Whether a person is competent to stand trial is a jurisdictional question and cannot be waived by the defendant or counsel. *People v. Smith* (2003) 110 Cal.App.4th 492.

If a defendant requires continued treatment to maintain competency, or if jail placement would create a substantial risk that the defendant would again become incompetent, the court may return the defendant to the treatment facility before criminal proceedings resume. Penal Code § 372(e).

## I. Judicial Review of a Competency Determination

### ***Can a defendant appeal a determination of his competency to stand trial?***

A defendant may appeal a judgment of incompetency to stand trial. *People v. Fields* (1965) 62 Cal.2d 538.

Under the “collateral order” doctrine, a defendant can appeal an IST finding and commitment order before the court issues a final judgment in the case. *U.S. v. Friedman* (9<sup>th</sup> Cir. 2004) 366 F.3d 975.

In reviewing a determination of IST or an order to involuntarily medicate a defendant to restore competency, an appellate court reviews the trial court record in the light most favorable to the jury’s determination and determines whether substantial evidence supports the finding. Evidence is substantial if it is reasonable, credible and of solid value. When experts disagree about defendant’s competence, and the jury rules in favor of competence, the reviewing court will uphold the verdict. *People v. Turner* (2004) 34 Cal.4th 406; *Carter v. Superior Court* (2006) 141 Cal.App. 4<sup>th</sup> 992.

Defense counsel’s failure to raise the issue of IST in the trial court does not waive the issue on appeal. *People v. Ary* (2004) 118 Cal.App.4th 1016.

The appellate court does not review the propriety of the trial courts competency ruling based on evidence that was not presented to it at the time the ruling was made. *People v. Panah* (2005) 35 Cal.4th 395.

In overturning a finding that a defendant was competent to stand trial, the court did not abuse its discretion by subjecting the jury verdict to closer than usual scrutiny because the right to jury trial on the issue of competency is statutory rather than constitutional, the facts were uncontested, and the finding on the issue of competence did not necessarily affect the questions of guilt or penalty. *People v. Samuel* (1981) 29 Cal.3d 489.

### ***Can a defendant challenge a competency determination through a writ of habeas corpus?***

A defendant can challenge a finding of IST and subsequent commitment in the superior court through a writ of habeas corpus. Welf. & Inst. Code § 7250; Penal Code § 1473.

A defendant's procedural due process claim in the trial court that he was tried while mentally incompetent was sufficient to preserve a substantive due process claim on federal habeas corpus review.

*Lounsbury v. Thompson* (9<sup>th</sup> Cir. 2004) 374 F.3d 785.

## **J. Alternatives to Incompetency to Stand Trial Proceedings**

### ***Mental Health Services Under the LPS Act***

When a court believes that short-term psychiatric treatment may resolve any potential problems, a defendant with a mental illness or a developmental disability may be transferred to the county mental health system for evaluation and treatment as either a voluntary or involuntary patient. Penal Code §§ 4011.6; 4011.8. Once transferred, the defendant will be concurrently subject to both criminal proceedings and to LPS commitment, and will be protected by the patients' rights provisions found in the LPS Act, including the right to refuse treatment. Welf. & Inst. Code §§ 5000, *et seq.*

### ***Diversion of Defendants with Mental Retardation***

Under Penal Code sections 1001.20 through 1001.34, diversion is available to a defendant with a cognitive developmental disability who is charged with a misdemeanor, or a charge that is reduced to a misdemeanor. If found eligible, the court refers the defendant to the appropriate regional center for an evaluation as to whether the defendant is eligible for treatment and habilitation. Upon consultation with the district attorney, public defender, probation department, and regional center, the court will determine whether diversion is appropriate. Penal Code §§ 1001.22, 1370.1(a)(1)(B)(i).

A defendant with a developmental disability who is diverted from IST proceedings remains subject to involuntary civil commitment. Welf. & Inst. Code §§ 5000 *et seq.*, 6502; Penal Code § 1370.1(c)(2). *See also In re Hop* (1981) 29 Cal.3d 82.