

# Juvenile Competency Statutes: A Model for State Legislation

KELLIE M. JOHNSON\*

“Many things can wait; the child cannot. Now is the time his bones are being formed, his mind is being developed. To him, we cannot say tomorrow; his name is today.”<sup>1</sup>

INTRODUCTION.....	1068
I. JUVENILE JUSTICE IN AMERICA: ORIGINS AND TRANSFORMATIONS .....	1069
A. <i>A Targeted History of the Juvenile Justice System</i> .....	1069
B. <i>Transformation of the Juvenile Justice System:</i> <i>In re Gault and Subsequent Legislation</i> .....	1070
II. THE ADULT COMPETENCY RIGHT .....	1072
III. JUVENILE COMPETENCY AND THE NEED FOR STATUTORY DEFINITION .....	1074
A. <i>Supreme Court Ambiguity and State Power</i> .....	1074
B. <i>The Need for State Juvenile Competency Statutes</i> .....	1075
C. <i>An Example of the Problem: Indiana’s Response to</i> <i>Juvenile Competency</i> .....	1076
IV. THE ROLE OF DEVELOPMENTAL PSYCHOLOGY AND BIOLOGICAL RESEARCH .....	1077
A. <i>Developmental Psychology and Juvenile Competency</i> .....	1077
B. <i>NIMH Study on Juvenile Biological Brain Development</i> .....	1080
V. CURRENT STATE STATUTES AS A GUIDE FOR FUTURE JUVENILE COMPETENCY LEGISLATION .....	1081
A. <i>Definition of “Competence”</i> .....	1082
B. <i>Procedure for Raising Competency Issue</i> .....	1082
C. <i>Experts</i> .....	1082
D. <i>Expert Report Criteria</i> .....	1083
E. <i>Causes of Incompetency</i> .....	1085
F. <i>The Aftermath of an Incompetency Finding</i> .....	1087
VI. TOWARD A MODEL JUVENILE COMPETENCY STATUTE.....	1089
CONCLUSION.....	1089
APPENDIX.....	1090

---

\* J.D. Candidate, 2006, Indiana University School of Law–Bloomington; B.A. Indiana University, 2003. I would like to thank Professor Michael Jenuwine for his insights and ideas on this topic; Jules Asher, Jay Giedd, and the National Institute of Mental Health for their informative studies; and Thomas Grisso for being a pioneer in the field of juvenile competency. Most of all, I would like to thank my parents, David and Patricia, and Matthew. None of this would be possible without your constant love and support, and for that I am grateful beyond words.

I. Gabriela Mistral, Chilean Poet and 1945 Nobel Prize Winner in Literature, <http://www.nsd.c.org/library/words.cfm> (last visited Jan. 26, 2006).

## INTRODUCTION

Juvenile justice is a relatively new system in the United States. Although many assume that the juvenile justice system existed at the start of our nation, its origins actually date back little more than a century.<sup>2</sup> Even so, juvenile offenders did not receive court-recognized constitutional protections until the mid-1960s, and despite the Court's recognition of these rights, the due process protections of the juvenile justice system still remain in flux today.<sup>3</sup> Increased juvenile accountability, more punitive punishments, and frequent transfers to the adult penal system render the groundwork of the juvenile system volatile.<sup>4</sup> This recent trend toward a more adversarial juvenile justice system demands more extensive juvenile due process protection during delinquency hearings.

While the Supreme Court has recognized some rights and due process protections for juveniles, it has never explicitly recognized a juvenile's right to be found competent before a juvenile delinquency proceeding. Therefore, states are left with the power to protect, reject, or ignore a juvenile's competency right. States need to recognize juvenile competency rights in order to adequately protect our nation's youth from an increasingly punitive system. This Note outlines the history of juvenile competency and the wide array of solutions adopted by various states. It ultimately shows the need for each state to enact specific juvenile competency legislation that defines and outlines the juvenile competency right as supported by scientific, developmental, and psychological evidence. Many states do not have juvenile competency legislation, and several of the states that do have legislation need to update their statutes to specifically address key issues. This Note analyzes common provisions of existing state juvenile competency statutes and makes suggestions for future legislation. Finally, this Note drafts a "model" state juvenile competency statute by combining common provisions from existing state statutes with new provisions supported by existing scientific and developmental research.

Part I gives a brief overview of the historical origins of the American juvenile justice system and the transformation of the system through modern United States Supreme Court decisions. Part II outlines the origins of the adult right to competency and the standards that the Supreme Court created for adult competency assessment. Part III describes the unsettled nature of the juvenile competency right and emphasizes the need for each state to have a detailed juvenile competency statute. Part III also uses the recent Indiana Supreme Court decision, *In re K.G.*,<sup>5</sup> as an illustration of the problem facing states that recognize the juvenile competency right but do not have the proper legislation to fully protect juveniles in those states. Part IV uses developmental

---

2. DEAN J. CHAMPION, *THE JUVENILE JUSTICE SYSTEM: DELINQUENCY, PROCESSING, AND THE LAW* iii (1992).

3. *Id.*; see also *In re Gault*, 387 U.S. 1 (1967) (extending traditional adult due process procedural safeguards to juveniles in the juvenile justice system); *Kent v. United States*, 383 U.S. 541 (1966) (holding that for a juvenile court waiver of jurisdiction the juvenile court must conduct a meaningful review, and the juvenile is entitled to a hearing, counsel access to records, and a reasoned statement from the juvenile court).

4. See SUSAN GUARINO-GHEZZI & EDWARD J. LOUGHRAN, *BALANCING JUVENILE JUSTICE* (2004).

5. 808 N.E.2d 631 (Ind. 2004).

psychology and developmental research on juveniles to illustrate the proven difference between the adult brain and the juvenile brain. Part V surveys existing state juvenile competency statutes and outlines the common provisions that are necessary for a complete and detailed statute. Finally, Part VI explains the model juvenile competency statute which is constructed using existing legislation, developmental research, and comprehensive provisions. The proposed Model Statute is attached as Appendix.

## I. JUVENILE JUSTICE IN AMERICA: ORIGINS AND TRANSFORMATIONS

### A. A Targeted History of the Juvenile Justice System

The road to the modern juvenile justice system began in 1899 when the Illinois Legislature created the first juvenile court for youths aged eight to seventeen years.<sup>6</sup> The Illinois Juvenile Court Act served as a model for the rest of the states, and all but three states adopted similar acts by 1920.<sup>7</sup> Political Progressives envisioned a “benevolent treatment agency staffed by expert judges and assisted by social services personnel.”<sup>8</sup> This system became known as the “rehabilitative model” of juvenile justice due to its focus on the treatment of juveniles.<sup>9</sup> Progressives believed that children were not morally accountable for their behavior due to their limited cognitive, social, and moral development; therefore, the disposition of juvenile proceedings focused on restoring the youth to industrious members of society.<sup>10</sup> This rehabilitative focus was one of the primary differences between the juvenile system and its adult counterpart.

The legal foundation of the juvenile justice system is based on the English common law doctrine of *parens patriae*.<sup>11</sup> The doctrine grants juvenile courts broad power to make decisions regarding the disposition of delinquents.<sup>12</sup> These juvenile courts were supposed to administer “personalized justice” to achieve the rehabilitative goal.<sup>13</sup> Originally, the juvenile justice system granted judges broad discretion to conduct very informal proceedings.<sup>14</sup> This informality was a major part of the rehabilitation process, and it resulted in proceedings that were minimally adversarial.<sup>15</sup>

---

6. MARY J. CLEMENT, *THE JUVENILE JUSTICE SYSTEM: LAW AND PROCESS* 16 (2d ed. 2002). The Chicago Juvenile Court came into existence with the child-saving movement and the violent decline of youth reform institutions. *Id.*

7. Allison Boyce, *Choosing the Forum: Prosecutorial Discretion and Walker v. State*, 46 ARK. L. REV. 985, 986 (1994).

8. *Id.* See generally Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 474 (1987) (attributing the popularity of the Progressive movement in the early 1900s to the social problems caused by rapid industrialization and modernization).

9. Boyce, *supra* note 7, at 986; see also Feld, *supra* note 8, at 474 (overarching theme in all Progressive reforms was to “rehabilitate the deviant”).

10. Boyce, *supra* note 7, at 986.

11. See CHAMPION, *supra* note 2, at 18.

12. *Id.*; see also *In re K.G.*, 808 N.E.2d 631, 636 (Ind. 2004) (“[T]he *parens patriae* doctrine gives juvenile courts power to further the best interests of the child, which implies a broad discretion unknown in the adult criminal court system.”).

13. CLEMENT, *supra* note 6, at 19.

14. Boyce, *supra* note 7, at 987. These proceedings were not open to the public and did not

Although subsequent United States Supreme Court decisions somewhat eroded the doctrine of *parens patriae*,<sup>16</sup> the standard still does influence the modern juvenile justice system. The majority of current juvenile dispositions involve relatively mild sanctions such as probation, community service, therapy, or financial restitution to the victim.<sup>17</sup> Juvenile confinement is a last resort for most offenses,<sup>18</sup> which demonstrates continued dominance of the rehabilitative purpose. Today, juvenile justice judges typically work with mental health professionals and social welfare staff to determine an individualized treatment plan for the delinquent youth.<sup>19</sup>

*B. Transformation of the Juvenile Justice System:  
In re Gault and Subsequent Legislation*

The United States Supreme Court altered the structure of the juvenile justice system with its decision in *In re Gault*.<sup>20</sup> Before *In re Gault*, it was possible for juveniles to be institutionalized because of their misconduct, but the informal juvenile proceedings lacked many of the procedural safeguards of the adult criminal system. The *In re Gault* decision held that the informal procedure of the juvenile system violated the Due Process Clause of the Fourteenth Amendment.<sup>21</sup> “[I]t would be extraordinary if our Constitution did not require the [juvenile system to have the] procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo court.”<sup>22</sup> The decision specifically extended certain procedural rights to juveniles during the adjudication of delinquency proceedings, including the right to counsel, the right to notice of charges, the right to confrontation, the privilege against self-incrimination, the right to appellate review, and the right to a transcript of the proceedings.<sup>23</sup> Further Supreme Court decisions provided juveniles with double jeopardy protection and required the government to prove guilt

---

have any formal records or transcripts. See Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1133 n.105.

15. Boyce, *supra* note 7, at 987.

16. See, e.g., *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

17. CHAMPION, *supra* note 2, at 19 (“[T]hese [nominal and conditional] sanctions are intended to reflect the rehabilitative ideal that has been a major philosophical underpinning of *parens patriae*.”).

18. *Id.* However, some juvenile justice experts support modern contemporary jurisprudence that stresses juvenile accountability and the “get tough” movement. This movement has led to an increase in punitive juvenile dispositions. *Id.*

19. Thomas Grisso, Michael O. Miller & Bruce Sales, *Competency to Stand Trial in Juvenile Court*, 10 INT’L J.L. & PSYCHIATRY 1, 1 (1987).

20. 387 U.S. 1 (extending many adult criminal justice procedural safeguards to the juvenile justice system).

21. *Id.* at 13 (“[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.”).

22. *Id.* at 27–28.

23. Christine A. Sullivan, *Statutory Reform in the Georgia Juvenile Court System: Juvenile Competency Issues Finally Addressed*, 15 GA. ST. U. L. REV. 879, 882 (1999). Note that the Court did not specifically extend the right for a juvenile to be found competent in juvenile court. See *infra* Part III.A.

beyond a reasonable doubt.<sup>24</sup> These procedural requirements introduced adversarial tactics and formality into a system otherwise devoid of these characteristics.

Advocates of juvenile procedural reform were confident that these Supreme Court decisions would provide juveniles with necessary constitutional protections without damaging the beneficial aspects of the juvenile system.<sup>25</sup> Nevertheless, these reforms were a significant departure from the framework of the original Illinois Juvenile Court Act.<sup>26</sup> Four principal themes emerged in response to the procedural reforms: a jurisdictional reorganization over juveniles, a greater emphasis on criminal offenses rather than on the youthful offenders, a need to limit dispositional judicial discretion, and a need for more formal adjudicative procedures.<sup>27</sup> The Court's decisions inadvertently initiated a convergence between the juvenile system and the adult criminal system spurring new legislation in the states.<sup>28</sup> Within twenty years of *In re Gault* and its progeny, many state legislatures passed statutes that "criminalized" juvenile courts and mandated more punitive punishments for youthful offenders.<sup>29</sup> These statutes frequently removed non-criminal cases from the jurisdiction of juvenile courts, increased the frequency of juvenile transfers to criminal court, and focused on juvenile accountability.<sup>30</sup> Ironically, the procedural safeguards intended to protect a juvenile's due process rights became the same safeguards that subjected the juvenile to a harsher, more punitive system.

The convergence of the juvenile and criminal justice systems continued throughout the 1980s. The focus turned to the specific offenses committed by juveniles and the harm inflicted upon their innocent victims.<sup>31</sup> The cry in many statehouses became, "[d]o an adult crime, do adult time."<sup>32</sup> Legislatures responded with an enhanced statutory focus on harsher punishments for juvenile offenders, and juveniles began to pay for their misconduct with time.<sup>33</sup> No longer were the original reformatory goals of the juvenile system enough to pacify the public.

---

24. *Breed v. Jones*, 421 U.S. 519 (1975); *In re Winship*, 397 U.S. 358 (1970).

25. CHRISTOPHER P. MANFREDI, *THE SUPREME COURT AND JUVENILE JUSTICE* 157 (1998). Advocates for this procedural reform referred to it as the "constitutional domestication" of the contemporary juvenile proceeding. While supporters recognized that the reforms would have a strong impact on the administration of juvenile justice, they did not believe that the reforms would drastically alter the basic principles and goals of the juvenile system. *Id.* at 156.

26. *Id.* at 159.

27. *Id.* at 169. Note that each of these themes is a significant departure from the rehabilitative and relatively unstructured setup of the original juvenile justice system.

28. *Id.* at 159, 169.

29. *Id.* at 169. States such as California, Delaware, Florida, Maine, Minnesota, Nebraska, and West Virginia enacted statutes designed to increase juvenile accountability and protect the public from delinquent youth. For example, California's Welfare and Institutions Code included, as a part of its purpose, "protect[ing] the public from criminal conduct by minors . . . [and] inpos[ing] on the minor a sense of responsibility for his or her own acts." *Id.*

30. *Id.*

31. FRANK W. MILLER, ROBERT O. DAWSON, GEORGE E. DIX & RAYMOND I. PARNAS, *THE JUVENILE JUSTICE PROCESS: CASES AND MATERIALS* 1 (4th ed. 2000). Note that Miller refers to the United States Supreme Court's *In re Gault* decision as "the foundational legal event of the modern juvenile justice system in America." *Id.*

32. *Id.*

33. *Id.* at 1-2 ("[L]egislatures increased the criminal-law attributes of the juvenile system

The aftermath of these important judicial decisions and the subsequent state statutory reforms still affect the juvenile justice system today. The increase in juvenile crime peaked in 1995 and has since been on a steady decline.<sup>34</sup> Nevertheless, the statutory framework from the mid-1980s remains, and the “juvenile system today much more closely resembles the criminal system.”<sup>35</sup> It is important that juveniles understand the adjudicative process and the ramifications of delinquency proceedings as an increasing number of adolescents are in jeopardy of punishment formerly reserved for adults.<sup>36</sup> Juvenile comprehension and participation is necessary for a fair and just American juvenile justice system.

## II. THE ADULT COMPETENCY RIGHT

The adult’s right to be competent before proceeding through the criminal process has historic origins that date back to English common law.<sup>37</sup> As early as 1790, an English court ruled that a defendant could not be tried unless “by collecting together his intellects, and having them entire, he shall be able so to model his defense as to ward off the punishment of the law.”<sup>38</sup> Early American courts also recognized the incompetency plea, as exemplified by the court declaration that the man who attempted to assassinate President Andrew Jackson was unfit to stand trial.<sup>39</sup> In 1899, a federal court declared that the right to be competent while on trial derived from the Due Process Clause of the Constitution.<sup>40</sup> This constitutional basis gave courts around the country a legal reason not to place an incompetent adult on trial.

The modern United States Supreme Court recognized that the “prohibition [of an incompetent to stand trial] is fundamental to an adversary system of justice.”<sup>41</sup> In *Dusky v. United States*, the Court stated that the “test [for competence] must be whether the [adult defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of proceedings against him.”<sup>42</sup> The Court expanded the

---

itself, for example, by providing for criminal type record-keeping . . . and providing that juvenile court hearings that previously were closed to the public would be open, just like [adult] criminal trials.”).

34. *Id.* at 2.

35. *Id.* Miller stresses that the juvenile system is still not identical to the adult criminal system, but he challenges the juvenile system to “re-define itself, its mission and its methods.” *Id.*

36. Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL’Y & L. 3, 5 (1997).

37. RALPH REISNER, CHRISTOPHER SLOBOGIN & ARTI RAI, *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 963 (4th ed. 2004).

38. Frith’s Case, 22 How. St. Tr. 307, 318 (1790).

39. REISNER ET AL., *supra* note 37, at 964.

40. *Id.* (“It is not ‘due process of law’ to subject an insane person to trial upon an indictment involving liberty or life.”). This Note focuses solely on a defendant’s right to be found competent to actually *stand trial*. Questions concerning a defendant’s competency to be *sentenced* have been raised in situations either where a “decompensation” occurs between trial and sentencing, or where the defendant pleads guilty to the charges and therefore does not go to trial. *See Saddler v. United States*, 531 F.2d 83 (2d Cir. 1976).

41. *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

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

test in *Drope v. Missouri* to include the requirement that the adult defendant be able to “assist in preparing his defense.”<sup>43</sup> A defendant *must* be able to participate in his own defense, or the due process rights provided by *Gideon v. Wainwright*,<sup>44</sup> *Pointer v. Texas*,<sup>45</sup> and *Washington v. Texas*<sup>46</sup> are illusory. The adversarial process presumes that a defendant will have adequate faculties to effectively participate in his own defense. Accordingly, the adult competency right is now a well-recognized constitutional protection, and many modern state statutes adopt the *Drope* and *Dusky* competency standards verbatim.<sup>47</sup>

The *Dusky* standard makes it clear that a determination of an adult defendant’s competency focuses on the defendant’s *present* abilities to understand the proceedings and assist his attorney.<sup>48</sup> This focus on rational and factual understanding suggests an emphasis on cognitive functioning, and courts have held that “the mere fact that a defendant has psychotic symptoms or has a particular IQ does not mean that the defendant is incompetent to stand trial. Neither mental illness nor the defendant’s need for treatment is [alone] sufficient for an incompetency finding.”<sup>49</sup> This emphasis on a multi-factored analysis illustrates the importance of cognitive ability and functioning in the competency determination.<sup>50</sup>

Most jurisdictions allow any party to raise an issue regarding the defendant’s competency: the trial judge *sua sponte*, the defense attorney, or the prosecuting attorney.<sup>51</sup> If the adult’s incompetency appears to be related to a mental illness or possible mental retardation, the court will order one or more mental health professionals to evaluate the defendant’s mental state.<sup>52</sup> States vary as to which party bears the burden of proving that the defendant is competent or incompetent, but most states have adopted a preponderance of the evidence standard for the party determined to bear that burden.<sup>53</sup> If the defendant is found competent to stand trial the proceedings resume. However, if the defendant is found incompetent, most states then require treatment for the purpose of restoring competency.<sup>54</sup> In *Godinez v. Moran*, the Supreme Court stated, “while States are free to adopt competency standards that are

---

43. *Drope*, 420 U.S. at 171.

44. 372 U.S. 335 (1963) (holding that the Due Process Clause extends the Sixth Amendment right to counsel for federal criminal defendants to state criminal defendants).

45. 380 U.S. 400 (1965) (holding that the Due Process Clause extends the Sixth Amendment right for a federal criminal defendant to confront his accusers to state criminal defendants).

46. 388 U.S. 14 (1967) (holding that the Due Process Clause extends the Sixth Amendment right for a federal criminal defendant to present witnesses to state criminal defendants).

47. REISNER ET AL., *supra* note 37, at 965.

48. *Id.*

49. *Id.* at 966. In order for a defendant with a mental illness to be found incompetent to stand trial, the mental illness must “adversely affect [defendant’s] ability to understand his circumstances and make rational decisions about his case.” *Ryan v. Clarke*, 281 F. Supp. 2d 1008, 1044 (D. Neb. 2003) (citing *Rees v. Peyton*, 384 U.S. 312 (1966)).

50. This rationale for the adult competency right supports a full extension of the competency right to juveniles in the juvenile justice system. *See infra* Part IV.

51. REISNER ET AL., *supra* note 37, at 977.

52. *Id.*

53. WAYNE R. LAFAYE, *SUBSTANTIVE CRIMINAL LAW* § 8.1(a) (2d ed. 2003).

54. REISNER ET AL., *supra* note 37, at 977.

more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements.<sup>55</sup> Therefore, the Court left specific adult competency statute formulations up to the states.

The Supreme Court has recognized that the juvenile justice system and the adult criminal justice system are distinct entities with different procedures and goals.<sup>56</sup> Therefore, the Court's decisions on adult competency standards do not automatically extend to juveniles in delinquency proceedings.

### III. JUVENILE COMPETENCY AND THE NEED FOR STATUTORY DEFINITION

#### A. Supreme Court Ambiguity and State Power

Although *In re Gault* changed the procedural structure of the juvenile justice system, it only extended a few adult due process procedural protections to juveniles. The United States Supreme Court specifically tendered the right to notice, right to counsel, right to confrontation, privilege against self-incrimination, right to appellate review, and right to a transcript of the proceedings.<sup>57</sup> The Court did not specify if this was an exhaustive list or if state juvenile courts could apply at their discretion additional procedural safeguards to juveniles.

Notably *absent* from the Court's list is a juvenile's right to be found competent. Does a juvenile have the right to be found competent before a juvenile court delinquency proceeding is held? Should states automatically assume that this "right" falls within the same procedural boundaries of the extended *Gault* protections? Can an eight-year-old offender *ever* be competent for a juvenile delinquency proceeding? Today, nearly forty years after *In re Gault*, the United States Supreme Court has never directly answered any of these important questions.

Without Supreme Court guidance, states have developed different approaches to juvenile competency. As of 2002, "thirty-five states and the District of Columbia [had] case law and/or statutory provisions pertaining to adjudicative competence in juvenile court."<sup>58</sup> Conversely, Oklahoma case law flatly rejects that a juvenile has a right to be found competent.<sup>59</sup> The Oklahoma court stated, "[T]he nature of juvenile proceedings themselves, being specifically not criminal proceedings and being directed towards rehabilitation of a juvenile, indicates to this Court the intent of the [Oklahoma] legislature to deal with juveniles regardless of mental state in an effort to provide rehabilitation and necessary treatment."<sup>60</sup> As of 2002, the remaining fourteen states had

---

55. *Godinez v. Moran*, 509 U.S. 389, 402 (1993).

56. *See In re Gault*, 387 U.S. 1 (1967).

57. *Id.*

58. Lynda E. Frost & Adrienne E. Volenik, *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent*, 14 WASH. U. J.L. & POL'Y 327, 332 (2004) (quoting Richard E. Redding & Lynda E. Frost, *Adjudication Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL'Y & L. 353, 368 (2001)) (alteration in original).

59. *See G.J.I. v. State*, 778 P.2d 485 (Okla. Crim. App. 1989). Oklahoma is the only state to explicitly reject a juvenile's right to be found competent before a delinquency proceeding.

60. *Id.* at 487. Since *G.J.I.*, the juvenile criminal justice system has become more criminalized and delinquency hearing sentencing is more severe. Therefore, the Oklahoma courts might overturn *G.J.I.* and acknowledge a juvenile competency right if a similar case were



not addressed the juvenile competency issue.<sup>61</sup> Even the state juvenile competency statutes that do exist vary immensely from state to state.<sup>62</sup>

Most states recognize that juveniles have a right to be found competent before proceedings begin, but states differ on how to procedurally determine if a juvenile is competent. The Louisiana Supreme Court, in a manner similar to other state courts, justified a juvenile's competency right under Louisiana law on the ground that "the right not to be tried while incompetent is a due process-fundamental fairness right . . . [that should] be applicable to juvenile proceedings, unless some essential end of the juvenile justice system will be thwarted by its application."<sup>63</sup> This rationale alone does not adequately recognize that there are *fundamental developmental differences* between adult criminal defendants and juvenile delinquents that should be considered in every juvenile competency determination. These developmental differences need to be statutorily acknowledged in order to adequately protect delinquent youth in juvenile proceedings.<sup>64</sup>

### B. The Need for State Juvenile Competency Statutes

States that recognize the juvenile competency right need juvenile competency statutes to adequately protect the due process rights of juveniles in their state. States that recognize the right but do not have detailed juvenile competency statutes are undermining the recognized competency right by not providing adequate protection for juveniles in their system. Furthermore, judges in those state systems do not have a guide for making a juvenile competency determination, and this can lead to the unequal administration of justice around the state. Unfortunately, this problem is widespread. Several states that recognize the juvenile competency right either have no statute to correspond with the recognized right or have an inadequate statute that does not define the key terms or procedures.

Therefore, many of the enacted juvenile competency statutes could use revisions.<sup>65</sup> The statutes are often vague and leave much room for interpretation of key issues. All juvenile competency statutes should *at least* address the definition of competency, the procedure for raising the competency issue, the requirements for expert evaluation, specific expert report criteria, acceptable sources of incompetency, and the aftermath of an incompetency finding. Each of these provisions should also address the specifics of those requirements. For example, when a state determines that an expert should evaluate a potentially incompetent juvenile, the statute should specify the number of

---

heard today.

61. Frost & Volenik, *supra* note 58, at 332. Note that the Indiana Supreme Court addressed the issue of juvenile competency in May 2004 and held that juveniles do have a right to be found competent. See *In re K.G.*, 808 N.E.2d 631 (Ind. 2004); *infra* Part III.C.

62. See *infra* Part V.

63. *In re Causey*, 363 So. 2d 472, 476 (La. 1978).

64. See *infra* Parts IV, VI, and Appendix.

65. See, e.g., FLA. STAT. ANN. § 985.223(2) (West 2001) (does not define the term "immaturity" and does not give a specific chronological age or range); VA. CODE ANN. § 16.1-356 (2005) (does not mention mental illness or mental retardation, and does not specify the number of evaluating experts or a required professional degree); WIS. STAT. ANN. § 938.295(2)(b) (West 2004) (does not give specific criteria for the expert report other than a broad definition of the *Dusky* competency standard).

required experts, the professional degrees the experts must possess, and which parties can retain experts.<sup>66</sup> It is important that a statute adequately address these issues to avoid confusion and delineate standards that will be followed equally by each juvenile court within the state. Detailed statutes increase the likelihood that justice will be equally administered across the state, thereby increasing the likelihood that juvenile rights will be equally protected.

Comprehensive juvenile competency legislation becomes more important as the juvenile justice system becomes more adversarial. In the wake of significant United States Supreme Court decisions<sup>67</sup> and public outcry for juvenile responsibility,<sup>68</sup> juvenile system punishments continue to grow increasingly punitive. It is crucial for juveniles to adequately *understand* the proceedings against them as the outcomes are increasingly similar to adult punishments. As a result, a juvenile's right to be found competent is vital. This state-recognized right must be supported by specific state legislation that specifies evaluation procedures, reporting techniques, and key definitions. Comprehensive statutes allow juvenile judges to obtain information necessary to determine a juvenile's competency. This important issue must be addressed immediately both in states without juvenile competency legislation and in states with deficient statutes.

### *C. An Example of the Problem: Indiana's Response to Juvenile Competency*

The Indiana Supreme Court first addressed the juvenile competency issue in 2004. *In re K.G.*<sup>69</sup> granted Indiana juveniles the right to be found competent before a criminal delinquency proceeding, and also held that Indiana's adult competency statute did not apply to these juvenile cases. The court noted that neither Indiana case law nor Indiana statutory provisions specifically recognized the juvenile competency right. Nonetheless, the court did not apply section 31-32-1-1 of the Indiana Code,<sup>70</sup> which would have granted the adult competency right to juveniles by default.<sup>71</sup> The court stated, "[W]e do not believe the [Indiana] Legislature intended that the adult competency statute should apply to juveniles."<sup>72</sup> Instead, the court utilized section 31-32-12-1 of the Indiana Code<sup>73</sup> and granted the juvenile court the power to examine

---

66. States can choose to have experts appointed by the court, the juvenile, the state, or they can allow each of these parties to retain their own experts. Furthermore, states can choose whether to allow psychologists, psychiatrists, medical doctors, or a combination of professionals to evaluate the juvenile.

67. *See, e.g., In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

68. *See supra* notes 27–36 and accompanying text.

69. 808 N.E.2d 631 (Ind. 2004).

70. "If a child is alleged to be a delinquent child, the procedures governing [adult] criminal trials apply in all matters *not* covered by juvenile law." IND. CODE § 31-32-1-1 (2004) (emphasis added). This section specifies that the adult competency standard *should* apply to juveniles since no Indiana juvenile statute addresses juvenile competency.

71. *In re K.G.*, 808 N.E.2d at 637.

72. *Id.* at 637.

73. The statute provides the circumstances under which an Indiana juvenile court may "authorize mental or physical examinations or treatment." IND. CODE § 31-32-12-1 (2004). Note that this statute *does not mention competency*.

juveniles with possible competency issues. The court held that the statute “allows for the examination and/or treatment of a child after a delinquency petition has been filed in order to determine the child’s competency.”<sup>74</sup> Ironically, the court admitted that it construed section 31-32-12-1 “comprehensive[ly]” and that “the statute does not specifically mention ‘competency.’”<sup>75</sup>

Section 31-32-12-1 of the Indiana Code is too vague to protect the important rights it now attempts to guard. To adequately protect the rights of delinquent juveniles, the State *must* define juvenile competency with more than one vague statute that does not even use the word “competency.” Section 31-32-12-1 is not sufficient to guide Indiana juvenile courts in juvenile competency determinations. The statute allows a juvenile court to authorize mental or physical examinations and treatment if a physician certifies that an emergency exists.<sup>76</sup> Unfortunately, the statute does not specify what constitutes an emergency or what type of mental examination can be conducted during an “emergency.” Although the statute does authorize an examination to provide information for the dispositional hearing, it is not specific enough to adequately guide a juvenile court in a competency determination. Indiana juvenile courts need specific definitions to use and procedures to follow during juvenile competency determinations.

Since the United States Supreme Court left juvenile competency determinations to the individual states, the duty falls on each state to provide guidance to its juvenile court if the state chooses to recognize the juvenile competency right. The Indiana Supreme Court correctly followed many other states and recognized a juvenile’s right to be found competent before a delinquency proceeding, but the court did not give the Indiana juvenile courts proper guidance on *how* to define, determine, or assess juvenile competency. Therefore, as with most state legislatures, the Indiana General Assembly must pass legislation to protect the right the Indiana Supreme Court recognized.

Indiana is not the only state in this situation. Many states do not even have juvenile competency legislation, and of the states that do, many have incomplete and inadequate statutes. Legislatures in these states should take cues from the minority of states with decent juvenile competency statutes.<sup>77</sup> An analysis of diverse state legislation can provide a state legislature with the information necessary to enact a statute that protects a juvenile’s right to competency and also guides juvenile courts in the proper competency determination procedure.

#### IV. THE ROLE OF DEVELOPMENTAL PSYCHOLOGY AND BIOLOGICAL RESEARCH

##### *A. Developmental Psychology and Juvenile Competency*

New legal reforms and the increase of punitive sentences in the juvenile justice system require us to take a serious look at the issues surrounding juvenile competence. Traditionally, mental illness or mental retardation provided the basis of an incompetency finding, but modern developmental psychologists argue that, due to the increase of younger adolescents in juvenile court, the competence question should also

---

74. *In re K.G.*, 808 N.E.2d at 639.

75. *Id.*

76. IND. CODE § 31-32-12-1(1).

77. *See infra* Part V.

focus on *developmental immaturity*.<sup>78</sup> In 1995, Vance Cowden and Geoffrey McKee conducted a study where forensic mental health professionals evaluated the competency of 136 juvenile delinquents.<sup>79</sup> The clinicians reviewed and assessed each juvenile's offense and school records, and conducted clinical interviews with the juvenile and his family.<sup>80</sup> The study found that the percentage of competent adolescents increased with chronological age.<sup>81</sup> The study showed that twenty percent of the nine- to twelve-year-olds were competent, half of the thirteen- to fourteen-year-olds were competent, and the percentage of competent fifteen- and sixteen-year-olds equaled percentages found in studies of adult competency.<sup>82</sup> The Cowden and McKee study showed a clear correlation with the age of the defendant and the likelihood of competence. Thus, as developmental skills and capacities increase with age, so too does the percentage of juveniles found competent.

Developmental psychology provides valuable insight into the juvenile competency field. Richard Bonnie classifies relevant competency abilities using two concepts from the *Dusky* standard.<sup>83</sup> First, the abilities related to the juvenile's competence to assist counsel must be analyzed. These abilities include the capacity to understand the charges, understand the possible penalties, assist counsel, and understand the roles of various people in the trial process.<sup>84</sup> In addition, the juvenile must appreciate the significance of each of these matters for *his own* situation.<sup>85</sup> For example, a juvenile's understanding of possible dispositions of a delinquency proceeding is of little value if the juvenile does not appreciate that these dispositions can occur in *his* case. The second prong of Bonnie's classification is "decisional competence." This prong refers to the capacity of a defendant to engage in the reasoning process and make specific judgments with input from counsel.<sup>86</sup> Decision making involves "the ability to consider the potential consequences of several options, to make subjective judgments about the desirability and probability of those consequences, and to compare them."<sup>87</sup> Developmental psychologists advocate that adolescents have limited abilities to appreciate and understand many of the above concepts due to their immature developmental capacities.<sup>88</sup>

---

78. Grisso, *supra* note 36, at 6 ("[Unfortunately], [c]ourt clinicians have little to guide them in assisting the courts to weigh adolescents' immaturity as it relates to trial competence.").

79. *Id.* at 7.

80. *Id.* The ultimate decision of competency was made by a clinical team rather than one clinician.

81. *Id.* Although this study does provide valuable initial data for understanding juvenile competence, it does not specifically divide competency characteristics into the categories that may be helpful to a juvenile in a court proceeding.

82. *Id.*

83. *Id.* at 8.

84. *Id.*

85. *Id.* ("For example, a defendant's understanding that defense attorneys are intended as advocates will be of little value if mental disorder or developmental disability prevents the defendant from believing (appreciating) that this advocacy will be provided in his or her case.").

86. *Id.*

87. *Id.*

88. See, e.g., Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137 (1998); Grisso, *supra* note 36; Grisso, *supra* note 19.

Juveniles' capacity for decision making in the justice system has not been extensively studied. However, existing data does suggest that certain adolescents have limited abilities in areas directly related to juvenile adjudicative competence.<sup>89</sup> Specifically, the weight of evidence suggests that juveniles thirteen-years-old or younger are at a high risk for deficits in competence-related abilities.<sup>90</sup> Unfortunately, few state statutes actually recognize age or developmental immaturity as a valid basis for a juvenile incompetency finding.<sup>91</sup> Most states require that a diagnosable mental illness or physical developmental disorder serve as the basis for an incompetency finding.<sup>92</sup> By requiring an incompetency finding to be based on a diagnosable disorder, these states ignore youth whose age-related developmental capacities alone could impair their ability to competently proceed at a hearing.

Developmental psychologists advocate that states should not require juvenile competency to be predicated on a finding of mental illness or mental retardation.<sup>93</sup> First, the mental illness requirement does not take into account the developmental concerns noted above. Second, some psychotic mental disorders, such as schizophrenia, normally do not manifest symptoms until early adulthood.<sup>94</sup> Although the typical delusions and hallucinations associated with schizophrenia may not be present in the juvenile, the early form of the disorder may still be responsible for deficits in certain capacities needed for adjudicative competency.<sup>95</sup> Consequently, a pre-schizophrenic juvenile in a delinquency proceeding will probably not exhibit the classic symptoms of schizophrenia at his young age, but the disorder may still affect his adjudicative competence. Unfortunately, state statutes that require a finding to be based on a diagnosable condition at the time of the proceeding will not recognize this pre-schizophrenic juvenile's genuine incompetency.<sup>96</sup>

---

89. See Grisso, *supra* note 36, at 9–20 (providing an in-depth look at various empirical studies relating to the interaction between juvenile development and adjudicative competence); Thomas Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333 (Aug. 2003).

90. Grisso, *supra* note 36, at 20. It is not a coincidence that thirteen seems to be the "magic age" for development and increased competence. Grisso's research is supported by the recent NIMH study on juvenile brain development. See *infra* Part IV.B.

91. Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, in *YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE* 88 (Thomas Grisso ed., 2000) ("Formalistic, disorder-oriented application of current standards, therefore, may result in unfair jeopardy for youths whose developmental incapacities impair their ability to participate in their own defense."); see also *infra* Part V.E.1.

92. See, e.g., D.C. CODE ANN. § 16-2315(c) (2005); TEX. [FAM.] CODE ANN. § 55.31(a) (Vernon 2002).

93. See Grisso, *supra* note 36; Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005).

94. *Id.* at 87; see also American Psychiatric Association, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 37 (4th ed. 1994).

95. *Id.*

96. See, e.g., TEX. [FAM.] CODE ANN. § 55.31 (Vernon 2002); *infra* Part V.E.2.

*B. NIMH Study on Juvenile Biological Brain Development*

Even juveniles without mental illness or mental retardation may be significantly developmentally impaired and incompetent to proceed in a delinquency hearing as a result of their chronological age. A study by the National Institute of Mental Health (NIMH), an agency of the United States Department of Health and Human Services, reveals that the center of reasoning and problem solving are among the last to developmentally mature in the brain.<sup>97</sup> Researchers conducted a ten-year study of brain scans of children ages four to twenty-one to see if there was a typical pattern of brain maturation during this crucial developmental period.<sup>98</sup> The study concluded that the higher-order brain centers, such as the prefrontal cortex, do not fully develop until young adulthood.<sup>99</sup>

The study specifically found that the first areas of the brain to mature are the extreme front and back regions, which are the regions associated with the most basic functions such as sense processing and movement.<sup>100</sup> The parietal lobes, which are involved in spatial orientation and language, develop next.<sup>101</sup> The prefrontal cortex, which involves "executive functions," matures last.<sup>102</sup> Just prior to puberty there is a growth spurt of gray matter in the juvenile brain, predominately in the "seat of executive functions."<sup>103</sup> "Striking growth spurts can be seen from ages six to thirteen in areas connecting brain regions specialized for language and understanding spatial relations."<sup>104</sup>

The research also compared magnetic resonance imaging (MRI) brain scans of young adults, ages twenty-three to thirty, with teens, ages twelve to sixteen. The scans looked for signs of myelin, the cylindrical covering on the axons of some neurons.<sup>105</sup> Additional myelin implies an excess of mature, efficient connections within the gray matter of the brain. As expected, a comparison of the teen and young adult brain scans showed the largest difference in myelin content in the frontal lobe, with the young adult brains containing significantly more myelin than the teenage brains.<sup>106</sup> This research

---

97. Press Release, National Institute of Mental Health, *Imaging Study Shows Brain Maturing*, (May 17, 2004), [hereinafter Press Release] available at <http://www.nimh.nih.gov/press/prbrainmaturing.cfm>.

98. *Id.*

99. *Id.* The researchers condensed fifteen years of developmental brain maturation into a six-second video that can be seen at <http://www.nimh.nih.gov/press/prbrainmaturing.mpeg> (last visited Nov. 15, 2005). For the complete scientific results, see Nitin Gogtay, et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. OF THE NAT'L ACAD. OF SCI. 8174 (2004), available at [www.pnas.org/cgi/doi/10.1073/pnas.0402680101](http://www.pnas.org/cgi/doi/10.1073/pnas.0402680101).

100. Press Release, *supra* note 97.

101. *Id.*

102. *Id.*

103. *Teenage Brain: A Work In Progress*, National Institute of Mental Health, Sept. 16, 2005, <http://www.nimh.nih.gov/publicat/teenhbrain.cfm>.

104. *Id.*

105. *Id.*

106. *Id.* The teen frontal lobe was the only lobe that appeared significantly immature in comparison to the young adult brain. Ironically, this coincides with the late teen/early twenties age-of-onset of schizophrenia, a disorder characterized by impaired executive (frontal) brain

implies that young adults are better equipped to rationalize and understand their environments due to the physical increase of myelin in the frontal lobe of the brain.<sup>107</sup>

In light of this concrete biological evidence, young juveniles should be presumed chronologically incompetent in a juvenile delinquency proceeding.<sup>108</sup> Scientific studies conclude that the executive center of the brain does not fully develop until young adulthood. The brain of a young juvenile has not yet reached the developmental capacity necessary to allow the juvenile to fully articulate his thoughts and adequately understand complex situations.<sup>109</sup> A lack of these skills can adversely affect the young juvenile in a juvenile delinquency proceeding. A young juvenile who cannot articulate pertinent thoughts to defense counsel may be hindered at legal proceedings because of this limited participation in his own defense. Juveniles who are incompetent due to developmental brain immaturity are currently not receiving full due process protection in states that recognize the juvenile competency right but do not recognize this biological origin of incompetency.

#### V. CURRENT STATE STATUTES AS A GUIDE FOR FUTURE JUVENILE COMPETENCY LEGISLATION

A survey of existing juvenile competency statutes shows that many of the existing statutes have common provisions. These common provisions include a definition of "competency," a procedure for raising the competency issue, specific requirements for expert evaluation, expert report criteria, acceptable sources of incompetency, and the aftermath of the incompetency finding. States without juvenile competency legislation, such as Indiana, should look to these common provisions as a starting point for new legislation.<sup>110</sup> Each state can modify the common provisions to fit individual state needs. It is imperative that juvenile competency legislation define important terms for juvenile courts and guide them in the actual competency determination procedure to ensure that juveniles throughout the state receive equal treatment. This Part outlines the common provisions found in juvenile competency statutes and uses existing statutes as examples.

---

functioning.

107. For further biological research on brain development, see Jay N. Giedd, et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861 (Oct. 1999); Elizabeth R. Sowell, et al., *Localizing Age-Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping*, 9 NEUROIMAGE 587 (1999).

108. This Note considers "young juveniles" to be under the age of thirteen at the time the issue of competency is raised. See *infra* Part V.E.1; Part VI (arguing that the Model Statute should account for a rebuttable presumption of incompetence for juveniles under the age of thirteen).

109. See Scott & Grisso, *supra* note 93, at 811–18 (stating that developmental psychologists agree with this biological data and use it to advocate for court recognition of chronological juvenile incompetence).

110. States with inferior and ill-constructed juvenile competency legislation should also use these common provisions to modify their existing legislation and to more adequately define and protect a juvenile's competency right.

### A. Definition of "Competence"

Almost every juvenile competency statute utilizes the *Dusky* standard<sup>111</sup> to define competency. While some states define "competence" and other states define "incompetence," some version of the *Dusky* standard is the preferred definition.<sup>112</sup> Arizona's statute states that "[i]ncompetent" means a juvenile who does not have sufficient present ability to consult with the juvenile's counsel with a reasonable degree of rational understanding *or* who does not have a rational and factual understanding of the proceedings against the juvenile."<sup>113</sup> Note that the "or" between the two clauses allows for an incompetency finding if the juvenile does not satisfy *either* prong of the definition. The disjunctive used in this instance means the juvenile must sufficiently understand the proceedings against him *and* have the ability to reasonably assist defense counsel. While it may seem counterintuitive that the juvenile competency definition tracks the adult definition verbatim, state juvenile competency statutes provide for differences in other areas.

### B. Procedure for Raising Competency Issue

Most states adopt similar procedures for raising the juvenile competency issue. Typically, the issue can be raised *sua sponte* by the juvenile court, on the motion of the juvenile's attorney, or by the attorney representing the state.<sup>114</sup> This flexibility assures that the juvenile has a fair chance of having his competency examined before the delinquency proceeding because any interested party can raise the issue. Once competency is at issue, state statutes typically require an examination of the juvenile and a stay in the proceeding.<sup>115</sup> This standard complies with the policy rationale that an incompetent juvenile not be subjected to proceedings until he is competent to understand the proceedings.

### C. Experts

State statutes differ on the exact specifications required for experts to examine the juvenile's competency. The Florida statute requires that competency be "based on an

---

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

112. See *supra* text accompanying notes 42–47.

113. ARIZ. REV. STAT. § 8-291 (2005) (emphasis added); see also FLA. STAT. ANN. § 985.223(1)(f) (West 2001) (defining juvenile competency with the *Dusky* standard). Note that the statutes that define "incompetent" place an "or" between the two clauses, while the statutes that define "competent" place an "and" between the two clauses.

114. See, e.g., ARIZ. REV. STAT. § 8-291.01(B) (2005); D.C. CODE ANN. § 16-2315(a) (2005); FLA. STAT. ANN. § 985.223(1) (West 2001); VA. CODE ANN. § 16.1-356(A) (2005). *But cf.* TEX. [FAM.] CODE ANN. § 55.31(b) (Vernon 2002) (suggesting that the incompetency issue can be raised only by the juvenile's counsel or the attorney for the state).

115. See, e.g., D.C. CODE ANN. § 16-2315(c)(1)–(2) (2005) (providing for a stay in the proceeding after an examination shows the juvenile is incompetent to proceed); TEX. [FAM.] CODE ANN. § 55.31(c) (Vernon 2002) (providing for a stay in the proceedings and a required examination of the juvenile once the court determines that there is probable cause of the juvenile's incompetency).



evaluation of the child's mental condition made by not less than two nor more than three experts appointed by the court."<sup>116</sup> While the Florida statute does specify the number of experts needed for a competency determination and that such experts should be court-appointed, the statute does not detail what qualifications the "experts" must have to examine the juvenile. While other provisions of the statute refer to "mental health professionals," the statute does not specify what professional degree, if any, these "experts" must possess.<sup>117</sup> In comparison, the Arizona statute states, "the court shall appoint two or more mental health experts, at least one of whom is a psychiatrist licensed pursuant to [Arizona specifications]."<sup>118</sup> This statute is more thorough because it specifies the minimum number of mental health experts needed for a competency examination and requires that at least one of the experts have the specified professional degree.

In addition, another provision of the Arizona Code clarifies that any party can still retain its own expert to conduct a competency evaluation at the party's expense.<sup>119</sup> This provision varies significantly from the aforementioned Florida Code, which requires that the experts be appointed by the court.<sup>120</sup> While court-appointed experts may be more neutral in determining competency, it is important that each party have the right to retain its own expert as the juvenile system becomes more adjudicative.<sup>121</sup> However, a system that uses court-appointed experts furthers the original rehabilitative goal of the juvenile justice system and eliminates the need for each party to expend time and resources finding an expert that will evaluate the juvenile in a light favorable to its argument.

#### *D. Expert Report Criteria*

States also vary on the specific requirements an evaluating expert's report must address. Some states give a large amount of discretion to the expert to describe whatever specific abilities the expert deems necessary in the examination report. For example, the Wisconsin Code designates that the expert report:

shall describe the nature of the examination and identify the persons interviewed, the particular records reviewed and any tests administered to the juvenile. . . . [T]he report shall also contain an opinion regarding the juvenile's present mental capacity to understand the proceedings and assist in his or her defense and, if the examiner reports that the juvenile lacks competency to proceed, the examiner's opinion regarding the likelihood that the juvenile, if provided treatment, may be restored to competency . . . .<sup>122</sup>

---

116. FLA. CODE ANN. § 985.223(1)(b) (West 2001).

117. § 985.223(1)(d)–(e).

118. ARIZ. REV. STAT. § 8-291.02(A) (2005).

119. § 8-291.02(D).

120. See *supra* text accompanying note 116.

121. See, e.g., FED. R. EVID. 706. The Federal Rules of Evidence allow the court to appoint its own experts and each party to also present its own experts. While these rules do not apply in state juvenile courts, it is important to keep the rules in mind as the juvenile system becomes more adjudicative.

122. WIS. STAT. § 938.295(2)(b) (West 2004).

This statute identifies key material that the expert examination report must address, but it does not direct the examiner to examine and report on precise abilities that will be critical in a competency determination.<sup>123</sup> Imprecise evaluation criteria could lead to inconsistent reports on the same juvenile if the experts did not evaluate the juvenile using the same criteria.

Other state statutes are more detailed and demand exact criteria in the examination report. The Arizona Code dictates that the report shall include at least: the name of the mental health expert; a description of the nature, content, extent, and results of the examination and any test results; facts on which the findings are based; and the expert's opinion as to the competency of the juvenile.<sup>124</sup> Note that the statute still leaves some discretion to the expert to report on what he deems necessary for a proper juvenile competency determination. Thus, while the Arizona statute gives more detail than the Wisconsin statute, it still does not quite get to the heart of the juvenile competency issue because it does not address the capabilities that a juvenile should have in order to be deemed competent to proceed in a delinquency hearing.

The Florida statute, however, demands specific report information that goes directly to the root of the juvenile competency issue. Section 985.223 of the Florida Code mandates that each expert report must address the child's capacity to:

- (1) Appreciate the charges or allegations against the child
- (2) Appreciate the range and nature of possible penalties that may be imposed in the proceedings against the child, if applicable
- (3) Understand the adversarial nature of the legal process
- (4) Disclose to counsel facts pertinent to the proceedings at issue
- (5) Display appropriate courtroom behavior
- (6) Testify relevantly.<sup>125</sup>

The advantage of the Florida statute is that it instructs the expert examiner to address issues that will be extremely relevant to a competency determination. While other states leave it to the examiner to identify and report on these important characteristics and abilities, the Florida Code *requires* that each expert report address these salient issues. These standards enable the juvenile court judge to weigh the information and adequately determine if the juvenile is competent to proceed. This statute also leads to uniformity between various expert reports because each report will focus on these specific criteria. As a result, it will be easier for a judge to compare the expert evaluations and make a proper competency determination of the juvenile.

The Arkansas Code parallels many of the Florida provisions for expert report criteria, but it adds some requirements of its own. The Arkansas Code requires the expert to include the juvenile's capabilities to extend his thinking into the future, consider the impact of his actions on others, verbally articulate himself in a coherent manner, display logical decision-making abilities, and accurately and reliably relate a sequence of events.<sup>126</sup> Requiring an expert to report on these specific abilities forces the expert to consider how the juvenile will actually perform in a delinquency proceeding. As a result, Arkansas juvenile competency expert reports will focus on

---

123. Cf. FLA. CODE ANN. § 985.223(1)(f) (West 2001) (listing mental capacities that must be addressed by a court-appointed expert when evaluating a child's competency).

124. ARIZ. REV. STAT. § 8-291.07(B)(1)-(4) (2005).

125. FLA. CODE ANN. § 985.223(1)(f)(1)-(6) (West 2001).

126. ARK. CODE ANN. § 9-27-502(b)(7)(C)(ix)(b) (2002).

delinquency-specific criteria and guide the juvenile court judge in his determination. The proposed model juvenile competency statute will include provisions from both the Florida Code and the Arizona Code in order to fully address the juvenile's competency and expected performance in a delinquency proceeding.<sup>127</sup>

### *E. Causes of Incompetency*

Perhaps the most contentious issue within juvenile competency legislation is the determination of *what* constitutes an acceptable cause of juvenile incompetency. Some states require incompetency to be the result of a mental illness or mental retardation,<sup>128</sup> while other states do not even mention those disorders in their juvenile competency provisions.<sup>129</sup> These discrepancies illustrate the difficulty in determining the etiology of juvenile incompetency. Juveniles face unique issues with competency due to their limited development. While this limited development can affect a juvenile's ability to comprehend information requisite for competency, it can also hide severe mental illnesses that may not fully appear until early adulthood.<sup>130</sup> Some state statutes allow for incompetency to be based solely on age or developmental immaturity, but other states expressly maintain that these factors should not be taken into consideration.

#### 1. Age and Immaturity

Section 985.223 of the Florida Code states that “[a] child who has been adjudicated incompetent to proceed because of age or immaturity, or for any reason other than for mental illness or retardation, must not be committed . . . for restoration-of-competency treatment.”<sup>131</sup> The Florida Code is one of the few statutes that expressly allows developmental immaturity to be a basis for juvenile incompetency. Unfortunately, the Florida Code does not identify a specific chronological age and does not define “immaturity.”<sup>132</sup> One can presume that “immaturity” refers to a deficiency in the developmental skills necessary for competency, but this definition is not mentioned in the statute. Nevertheless, this section of the Florida Code is admirable because it recognizes that the developmental immaturity of juveniles can result in an incompetency finding.

The Florida Code further orders that juveniles deemed incompetent based on this provision shall not be committed to competency restoration treatment. These juveniles do not need mental health treatment or hospitalization; they merely need time for their developmental capacities to mature. Although the Florida Code is one of the few that allows for an incompetency finding based on age or immaturity, this conclusion is supported by empirical data provided by developmental psychologists and biological

---

127. See *infra* Appendix.

128. See, e.g., TEX. [FAM.] CODE ANN. § 55.31(a) (Vernon 2002).

129. See, e.g., VA. CODE ANN. § 16.1-356 (2005).

130. See *supra* Part IV.A.

131. FLA. CODE ANN. § 985.223(2) (West 2001).

132. Developmental research shows that it is not possible to have a per se chronological age for competence, but the studies do realistically suggest that a *presumed* incompetence age of thirteen would be consistent with the research. See *supra* Part IV; *infra* Part VI.

data provided by neurologists.<sup>133</sup> The age/immaturity cause of incompetency is a valid etiology that should be acknowledged by all state juvenile incompetency statutes.

Like the Florida Code, the Arkansas Code recognizes chronological immaturity as a cause of juvenile incompetency. However, the Arkansas Code goes further by presuming some juveniles incompetent in certain murder cases, and this presumption is based solely upon the juvenile's age. Section 9-27-502 of the Arkansas Code mandates that any juvenile under the age of thirteen at the time of the alleged offense who is charged with either capital murder or murder in the first degree be *presumed* incompetent to proceed.<sup>134</sup> This presumption can be overcome, but the prosecution bears the burden of proving competence by a preponderance of the evidence.<sup>135</sup> This is a counterintuitive provision for a state to enact at a time when our society wants to hold violent children accountable for their crimes at a very young age. However, the Arkansas Code realistically acknowledges that juveniles who commit such violent crimes at a very young age are probably not competent for delinquency proceedings.

State statutes that codify incompetency due to chronological age or developmental immaturity effectively recognize the patent developmental differences between adults and juveniles. It is admirable that these states take a position that acknowledges the developmental limitations of young juvenile delinquents. Unfortunately, most of the statutes that do allow chronological immaturity as a basis for an incompetency finding do not list a specific chronological age and do not define "immaturity." Without a description of these key concepts, the effectiveness of the statute to declare juveniles chronologically incompetent may be limited.

## 2. Mental Illness or Mental Retardation

Some state juvenile competency statutes specifically require that an incompetency finding be based on mental illness or mental retardation. For example, the Texas Code mandates that the incompetency finding be based on one of these two conditions.<sup>136</sup> Additionally, the Arizona Code states that "[t]he presence of a mental illness, defect or disability *alone* is not grounds for finding a juvenile incompetent."<sup>137</sup> This practical restriction is logical because a competent juvenile should not be found incompetent merely because of a diagnosable mental illness that does not affect his competency. Many juveniles may have the requisite capacity to meet the competency standards even if they have a mild diagnosable mental condition. Arizona rightfully recognizes this potential fact pattern and requires that a juvenile incompetency finding be predicated on more than a medial diagnosis.

States that require an incompetency finding based on the presence of a mental illness or mental retardation disregard developmental studies that support

---

133. See *supra* text accompanying notes 79–82 and *supra* Part IV.B.

134. ARK. CODE ANN. § 9-27-502(b) (2002). Note that Arkansas's presumption in these capital murder cases corresponds with developmental psychologists' suggestions that children under thirteen cannot realistically be found competent. See *supra* text accompanying notes 79–82.

135. § 9-27-502(b)(1)(B).

136. See TEX. FAM. CODE ANN. § 55.31(a) (Vernon 2002).

137. ARIZ. REV. STAT. § 8-291.01(B) (2005) (emphasis added).

incompetency findings based on age or immaturity.<sup>138</sup> Consequently, these states may allow incompetent juveniles to proceed because they do not have a diagnosable mental disorder.<sup>139</sup> On the other hand, these states do eliminate much of the confusion that results from recognizing chronological immaturity as an acceptable cause of incompetency. It is much easier to diagnose a mental disorder or mental retardation than it is to evaluate a juvenile based on maturity level. How should a state define “immaturity?” How can it be measured? Does it vary from week-to-week or day-to-day?

When a court declares a juvenile incompetent based on a diagnosable mental illness or mental retardation, it reassures society that the incompetent juvenile will not be subjected to a juvenile justice system that he is not competent to handle. However, a finding of “chronological incompetence” may send a signal that culpable delinquents are “working the system” and not being held responsible for their actions. Each state must analyze these issues and enact the juvenile competency statute that satisfies its jurisdictional needs.

#### *F. The Aftermath of an Incompetency Finding*

States also differ on how to proceed once a juvenile court officially declares a juvenile incompetent. While all states with juvenile competency legislation agree that the delinquency proceeding cannot immediately continue after an incompetency finding, states differ on the treatment specifics necessary to restore competency and the acceptable length of treatment. The Florida Code is the most specific statute that deals with the details of juvenile competency restoration and commitment proceedings.<sup>140</sup> The statute provides for different commitment outcomes for incompetent juveniles based on whether they were deemed incompetent due to age or immaturity or due to mental illness or mental retardation.<sup>141</sup>

The statute mandates that any juvenile who is found incompetent because of age or immaturity *must not* be committed to the state department of family services.<sup>142</sup> Furthermore, the Florida Code distinguishes commitment outcomes based on the degree of the crime committed by the incompetent juvenile. The statute orders that any juvenile deemed incompetent due to mental illness or retardation must be committed to the department of family services if he committed a crime that would be an adult felony, while an incompetent juvenile who committed a crime that would be an adult misdemeanor must not be committed to family services.<sup>143</sup> These provisions

---

138. *See supra* Part IV.

139. Note that these state statutes would allow a proceeding against a juvenile who may have a specific mental disorder, such as schizophrenia, which does not manifest its symptoms until early adulthood. A juvenile in this situation would not meet the criteria for a diagnosable mental disorder, but he may still suffer competency-diminishing effects of the mental illness. *See supra* text accompanying notes 94–96.

140. Arizona also has a statute governing the aftermath of an incompetency finding, but it is not as complete as the Florida statute and will not be used in this section. *See* ARIZ. REV. STAT. § 8-291.09 (2005).

141. *See* FLA. CODE ANN. § 985.223(2)–(6) (West 2001).

142. § 985.223(2).

143. *Id.* The Florida statute mandates that committed children be sent to the Florida

demonstrate Florida's preference to not commit juveniles even if they are incompetent to proceed. The requirements also further the rehabilitative goals of the American juvenile justice system by not subjecting a juvenile to unnecessary detention.

The Florida statute further mandates that juveniles deemed incompetent due to mental illness or mental retardation *must meet the criteria for secure placement* before they can be committed.<sup>144</sup> The statute states that the child may be placed in a secure facility if the court finds by clear and convincing evidence that:

The child is manifestly incapable of surviving with the help of willing and responsible family or friends, including available alternative services, and without treatment or training the child is likely to either suffer from neglect or refuse to care for self, and such neglect or refusal poses a real and present threat of substantial harm to the child's well-being; *or* there is a substantial likelihood that in the near future the child will inflict serious bodily harm on self or others, as evidenced by recent behavior causing, attempting, or threatening such harm.<sup>145</sup>

Furthermore, all available less-restrictive alternatives must be found inappropriate before the state can commit the juvenile.<sup>146</sup> The Florida statute takes all precautions to ensure the well-being of the child and will not allow commitment unless it is absolutely necessary for the health of the child and the community.

The statute even protects the juvenile during the actual commitment. It mandates that the Florida Department of Children and Family Services place the juvenile in the facility that is the "least restrictive alternative consistent with public safety."<sup>147</sup> The service provider is required to file a written update report within at least six months of the commitment date (or, alternatively, after any period of extended treatment or training), at any additional time ordered by the juvenile court, and at any time the provider determines that the juvenile has attained competency or no longer meets the secure placement criteria.<sup>148</sup> The juvenile court retains jurisdiction over the juvenile for up to two years after the date of incompetency,<sup>149</sup> but if, at the end of the two-year period, the court determines the child has not attained competency and will not attain it within one year, the court must dismiss the delinquency action.<sup>150</sup> This requirement prevents the state from indefinitely committing an incompetent juvenile in order to keep him from society or to avoid proceeding with the delinquency action.

---

Department of Children and Family Services. Obviously, each state must determine which social services facility could best handle the unique situation of incompetent juveniles.

144. See FLA. CODE ANN. § 985.223(3) (West 2001).

145. § 985.223(3)(a)(1)–(2) (emphasis added).

146. § 985.223(3)(b).

147. § 985.223(4).

148. § 985.223(4)(e).

149. *But cf.* ARIZ. REV. STAT. § 8-291.09(F) (2005) (mandating that the Arizona competency restoration order is valid for no more than 180 days).

150. FLA. CODE ANN. § 985.223(5)(c) (West 2001). The statute does suggest that the court can retain jurisdiction over the delinquency proceeding if there is evidence at the end of the two-year commitment that the juvenile will regain competency within a year.

## VI. TOWARD A MODEL JUVENILE COMPETENCY STATUTE

This Note advocates the necessity of juvenile competency statutes for proper juvenile due process protection and for the equal administration of justice within each state system. Part V outlined the common provisions from various existing state juvenile competency statutes and should serve as a starting point for states to enact or revise their own juvenile competency legislation. Attached as Appendix is what I propose to be the model juvenile competency statute. It is constructed from the framework of the common provisions outlined in Part V.<sup>151</sup>

While most of the components of the statute are not particularly controversial, the Model Statute *does allow* chronological immaturity as an acceptable cause of juvenile incompetency. This proposition is supported by the developmental psychology research and scholarship outlined in Part IV.A and the NIMH biological brain study described in Part IV.B. The Model Statute mandates that juveniles under the age of thirteen be *presumed incompetent*. This is a rebuttable presumption, but the burden should be on the state to prove beyond a preponderance of the evidence that a juvenile under the age of thirteen is competent to proceed in a juvenile delinquency hearing.

The presumption of incompetence for “young juveniles”<sup>152</sup> is consistent with public policy and due process requirements. Our criminal justice system does not subject incompetent adults to the criminal system, and it should not subject incompetent juveniles to the juvenile justice system. If we can determine which juveniles are likely to be incompetent due to age, the Model Statute should presume them incompetent to protect their state-acknowledged rights. Both the Cowden and McKee study<sup>153</sup> and the NIMH research<sup>154</sup> show that young juveniles under the age of thirteen are likely incompetent. It is not coincidence that the developmental psychology research and the biological brain development study both note the correlation of the age thirteen with the development of the young juvenile brain during puberty. The NIMH study notes a significant growth of gray matter in the brain just prior to the age of thirteen followed by a period of increased development of the executive functions of the brain that continues until young adulthood.<sup>155</sup> Therefore, a presumption of incompetence for young juveniles protects them in a system in which they cannot protect themselves. The tender age of a young juvenile alerts the judge that he is likely incompetent to understand the proceedings and thus cannot assist counsel in his defense.

## CONCLUSION

The right for a juvenile to be competent in the juvenile justice system comports with due process protections that should be recognized by all states. States that recognize the juvenile competency right need to protect juveniles by enacting comprehensive and detailed legislation that fully outlines the competency determination process. The

---

151. Certain provisions of the Model Statute are taken from existing state juvenile competency statutes. Other provisions are based on my own research of the juvenile competency issue.

152. For a definition of “young juvenile,” see *infra* Appendix, Model Statute § (b)(2).

153. See *supra* text accompanying notes 79–82.

154. See *supra* Part IV.B.

155. See *supra* text accompanying notes 103–104.

Model Statute drafted here meets that challenge and furthers the objectives of the American juvenile justice system.

## **Appendix**

### **§ XX-XX-XX: Model Statute for Juvenile Competency Determination**

#### **(a) Application**

- (1) The provisions of this statute shall apply to any juvenile delinquency proceeding where the juvenile's fitness to proceed is raised as an issue by any party or sua sponte by the court.
- (2) Once an issue of the juvenile's competency is raised, the delinquency proceeding shall temporarily cease until a determination is made on the competence of the juvenile pursuant to the following provisions.
- (3) Following a competency examination, the court shall determine how to proceed pursuant to subsection (g).

#### **(b) Definitions**

- (1) "Juvenile" means a person who is under eighteen years of age at the time the issue of competency is raised.
- (2) "Young juvenile" means a person who is under thirteen years of age at the time the issue of competency is raised.
- (3) "Incompetent" means a juvenile who does not have sufficient present ability to participate and consult with his defense counsel with a reasonable degree of rational understanding, or who does not have a rational and factual understanding of the proceedings against him.
- (4) "Mental Health Expert" means a physician licensed pursuant to State standards or a psychologist licensed pursuant to State standards who is all of the following:
  - (A) Familiar with this State's competency standards and statutes;
  - (B) Familiar with this State's available treatment, training, and restoration programs; and
  - (C) Certified by the court as meeting State developed guidelines in juvenile competency evaluation.
- (5) "Mental Illness" is any diagnosable mental impairment supported by the latest version of the Diagnostic and Statistical Manual of Mental Disorders (DSM).



(6) "Mental Retardation" is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills.

(7) "Chronological Immaturity" is a condition based on the juvenile's chronological age or significant lack of developmental skills where the juvenile has no significant mental illness or mental retardation.

(c) Procedure

A party shall raise the competency issue by filing a petition with the court. The petition shall state the facts in support of the request for a competency examination.

(1) The court shall rule on the petition and, if it sees fit, order the juvenile to be examined to aid in the determination of his mental fitness to proceed in the delinquency hearing. All examinations and expert reports must conform to the requirements of section (e) below.

(2) Whenever possible, a physical or mental health competency examination shall be conducted on an outpatient basis, but if the court deems it necessary, the court may order the juvenile admitted as an inpatient to a suitable medical facility for the purpose of the examination pursuant to subsections (3) and (4) below.

(3) The court may order the juvenile be detained to submit to any physical, neurological, or psychological examination to adequately determine the juvenile's mental competence condition if the juvenile meets the following criteria:

(A) The juvenile will not submit to an outpatient examination,

(B) The juvenile refuses to appear for an examination, or

(C) An adequate examination is not possible without the detention of the juvenile.

(4) If the juvenile is detained or committed for an inpatient examination, the examination shall not exceed the period of time that is necessary for the examination. In all cases, detention or commitment for examination must not exceed fourteen days.

(d) Experts

(1) The court will appoint not less than two (2) and no more than three (3) mental health experts who meet the requirements outlined in subsection (b)(4).

(A) At least one of the court-appointed experts must be a psychiatrist licensed pursuant to State standards.

(B) The other mental health experts must also meet the

requirements outlined in subsection (b)(4).

(2) Any party may retain one (1) expert at its own expense, but the party-retained expert must meet the requirements outlined in subsection (b)(4).

(e) Expert Report Criteria

(1) An evaluating mental health expert's report must address and evaluate the juvenile's capacity and ability to do each of the following:

(A) Appreciate the charges or allegations against him;

(B) Appreciate the nature of the adversarial process including:

(i) Ability to understand the participants in the juvenile delinquency proceeding (e.g., judge, defense counsel, State attorney, mental health expert, etc.), and

(ii) Ability to realize the role of each participant in his proceeding.

(C) Appreciate the range of possible penalties that may be imposed in the proceedings against him including:

(i) Ability to consider the impact of his actions on others, and

(ii) Ability to recognize how possible penalties imposed in the proceeding will affect him.

(D) Disclose to counsel facts pertinent to the proceedings at issue including:

(i) Ability to articulate thoughts,

(ii) Ability to articulate emotions, and

(iii) Ability to accurately and reliably relate a sequence of events.

(E) Display logical decision making;

(F) Display appropriate courtroom behavior;

(G) Testify relevantly at proceeding.

(2) In assessing the juvenile's competency the mental health expert shall:

(A) Conduct an age-appropriate mental status exam using tests designed for juveniles;

(B) Conduct an age-appropriate psychological evaluation using tests designed for juveniles; and

(C) Consider any other relevant tests or information.

(3) The expert report must conclude if the juvenile suffers from mental illness, mental retardation, or chronological immaturity.

(A) If mental illness, mental retardation, or chronological immaturity exist, the expert must report the severity of the impairment and its potential effect on the juvenile's competency to proceed.

(B) If the expert determines that the juvenile suffers from chronological immaturity, the expert must compare the juvenile to normal juveniles of the same age.

(C) If the expert determines that the juvenile suffers from a mental illness, he must also provide the following information:

- (i) The prognosis of the mental illness;
- (ii) If the mental illness is treatable with medication and if the juvenile is taking any medication; and
- (iii) How medication may affect the juvenile in the delinquency process.

(4) The expert report must state the expert's final conclusion of the juvenile's competence or incompetence and list specific reasons for the conclusion supported by results of the examination pursuant to the specified expert report criteria.

(A) If the mental health expert concludes that the juvenile is incompetent to proceed, the expert must give an opinion as to the possibility of future competence and an estimated time period in which competence could be restored with treatment.

(B) If the mental health expert concludes that the juvenile is competent to proceed, the court may resume the juvenile delinquency proceeding if it sees fit or may require further competency examination by another court-appointed mental health expert.

(f) Acceptable Causes of Incompetency

(1) A juvenile can be declared incompetent if he suffers from a mental illness that substantially affects his ability to assist counsel in his defense or to understand the proceedings against him. While a mental illness can support an incompetency finding, the existence of a mental illness alone cannot predicate a finding of incompetency.

(2) A juvenile can be declared incompetent if he suffers from mental retardation that substantially affects his ability to assist counsel in his defense or to understand the proceedings against him. While mental

retardation can support an incompetency finding, mental retardation alone cannot predicate a finding of incompetency.

(3) A juvenile can be declared incompetent based on chronological immaturity that substantially affects his ability to assist counsel in his defense or to understand the proceedings against him.

(A) Young juveniles under the age of thirteen when the competency issue is raised shall be presumed incompetent to proceed in the delinquency proceeding. The burden of proof is on the state to overcome this presumption by a preponderance of the evidence that the juvenile is competent to proceed.

(B) A juvenile who is found incompetent due to chronological immaturity may not be committed to the State Department of Child Services for competency rehabilitation treatment.

(i) If the mental health expert determines that there is a reasonable chance that the juvenile will become competent within 365 days, the proceedings shall be temporarily suspended and a new complete examination shall be conducted in 365 days.

(ii) If the mental health expert determines that there is not a reasonable chance that the juvenile will become competent within 365 days, the court may order that the delinquency proceedings permanently cease.

(g) Aftermath of an Incompetency Finding

(1) If a mental health expert determines that a juvenile is incompetent to proceed under one of the acceptable causes of incompetency outlined in (f), the court may choose to accept the incompetency finding or order a new expert examination.

(2) If the court accepts the incompetency finding, it must determine whether the juvenile meets the criteria for secure placement in the State Department of Child Services. A juvenile may be placed in a secure facility if the court makes a finding by clear and convincing evidence that:

(A) The juvenile is incompetent due to significant mental illness or mental retardation, and because of the significant mental illness or mental retardation:

(i) There is a real and present threat of substantial harm to the juvenile's well-being, or there is a substantial likelihood that in the near future the juvenile will inflict serious bodily harm on himself or others as evidenced by recent behavior; and

(ii) All available less restrictive alternatives are inappropriate.

(B) If the juvenile meets the secure facility placement requirements outlined in this subsection and is subsequently confined, the juvenile must be released back to the jurisdiction of the court if he becomes competent. The court will then determine how to proceed.

(3) If the court accepts the incompetency finding and determines that the juvenile does not meet the secure placement criteria, the court must analyze the mental health expert's opinion of potential competency restoration and determine:

(A) if there is a reasonable chance that the juvenile will attain competency in 365 days with treatment. If so, then the court must order that the delinquency proceeding temporarily cease and issue a restoration order for the juvenile. Restoration orders should specify:

- (i) The name of the restoration program provider and the location of the program,
- (ii) The length of the restoration program, and
- (iii) The frequency of restoration program provider reports and an outline of desired report content. The program provider must immediately report to the court if it believes the juvenile is competent to proceed.

(B) if there is not a reasonable chance that the juvenile will attain competency in 365 days with treatment. In this situation, the court may order that the delinquency proceeding permanently cease.

