



California's protection & advocacy system

FORENSIC MENTAL HEALTH – LEGAL ISSUES (IST)

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FORENSIC MENTAL HEALTH LEGAL ISSUES

Chapter 1

Incompetent to Stand Trial (IST) Commitment

Note: These materials were prepared for information only. The responses are not legal opinion or advice. Please check for the most recent and current version of law.

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A. Introduction

It is a violation of due process when a person, not competent, has gone through the criminal process. The person is not able to defend against criminal charges. *Pate v. Robinson* (1966) 383 U.S. 375; *People v. Samuel* (1981) 29 Cal.3d 489.

A person found not competent to stand trial (IST), may have fewer liberty rights compared to being in the criminal system. The person could be sent to a state hospital, a “treatment facility” such as an approved jail, or to the conditional release program (CONREP).

Individuals who are IST can face a longer time of commitment under a “Murphy” conservatorship. This can happen when a person is charged with a “violent” felony, found IST and has served their “maximum time.” These individuals were never found guilty of a crime, but under the Lanterman Petris Short Act (LPS) can be conserved.

Attorneys should consider court procedures that could help avoid a longer time of commitment for a person who is not competent.

B. 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 section 1367(a).

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 have “a rational as well as factual understanding of the proceedings against him.” *Dusky v. United States* (1960) 362 U.S. 402.

One cannot assert incompetency to stand trial 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.4th 492; *People v. Medina* (1965) 11 Cal.4th 694; *People v. Superior Court (Campbell)* (1975) 51 Cal.App.3d.459.

2. Competency to stand trial and competency to waive counsel

Is there a 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 told of the dangers of self-representation; and (3) makes a clear request to not have counsel within a reasonable time before trial. *Faretta v. California* (1975) 422 U.S. 806; *People v. Welch* (1999) 20 Cal.4th 701.

The legal standard to determine competency to not have counsel is the same test to determine competency to stand trial. The trial court must accept that the waiver of these constitutional rights is knowing and voluntary.

The defendant's mental capacity is the focus of competency. That is whether he has the ability to understand the proceedings.

The purpose of 'knowing and voluntary' is to see if the defendant understands the importance and consequences of a decision. Also, that the decision is not forced. *Godinez v. Moran* (1993) 509 U.S. 389, 401, fn.12; *Van Lynn v. Farmon* (9th Cir. 2003) 347 F.3d 735.

A trial court may deny or end self-representation by a defendant who on purpose is acting with serious or delaying misconduct. *Faretta v. California* (1975) 22 U.S. 806; *People v. Welch* (1999) 20 Cal.4th 701.

3. Incompetent to waive a jury trial

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

An incompetent defendant cannot waive his right to a jury trial or any other fundamental right. 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.4th 492.

C. Starting Incompetency to Stand Trial Proceedings

1. IST proceedings

The mental health director or designee is to evaluate the defendant and submit a recommendation on placement. This can be to an outpatient or in-patient treatment place. This report is to happen within 15 court days. A state hospital placement should not be considered unless there is no less restrictive placement available. The county will need to have a contract with the Department of State Hospitals for placement. Penal Code section 1370.01(a)(2)(A).

Placement options are the outpatient program, a treatment facility, or the State Hospital, or acceptance into diversion. Penal Code section 1370(c).

2. Issue of competency and when will IST proceedings begin

Who can raise the issue of competency and when will IST proceedings begin?

A trial court must start IST proceedings when there is doubt as to the defendant's competency to stand trial. A judge or defense counsel can raise the issue of competency if there is doubt as to the mental competency of the defendant. Penal Code sections 1368(a)&(b). The prosecutor may offer evidence of incompetency if defense counsel doesn't. Penal Code sections 1369(b)(1)-(2).

Competency can be raised during an action, prior to judgment, during court for violation of probation, at mandatory supervision, post release community supervision or during parole. Penal Code section 1368(a).

The judge shall state on the record the issue of competency. The judge shall ask for defense counsel's opinion about the defendant's competency. If the defendant does not have counsel, the court shall appoint one. Penal Code section 1368(a).

The court must take a break for as long as reasonably needed to allow counsel to talk with the defendant. Counsel is to form an opinion on mental competency then. Penal Code sections 1368(a)&(b), 1369; *People v. Laudermilk* (1976) 67 Cal.2d 272; *People v. Kaplan* (2007) 149 Cal.App.4th 372.

The court may order a hearing even when counsel believes the defendant is competent. Penal Code section 1368(b). The criminal case is put on hold until current mental competence is decided. Penal Code section 1368(c).

Due process requires a full competency hearing under Penal Code section 1368 when three elements exist. When a doubt arises in the mind of the trial judge that is confirmed by defense counsel, and there is substantial evidence of incompetency to stand trial, then a hearing must occur. *People v. Sundberg* (1981) 124 Cal.App 3d 944.

When there is no "substantial evidence" to show incompetence to stand trial, the decision to order a hearing is left to the court. *People v. Ogelsby* (2008) 158 Cal.App.4th 818; *People v. Gallegos* (1990) 52 Cal.3d 115.

3. “Substantial evidence”

What is the required “substantial evidence” or doubt to start IST proceedings?

"Substantial evidence" is reasonable doubt about the defendant's competency to stand trial. *People v. Frye* (1998) 18 Cal.4th 894. It is also evidence that is “reasonable, credible and of solid value.” *People v. Marshall* (1997) 15 Cal.4th 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 requires a hearing even when not supported by other evidence. *People v. Young* (2005) 34 Cal.4th 1149; *People v. Murrell* (1987) 196 Cal.App.3d 822.

The court can use certain factors to decide whether a person is competent to stand trial. These are behavior, the way the person acts at trial and with medical opinions. Sometimes, even one of these factors may be enough to prove IST. *Drope v. Missouri* (1975) 420 U.S. 162.

A court that allowed the party to serve as co-counsel at the penalty phase denied a claim of incompetency. The party presented motions in court. This showed full awareness of the nature of proceedings and ability to assist counsel. *People v. Hayes* (1999) 21 Cal.4th 1211, 1282.

What happens when a court does not have a hearing when there is “substantial evidence” of incompetency?

It is an error to not hold a competency hearing when there is substantial evidence that the defendant’s mental disorder stops him from assisting his own counsel. The error is reversible. *People v. Standewitz* (1982) 32 Cal.3d 80.

When a trial court fails to order a competency hearing when there is substantial evidence of incompetency a reversal of the conviction is required. The case should be sent back to the trial court. At that level, the state needs to show that a competency hearing can fix the error. *People v. Ary* (2004) 118 Cal.App.4th 1016.

D. Competency Hearings: Procedural Issues

1. What procedural rules apply to IST hearings?

Some pre-trial procedures may test if the criminal charges are appropriate. If that happens, this could do away with deciding competency to stand trial.

Generally, a competency hearing follows the rules in civil cases. This is so even though the issue is raised in a criminal trial. *People v. Johnwell* (2004) 121 Cal.App.4th 1267.

All criminal proceedings are suspended until competency to stand trial is decided. A jury that has been impaneled and sworn may be discharged if needed to avoid undue hardship. Penal Code section 1368(c).

A fully agreed upon jury decision is required to find the defendant not competent to stand trial. Penal Code section 1369(f). If the hearing is by jury, the defendant is given the same number of challenges as in a civil trial. *People v. Stanley*, (1995) 10 Cal.4th 764.

2. Defendant and his attorney disagree during incompetency proceedings

What happens if a defendant and his attorney disagree on issues during incompetency proceedings?

The defendant's right to a jury trial is based on state law. Counsel may waive the right to a jury trial even if the defendant objects. *People v. Masterson* (1994) 8 Cal.4th 965; *People v. Harris* (1993) 14 Cal.4th 984. Defense counsel did not violate a defendant's due process rights by seeking to prove incompetence when the defendant did not agree to this.

Defense counsel that wants to prove the defendant's incompetence over objection should let the defendant testify that he is competent. That should happen unless the court decides that the defendant is not competent. *People v. Bolden* (1979) 99 Cal.App.3d 375.

A defendant cannot reject his attorney's decision to seek a competency hearing. An absent defendant is treated as though he waived his right to attend the competency hearing. *People v. Jernigan* (2003) 110 Cal.App.4th 131.

It is unclear if defense counsel can waive a defendant's presence at an IST hearing when the client objects to the waiver. *People v. Harris* (1993) 14 Cal.App.4th 984.

Penal Code section 1368 requires 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 provides for the right to effective representation. A hearing and an order granting a motion for substitution of counsel should occur when there is enough to show a great loss if the request is denied.

After criminal proceedings have been suspended to have a competency hearing, the Constitution requires a hearing on the defendant's Marsden motion before deciding competency. *People v. Solorzano* (2005) 126 Cal. App. 4th 1063.

3. What is the burden of proof in a competency hearing?

A defendant is first seen as competent to stand trial unless incompetency is proved by a preponderance of the evidence. *Medina v. California* (1992) 505 U.S. 437; *People v. Rells* (2000) 22 Cal.4th 860; *People v. Skeirik* (1995) 10 Cal.4th 764, 808.

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

4. Do experts who evaluate competency also review the need for psychotropic medications?

The court can assign a mental health expert to examine a defendant. The expert can write a report on whether a formal competency hearing is needed. Evidence Code section 730.

Penal Code section 1369(a) allows the court to appoint either a psychiatrist, licensed psychologist and any other expert the court believes is proper to examine the defendant.

If the defendant or their attorney is not seeking a finding of mental incompetence, the court shall appoint a psychiatrist and licensed psychologist or both of one category. One psychiatrist or licensed psychologist may be named by defense counsel and the other by the prosecution.

The examination shall include the following:

- Evaluate the defendant's mental disorder
- Decide the defendant's ability or inability to understand the nature of the criminal proceedings
- See if the individual can assist counsel in a defense in a rational manner

The evaluator also reviews if treatment with antipsychotic medication is right for the defendant. They also decide if antipsychotic medication is likely to restore the defendant to mental competence and will address if the defendant is a danger to self or others.

The appointed expert will see if the defendant is competent to stand trial and if treatment with anti-psychotic medication is medically appropriate. The person will also look at whether the defendant is likely to be restored to competency and if the defendant has the capacity to refuse anti-psychotic medication. Also the expert will look at if the defendant is a danger to himself or others. Penal Code 1369.

A psychiatrist who examines the defendant may give an opinion if antipsychotic medication is right. They shall tell the court of the likely or possible side effects and expected effects of the medication. They shall also look at the other possible treatments. They may decide if it is medically right to give the medication in the county jail. Penal Code section 1369(a)(2).

Defense counsel shall give evidence to support mental incompetence. If defense counsel doesn't want to, the prosecution may. The prosecution shall present evidence of the defendant's present mental competence. Each party may offer testimony that does not agree with the other party's. Final arguments shall be made to the court or jury. Penal Code sections 1369(b)-(e).

If a jury trial, it shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The jury verdict shall be by full agreement. Penal Code section 1369(f).

Admitting written reports from two psychologists was not a denial of due process when a third expert was not allowed to decide if the defendant was competent to stand trial. *People v. Lawley* (2002) 27 Cal.App.4th 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.4th 478.

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

After a felony IST finding, criminal charges are suspended while the defendant is receiving treatment for competency. Penal Code section 1370.1(a)(1). If the defendant is found mentally incompetent, the trial, hearing on the alleged violation or judgment shall be suspended until the person becomes mentally competent. Penal Code section 1370(a)(1)(B).

Following an IST finding, a court may dismiss any misdemeanor charge against the defendant with 10 days' notice to the district attorney. Penal Code section 1370.2.

A defendant who returns to court because he is likely or unlikely to regain competency, or remains incompetent after the maximum time, may have the charges dismissed, or be subject to an LPS conservatorship. Penal Code sections 1370(c)-(e).

6. Statements made by a defendant during an IST evaluation

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

The Fifth Amendment does not allow the state to use statements made by a defendant when deciding competency to prove its main case at the guilt or penalty phase. *People v. Arcega* (1982) 32 Cal.3d 504; *Tarantino v. Superior Court* (1975) 48 Cal.App.3d 465.

The Fifth Amendment does not allow the state to use statements made by a defendant during a competency evaluation to impeach his testimony at the criminal trial. *People v. Pokovich* (2006) 39 Cal.4th 1240.

E. Placement of IST Defendants and Diversion

After a defendant is found not competent to stand trial, the next step is a placement hearing. That will decide where the defendant will be treated for competency. The community program director must give a written recommendation to the court at least 15 court days before that hearing. Penal Code section 1370(a)(2)(A).

1. Where will misdemeanor defendants found IST be placed for treatment?

A person charged with a misdemeanor and not competent will usually be sent to a local mental health treatment place. A person cannot be sent to a state hospital unless there are no other less restrictive places available. There must be a contract between the home county and the Department of State Hospitals to send someone there. Penal Code section 1370.01(a)(3)(A).

Misdemeanor IST defendants may also be placed directly in the Conditional Release Program (CONREP) for outpatient treatment. Penal Code section 1601.

2. Where will felony defendants found IST be placed for treatment?

The court considers the recommendation on placement by the community program director for individuals charged with a violent felony who are not competent. This can often be to the state hospital.

Before the court orders placement, the court shall first order the community program director or a designee to evaluate the defendant and submit to the court within 15 judicial days a written recommendation on placement.

The review should include if the defendant should be in outpatient treatment, a place run by the Department of State Hospitals or any other treatment facility including the county jail.

There should be no placement until the evaluation is done. The guidelines by the Department of State Hospitals shall be used if community-based residential treatment is considered.

The court will order the defendant to be placed in a state hospital, a public or private treatment facility that includes a jail that has treatment, or in community based residential treatment as described in Welfare and Institutions Code sections 5670 et seq. The facility should have a secure outside or a locked and controlled setting approved by the community program director. The place should help the defendant to quickly be competent. Or, the person can be placed on outpatient status under section 1600. Penal Code section 1370(a)(1)(B)(i).

When an IST defendant is charged with a felony listed in Penal Code 1601, inpatient treatment is likely required for at least 180 days. That is unless another facility or outpatient treatment would be more appropriate. Such a placement should not pose a danger to the health and safety of others which includes the victim or the victim's family. Penal Code section 1601(a); *People v. Superior Court (Lopez)* (2005) 125 Cal. App. 4th 1558. These defendants cannot be put in a state hospital, a developmental center, or other treatment place unless it is secure. Also, the court will decide if public safety is satisfied. Penal Code section 1370 (a)(1)(D).

The Department of State Hospital's response to the growing waitlist on placement of individuals who are charged with a felony and found IST has been to increase competency programming at jails. Jail Based Competency Treatment Programs (JBCT) have slowly increased over time wherein the Department contracts with identified county jails to provide competency programming. Usually the counties' Board of Supervisors would approve a local jail based competency program.

3. Placement for a defendant charged with a felony under Penal Code 290 (Sex Offender Registration Act)

IST defendants charged with a felony that requires sex offender registration may have to stay in a state hospital or secure treatment facility. That is unless the court decides that a different place would provide more appropriate treatment. The defendant should not pose a danger to others. Penal Code sections 1370 (a)(1)(B)(ii)-(iii).

IST defendants who are charged with a felony not on the Penal Code section 1601 list, or with a misdemeanor, could be on outpatient status. This can happen before a state hospital or other treatment facility stay. Penal Code section 1601(b).

4. Admission to the department of state hospitals of ISTs—prioritization and process for placement

The Department of State Hospitals has regulations that have to do with the admission and placement of ISTs. 9 CCR sections 4710 – 4717.

The regulations are silent about court orders and their impact on placement.

Under the regulation, the order of admission to the state hospital will be by the earliest commitment dates but the Department may change the order if any of the following exists:

- (1) Bed availability
- (2) Psychiatric acuity
- (3) Medical needs
- (4) Transportation

A person who has been placed in a Department jail based competency program that cannot appropriately serve the individual shall be admitted to a state hospital. Their original commitment date to the Department will be used. 9 CCR section 4710.

There are required documents for the state hospital to review before admission. The packet should be complete for review and approval before admission. 9 CCR sections 4711-4712. The admissions unit will look at the packet to see if the needed care or services can be given. 9 CCR section 4713.

The Department will look at risk level before admission which will help decide which state hospital may be chosen. That will depend on the level of risk from low to moderate to high security risk. 9 CCR sections 4714, 4717. Individuals who are at low to moderate security risk will likely go to the hospitals of Atascadero,

Patton, Napa or Metropolitan. For individuals who are at a high risk, they will likely go to Atascadero or Patton State Hospital. 9 CCR section 4717.

A person with a serious psychiatric need may be given priority for admission.

5. Diversion

After an incompetency finding, the court may make a finding that the defendant is an appropriate candidate for diversion under Penal Code section 1001.35 which provides that individuals with mental disorders have their mental health treatment and supports met in diversion so long a public safety is protected. Penal Code sections 1370(a)(1)(B)(iv-v).

Eligibility for diversion is found in Penal Code section 1001.36 with a maximum time in diversion as the lesser of the maximum time for the highest charge or two years. The court can, when specific circumstances exist as outlined in Penal Code section 1001.36(d), reinstate criminal proceedings and appoint a clinician as defined in the section or an expert to determine defendant's competence.

When charges are dismissed after completion of diversion, the defendant will no longer be deemed incompetent and the court will notify the Department of Justice of the outcome so that the arrest will be considered to never have occurred. Penal Code section 1370(a)(1)(B)(vi) & Penal Code section 1001.36(e).

If the defendant is found mentally incompetent, the court may make a finding that the defendant is an appropriate candidate for diversion and may, if the defendant is eligible pursuant to Section 1001.36, grant diversion for a period not to exceed the maximum time. Upon dismissal of the charges at the conclusion of the period of diversion, a defendant shall no longer be deemed incompetent to stand trial. Penal Code section 1370.01(a)(2).

F. Treatment of Individuals Committed as IST

The commitment and finding of IST status often means that the individual will receive treatment by programs to gain competency. Medication may also be a way to help a person gain competency. The person may also have the right to refuse medication.

The program at a state hospital could include knowing common criminal law words, and the role of court people like the defense attorney. Review of the legal definition of competency and maybe having a practice hearing can be included. The program offered to individuals may be used to decide if the individual appears to have gained competency for the court reports.

1. Do IST defendants have a right to treatment?

Treatment facilities should care for and treat individuals committed as IST. It should be in a way that will “promote the defendant’s speedy restoration to mental competence,” or the person may be placed on outpatient status as specified in Section 1600.” Penal Code section 1370(a)(1)(B)(i).

IST defendants who are waiting for a bed to become available at a state hospital may find themselves in a county jail. There, they could receive inadequate mental health treatment for long periods of time. The failure to provide adequate treatment may be a violation of the right to treatment under the due process clause of the U.S. Constitution. *Oregon Advocacy Center v. Mink* (9th Cir. 2003) 322 F.3d 1101.

A jail may be considered a treatment facility for IST defendants. Penal Code section 1369.1(a). This means that these individuals are not waiting for a bed to be available at the state hospital as they are currently being ordered to the jail for competency programming.

2. Do IST defendants have a right to refuse treatment with psychotropic medication?

Individuals who are IST have a protected liberty interest under the due process clause of the Fourteenth Amendment to refuse antipsychotic medication. *Sell v. United States* (2003) 539 U.S. 166.

The court may order medication during or after the hearing on placement. Penal Code section 1370(a)(2).

Individuals who are not subject to involuntary medication when placement is ordered could have a hearing on involuntary medication later. The hearing could be at a state hospital with an administrative law judge, and then following, at the Superior Court where the judge may hear the issue of medication. Penal Code sections 1370(a)(2)(C)&(D).

3. Does the court make decisions on medication for an IST defendant who also lacks capacity regarding medication?

Prior to the court making a placement order, the court also hears and determines whether the defendant lacks capacity to make decisions about being given psychotropic medication. The court shall consider the reports prepared under Penal Code section 1370 and also determine whether any of the following three standards are true:

- a) The defendant lacks capacity to make decisions regarding psychotropic medication and poses a serious harm to self without taking psychotropic medication

The court reviews and decides that the defendant lacks capacity to make decisions about antipsychotic medication. This is based on whether the defendant's mental disorder requires medical treatment with antipsychotic medication. Also, it will be reviewed if the mental disorder is not treated with the medication, if it is likely that serious harm to the physical or mental health of the patient will result.

This requires evidence that the defendant is having adverse effects to his or her physical or mental health. The court will also be looking at if the defendant has had these effects before due to a mental disorder and his or her condition is greatly worse. The fact that a defendant has a diagnosis of a mental disorder only is not enough to show the likelihood of serious harm to the physical or mental health of the defendant. Penal Code section 1370(a)(2)(B)(i)(I).

- b) The defendant lacks capacity and is a danger to others and requires psychotropic medication

The court reviews and finds that the defendant lacks capacity and is a danger to others because the party has inflicted, attempted to inflict, or made a serious threat of inflicting substantial harm on another while in custody. If the defendant had done that then the court looks at whether the defendant presents, as a result of mental disorder or defect, a demonstrated danger of inflicting substantial physical harm on others.

Demonstrated danger may be based on a review of the defendant's present mental condition, including looking at past behavior of the defendant within six years before 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)(i)(II).

- c) Does the defendant lack capacity and is charged with a serious crime and psychotropic medication is likely to render them competent to stand trial?

The defendant is charged with a serious crime against the person or property, and involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial. Also, the medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner. In addition, less intrusive treatments are unlikely to have substantially the same results, and antipsychotic medication is in the patient's best

medical interest given their medical condition. Penal Code section 1370 (a)(2)(B)(i)(III).

A court that finds that the defendant lacks capacity, or is a danger to self or others, or would likely be competent with psychotropic medication, shall order involuntary medication. The order will last up to a year. The medication will be ordered by the psychiatrist at the facility. Penal Code section 1370(a)(7).

The court shall review the order at the time of the review of the initial report and the 6 month progress reports to determine if the grounds for the authorization remain. In the review, the court shall consider the reports of the treating psychiatrist, and the patients' rights advocate or attorney, and may require the testimony from these parties. The court may continue the order authorizing involuntary medications for up to 6 months, vacate the order, or make any other appropriate order. Penal Code section 1370(a)(7).

Involuntary medication may be given in an emergency as described under the law. Welfare and Institutions Code section 5008. Penal Code section 1370(a)(2)(B)(iii).

4. The court finds that the defendant has capacity may order involuntary medication later after placement

- a) Is a defendant found to have capacity and voluntarily agrees to psychotropic medication later subject to an involuntary medication order?

If a court finds that the defendant has capacity about antipsychotic medication and consents, then the court's commitment order shall reflect this. The order will also show that if the defendant withdraws consent the treating psychiatrist can determine that the medication is needed.

A psychiatrist who does not gain consent from the defendant after trying and believes that the defendant lacks capacity shall certify that medication is necessary.

If the court finds that the defendant has capacity about antipsychotic medication, but does not consent, the defendant can be subject to the certification process while confined at a state hospital. That means that the defendant can later be returned to court to determine whether the defendant will be involuntarily medicated. Penal Code sections 1370(a)(2)(B)-(D).

- b) State hospital hearing for psychotropic medication when treating psychiatrist certifies that it is medically necessary

When the treating psychiatrist certifies that antipsychotic medication is medically necessary and appropriate, a medication review hearing is to be held within 72 hours in front of an administrative law judge at the facility where the defendant is

receiving treatment. Penal Code section 1370(a)(2)(D)(i). Concurrently, the doctor files a court petition for involuntary medication.

The treating doctor presents the case and the defendant has a right to representation by an attorney or patients' rights advocate. Either are to be appointed at least one day before the hearing. Their role is to review the defendant's rights at the hearing, discuss the process, and answer questions or concerns about the hearing. They will also assist the defendant in preparing for the hearing and providing the advocacy, and review the decision. Also, they will tell of the right to judicial review of the decision and provide referral information.

If the defendant loses, the order for medication is to last twenty one (21) days. Penal Code sections 1370(a)(2)(D)(i)-(ii).

However, if the administrative law judge rules in favor of the defendant, and since a petition was filed by the doctor when seeking certification, the court will hold a hearing to determine if involuntary medication will be administered.

The defendant shall have the following rights at this hearing:

- Timely access to his records
- To be present at the hearing unless the defendant waives the right
- To present evidence at the hearing
- To question persons presenting evidence supporting involuntary medication
- To make reasonable requests for attendance of witnesses on defendant's behalf
- To have a hearing conducted in an impartial and informal manner

5. Court does periodic reviews of progress towards competency and medication orders including the petition for involuntary medication

Within 90 days of commitment made under Penal Code section 1370(a), the medical director of the state hospital or other treatment facility where the defendant is located shall make a written report for the court and the community program director for the county or region of commitment. The report will describe the defendant's progress toward recovery of mental competency and shall include if antipsychotic medication is still necessary. Penal Code section 1370(b)(1).

If the court issues an order authorizing involuntary medication, then the reports made to the court on status shall include but not be limited to have the following:

- does the defendant have capacity to decide about anti-psychotic medication

- if the defendant lacks capacity to decide about antipsychotic medication, does the defendant risk serious harm to their physical health if not treated with the antipsychotic medication,
- whether the person presents a danger to others if not treated with the medication,
- whether the defendant has a mental illness and medications are the only effective treatment,
- whether there are any side effects from the medication now experienced by the defendant that would interfere with their ability to collaborate with counsel,
- whether there are alternatives to the medication,
- how quickly the medication is likely to bring the defendant to competency,
- whether the treatment plan includes methods other than medication to restore the defendant to competency,
- and if it applies, if no medication is likely to restore the defendant to competency.

Penal Code sections 1370 (b)(2)(A)-(I).

If the defendant is on outpatient status, that program's treatment staff shall make a written report to the community program director about the progress towards recovery of mental competence. The report shall consider the substantial likelihood that the defendant will regain mental competence in the foreseeable future. If the person has not yet regained mental competence, the defendant shall remain at the facility or on outpatient status. Penal Code section 1370(b)(1).

Thereafter, every six months, or until the defendant becomes mentally competent, a report is due to the court or the community program director or designee as to the status of progress towards recovery of mental competence and whether antipsychotic medication remains necessary.

The same requirement for a "six months" report applies to a defendant on outpatient status. Penal Code section 1370(b)(1).

A copy of these reports shall be given to the prosecutor and defense counsel by the court. Penal Code section 1370(b)(1).

If the 90 day initial report or the report prepared every six months shows that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future, the medical director of the state hospital or other treatment facility where the defendant is placed shall provide a copy of this report to the defense counsel and district attorney. In a separate notice, the county sheriff of the home county will be told that transportation will be needed for the patient to go back to court. Penal Code sections 1370(b)(1)(B)(i)-(ii).

6. Court orders after reviewing reports related to administering antipsychotic medication

After reviewing the reports, the court shall decide to order involuntary medication or not. The court will continue the order for medication if the original grounds for involuntary medication still exist. Penal Code section 1370(b)(3)(C).

If the initial reasons for involuntary medication no longer exist, and the report states that there is another reason for involuntary antipsychotic medication, the court shall set a hearing. The hearing should happen within 21 days to decide if the order for involuntary medication shall be removed or whether a new order shall be issued. Penal Code section 1370(b)(3)(C).

If the court finds that no treatment for the defendant's mental impairment is occurring, the defendant shall be returned to the committing court. The court shall send a copy of its order to the community program director or a designee. Penal Code section 1370(b)(4).

At each review, the court shall review the appropriateness of the security level of housing and treatment and if the defendant is to continue treatment at a state hospital or be on an outpatient basis. The court shall decide about antipsychotic medication. Penal Code section 1370(b)(5).

7. Can there be involuntary medication in an emergency?

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

G. Duration of Incompetency to Stand Trial Commitment

An IST commitment ends when either: (1) the maximum time for confinement runs out (Penal Code 1370(c)(1)); or (2) the defendant obtains certification that he has regained competency under Penal Code section 1372(a)(1).

However, there are other commitment categories that can be used to lengthen the time of hospitalization for IST defendants. Penal Code sections 1370(c)(1)-(2).

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 any longer than reasonably necessary to restore him to competency or determine that his competency cannot be restored. *Jackson v. Indiana* (1972) 406 U.S. 715.

The maximum time of commitment is two years or the maximum time of imprisonment for the most serious offense charged whichever is shorter. Penal Code section 1370(c)(1).

The court shall order the initiation of conservatorship proceedings if the defendant appears to the court to be gravely disabled under Welfare and Institutions Code section 5008(h) when the defendant is returned to court having reached “maximum time,” treatment for defendant’s mental impairment is not being conducted, or that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future. Penal Code section 1370(c)(2).

After the end of two years from the date of commitment or a period of commitment equal to the maximum term of imprisonment provided by law for a violation of probation or mandatory supervision, whichever is shorter, a defendant who has not become mentally competent shall be returned to the committing court. Penal Code section 1370.1(c)(1)(A).

If the criminal charges are dismissed before the defendant becomes mentally competent, the defendant shall be subject to the Lanterman Petris Short Act or commitment and detention under Section 6502 of the Welfare and Institutions Code. Penal Code sections 1370.1(c)(1)-(2).

The statutory time limit for commitments to regain trial competency applies to the sum of all commitments ordered on the same set of criminal charges. The time is not separately counted for each time a commitment was ordered. *In re Polk* (1999) 71 Cal.App.4th 1230.

In figuring the time of commitment, the “maximum time” is whichever is shorter, between the end of two years from the date of commitment or the time equal to the maximum term of imprisonment for the most serious offense charged. It could also be the maximum term of imprisonment provided by law for a violation of probation or mandatory supervision. But no later than 90 days prior to the expiration of the defendant’s term of commitment, a defendant who has not recovered mental competence shall be returned to the committing court. The court shall notify the community program director or a designee of the return and of any court orders. Penal Code section 1370(c)(1).

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

The court shall send a copy of the order starting the conservatorship process and the outcome to the community program director or designee, the sheriff and the district attorney of the county in which the criminal charges exist, and to the defendant's attorney. Penal Code section 1370(c)(2).

2. Time spent on an IST commitment

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 treatment facility, county jail as an IST, or outpatient program toward any prison time he must serve for the underlying offense. Penal Code sections 1375.5(a)-(b). 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. 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 the "maximum time" as an IST if his commitment changes to a specific legal status, under a type of LPS commitment known as a "Murphy" or "Hofferber" conservatorship. This type of conservatorship can last for one year but can be extended indefinitely so long as criteria are met. A legislator named "Murphy" introduced this law.

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 a non-dismissed 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.

The standard of proof used to determine dangerousness in a Murphy conservatorship is beyond a reasonable doubt. The standard of proof to find that the defendant is still incompetent as a component of a Murphy conservatorship is merely preponderance of the evidence. This differs from an LPS confinement based on grave disability which must be established beyond a reasonable doubt, *Conservatorship of Hofferber* (1980) 28 Cal.3d 161.

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

b) LPS conservatorship

When an IST defendant does not qualify under the “Murphy” conservatorship which follows after an IST commitment, he may still be committed under LPS conservatorship. This type of commitment are for persons who, because of chronic alcoholism or mental disorder, are “gravely disabled” -- unable to provide for food, clothing or shelter. Welfare and Institutions Code sections 5008(h)(1)(A)& (h)(2). Note that this LPS conservatorship usually does not necessarily follow an IST finding but could.

H. Change of Placement, Dismissal of Charges

If a change in placement is proposed for the defendant under an LPS conservatorship found under Welfare and Institutions Code section 5008(h)(1), the court shall provide notice and opportunity to be heard about the proposed placement to the sheriff and the district attorney in the county in which the criminal charges or revocation proceedings are pending. Penal Code section 1370(c)(3).

If the defendant is confined in a treatment facility, a copy of any report to the committing court about the defendant’s progress toward recovery of mental competence shall be provided by the committing court to the prosecutor and defense counsel. Penal Code section 1370 (c)(4).

The criminal action remains subject to dismissal except when there is an alleged violation of mandatory supervision. If the criminal action is dismissed, the court shall send a copy of the order of dismissal to the community program director or a designee. In a proceeding alleging a violation of mandatory supervision, if a person is not placed under a conservatorship or if the conservatorship is terminated, the court shall reinstate mandatory supervision and may change the terms and conditions of supervision which could include appropriate mental health treatment. Or the court could refer the matter to a local mental health court, reentry court, or other collaborative justice court available to improve the mental health of the defendant. Penal Code section 1370(d).

If the criminal action is dismissed, the defendant shall be released from commitment but without prejudice to initiate any proceedings under the LPS Act Welfare and Institutions Code sections 5000 et seq., Penal Code section 1370(e). This means that there could be a separate court proceeding for an LPS conservatorship.

I. Review of IST Status and Restoration of Competency

1. How can the IST status be reviewed?

If a progress report shows that there is no likelihood that an IST defendant will regain competency in the future, he must be returned to the committing court for civil commitment proceedings. Penal Code sections 1370(b)(1)(A), 1370.01(b), & 1370.1(b)(1); *People v. Superior Court (Lopez)* (2005) 125 Cal.App.4th 1558.

If the IST defendant is ineligible for conservatorship, unlikely to become competent, or the maximum term of confinement has been reached, the court must release the defendant from confinement. Penal Code sections 1370(c)(1)-(2).

2. What happens after a defendant is restored to competency?

After competency is restored, criminal proceedings are resumed – not begun anew. For example, an IST defendant who has already been held to answer on felony charges is not entitled to a new preliminary hearing, unless there are 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, a mistrial or a new trial is not required. The court decides whether a person is competent to stand trial and the matter cannot be waived by the defendant or counsel. *People v. Smith* (2003) 110 Cal.App.4th 492.

If a defendant requires ongoing 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 section 1372(e).

When a hospital has certified that a defendant was not likely going to gain competency and has recommended conservatorship proceedings to be started, the defendant does not then have a right to a competency hearing. *People v. Quiroz* (2016) 244 Cal.App.4th 1371.

3. Certificate of competency and process

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 the state will only pay for ten days of additional state hospital treatment. Penal Code section 1372(a)(3)(C).

A person who has regained competency and has been certified as restored to competency may be returned to a facility or hospital of their original commitment, or other approved secure facility. The recommendation for type of placement shall be based on the opinion that the person will need continued treatment in that facility in order to maintain competence to stand trial or that placing the person in a jail environment would create a substantial risk that the person would again become incompetent to stand trial before criminal proceedings could be resumed. Penal Code section 1372(e).

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. Penal Code sections 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.

A defendant's procedural due process claim in the trial court that he was tried while mentally incompetent was enough to allow for a substantive due process claim on federal habeas corpus review. *Lounsbury v. Thompson* (9th Cir. 2004) 374 F.3d 785.

J. Judicial Review of a Competency Determination

1. Can a defendant appeal a determination of lack of 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* (9th 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 decision and decides 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. 4th 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.

In overturning a finding that a defendant was competent to stand trial, the court did not abuse its discretion by reviewing the jury verdict to closer than usual scrutiny because the right to jury trial on the issue of competency is statutory rather than constitutional. Also, 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.

2. Can a defendant challenge a competency determination through a writ proceeding?

A defendant who is incompetent to stand trial maintains due process rights under *Sell v. United States* (2003) 539 U.S. 166 related to treatment with involuntary antipsychotic medications. Penal Code section 1369.1(b). A defendant can file a petition for habeas corpus to challenge an order authorizing a treatment facility or outpatient program to involuntarily administer antipsychotic medication as a person found incompetent to stand trial. Penal Code section 1370(h). A defendant can challenge a finding of IST and subsequent commitment in the Superior Court through filing a petition for a writ of habeas corpus. Welfare and Institutions Code section 7250; Penal Code section 1473.

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