CALIFORNIA JUDGES BENCHGUIDES

Benchguide 63

COMPETENCE TO STAND TRIAL

(INCLUDING COMPETENCY DURING REVOCATION PROCEEDINGS FOR VIOLATIONS OF PROBATION, MANDATORY SUPERVISION, PRCS, OR PAROLE)

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IV. SAMPLE FORMS

I. [§63.1] SCOPE OF BENCHGUIDE

This benchguide provides an overview of procedures for evaluating a defendant's mental ability to participate and make certain decisions in criminal proceedings. It discusses the procedures for raising the issue of mental competency, conducting a competency hearing, and committing an incompetent defendant for psychiatric treatment.

II. [§63.2] PROCEDURAL CHECKLIST: QUESTIONING DEFENDANT'S MENTAL COMPETENCE UNDER PENAL CODE §1368

(1) *Has defense counsel questioned defendant's mental competence to be tried or punished and requested a competency hearing?* Pen C §1368. A competency hearing is mandated only if there is objective substantial evidence of defendant's incompetence, regardless of counsel's subjective opinion. For discussion, see §§63.4–63.5.

(2) *Has a doubt arisen in the mind of the judge about defendant's mental competence to be tried or punished?* Pen C §1368(a). Ask defendant questions to assess his or her competence. For discussion, see §63.6. For a definition of mental incompetence, see §63.3.

(3) *State in the record the judge's doubt about defendant's mental competence.* Pen C §1368(a). For discussion, see §63.7.

(4) *Ask defense counsel whether, in his or her opinion, defendant is mentally competent.* Pen C §1368(a). Counsel's expression of an opinion does not violate the attorney-client privilege. Counsel is not required to answer. For discussion, see §63.8.

(5) *Appoint an attorney if defendant is unrepresented.* Pen C §1368(a).

(6) *Declare a recess if requested by defendant or defense counsel, or on the court's own motion.* Recess for a reasonably necessary time to permit counsel to confer with defendant and to form an opinion about

defendant's mental competence. Pen C §1368(a). For discussion, see §63.9.

(7) *Consider appointing a mental health expert under Evid C §730 to help determine whether to order a competency hearing*. For discussion of legal and practical considerations, see §63.10. Set a reasonably short deadline for receipt of the expert's report.

(8) *If there is substantial evidence of defendant's incompetence, order a competency hearing and suspend the criminal proceedings*. Pen C §§1368(b)–(c), 1369. Substantial evidence consists of a mental health expert's report indicating defendant is incompetent, or possibly a combination of other factors. For discussion, see §§63.11, 63.13–63.15.

☛ JUDICIAL TIP: The statute states that the court "shall" order a competency hearing if defense counsel believes defendant is incompetent. The court is required to order a hearing, however, only when there is objective, substantial evidence of defendant's mental incompetence. *People v Howard* (1992) 1 C4th 1132, 1164, 5 CR2d 268. For discussion, see §63.11.

(9) *If the evidence of incompetence is less than substantial, either order competency hearing or continue with the criminal proceedings.* The court has discretion on whether to order a hearing if evidence of incompetence is less than substantial. Pen C §1368(b); *People v Hale* (1988) 44 C3d 531, 540, 244 CR 114. For discussion, see §63.11.

☛ JUDICIAL TIP: The court is unlikely to be challenged or reversed on appeal if it orders the competency hearing in a close case and the hearing is actually held. An erroneous denial of a competency hearing, however, compels reversal of the judgment. See discussion in §63.33.

(10) *Advise the defendant of his or her rights at the hearing.* The court is not required to advise a defendant represented by counsel of the right to a jury trial. A jury trial must be requested by the defendant or defense counsel.

Note: A jury trial is not required to determine competence in any proceeding for a violation of probation, mandatory supervision, postrelease community supervision, or parole. For discussion, see §63.27.

(11) *Appoint psychiatrist(s) or licensed psychologist(s) to examine the defendant and report to the court their opinions about the defendant's competence and whether treating the defendant with antipsychotics is medically appropriate*. Pen C §1369(a). The court must appoint two psychiatrists or psychologists to examine the defendant if the defendant or

defense counsel is not seeking a finding of mental incompetence. Pen C §1369(a). For discussion, see §§63.20–63.21.

(12) *Set a due date for the psychiatric report(s) and a date for the defendant to return to court to review the report(s).* At this review hearing, defense counsel and the prosecutor may stipulate to the findings of the psychiatrist(s). For discussion, see §63.25.

(13) *Discharge an impaneled and sworn jury only if it appears that undue hardship to the jurors would result if retained on call*. Pen C §1368(c). The jury must be discharged if defendant is declared mentally incompetent. Pen C §1368(c).

(14) *If, on the defendant's return, the parties stipulate to the psychiatric report(s), make a finding of competency or incompetency based on the report(s).*

- If the court finds the defendant competent, order the criminal proceedings reinstated.
- If the court finds the defendant incompetent, order the community program director (or designee) to evaluate the defendant and submit a written recommendation of commitment within 15 days. For discussion, see §63.34.
- If the court finds the defendant incompetent, hear and determine whether the defendant lacks the capacity to make decisions regarding the administration of antipsychotic medication. For discussion, see §63.35.
- If the defendant lacks capacity, issue an order authorizing the treatment facility to involuntarily administer antipsychotic medication to the defendant when and as prescribed by a treating psychiatrist. For discussion, see §63.36.
- If the defendant has the capacity to make decisions regarding medication, and with the advice of counsel, consents to the administration of antipsychotic medication, include in the commitment order that antipsychotic medication may be given to the defendant as prescribed by a treating psychiatrist pursuant to the defendant's consent. For discussion, see §63.37.
- If the defendant has the capacity to make decisions regarding medication, and with the advice of counsel, does not consent to the administration of antipsychotic medication, the commitment order must indicate that, after the treating psychiatrist complies with Pen C §1370(a)(2)(C), the defendant must be returned to court for a hearing in compliance with Pen C §1370(a)(2)(C)–(D) regarding whether antipsychotic medication may be administered involuntarily. For discussion, see §63.38.

(15) *If, on the defendant's return, the parties do not stipulate to the psychiatric report(s), set competency hearing date.*

III. APPLICABLE LAW

A. [§63.3] Constitutional and Statutory Requirements

A person cannot be tried, adjudged to punishment, or have probation, mandatory supervision, postrelease community supervision (PRCS), or parole revoked while mentally incompetent. Pen C §1367(a); *Godinez v Moran* (1993) 509 US 389, 396, 113 S Ct 2680, 125 L Ed 2d 321; *Pate v Robinson* (1966) 383 US 375, 378, 86 S Ct 836, 15 L Ed 2d 815; *People v Hayes* (1999) 21 C4th 1211, 1281, 91 CR2d 211. The failure of a trial court to employ procedures to protect against the trial of an incompetent defendant deprives the defendant of the due process right to a fair trial and requires reversal of his or her conviction. *Pate v Robinson*, *supra*; *People v Hayes, supra*; *People v Hale* (1988) 44 C3d 531, 539, 244 CR 114.

The standards for determining whether a defendant is presently competent to be tried, sentenced, or have his or her probation, mandatory supervision, PRCS, or parole revoked under Pen C §1367(a) are as follows:

- The defendant must be capable of understanding the nature and purpose of the criminal proceedings;
- The defendant must comprehend his or her own status and condition in reference to these proceedings; and
- The defendant must be able to assist his or her attorney in conducting a defense, or be able to conduct his or her own defense in a rational manner. Pen C §1367(a); *People v Conrad* (1982) 132 CA3d 361, 369, 182 CR 912.

Incompetency proceedings fall under four different statutory schemes. When the defendant is charged with a felony or alleged to have a violated the terms of probation for a felony or mandatory supervision, the procedure for determining the defendant's competence is governed by Pen C §1370. If the defendant is charged with a misdemeanor or misdemeanors only, or a violation of formal or informal probation for a misdemeanor, Pen C §1370.01 governs. If the defendant is alleged to have violated the terms of his or her PRCS or parole, the procedure for determining the defendant's competence is governed by Pen C §1370.02. If a defendant is developmentally disabled, Pen C §1370.1 outlines the procedure for determining competence. See Pen C §1367(b). Each of these statutory schemes is addressed in this benchguide.

B. Incompetency Proceedings

1. Defense Request for Competency Hearing

a. [§63.4] Evaluation of Request

Defense counsel frequently raises the issue of the defendant's competence during a proceeding by stating that the defendant is uncooperative or unable to assist in the defense and moving for a competency hearing under Pen C §1368. A defendant is entitled to a Pen C §1368 hearing as a matter of right, however, only if he or she comes forward with substantial evidence of present mental incompetence. *People v Welch* (1999) 20 C4th 701, 737–738, 85 CR2d 203. The opinion of counsel must include a statement of specific reasons supporting that opinion to constitute substantial evidence of incompetence. Cal Rules of Ct 4.130(b)(2). When the evidence casting doubt on the defendant's present competence is less than substantial, the trial judge has discretion in deciding whether to order a competency hearing. 20 C4th at 742. For discussion of what constitutes substantial evidence, see §§63.13–63.14.

Penal Code §1368(b), which states that the court "shall" order a competency hearing "if counsel informs the court that he or she believes defendant is or may be mentally incompetent," appears at first glance to mandate a hearing whenever counsel voices a belief that defendant is incompetent. Reading this provision in response to Pen C §1368(a), however, the courts have required substantial evidence of doubt about the defendant's mental competence before the defendant is entitled to a hearing. *People v Welch*, *supra*, 20 C4th at 739 n7 (judge is not required to order competence hearing based merely on counsel's perception that defendant may be incompetent). When counsel raises the issue of the defendant's competence and requests a hearing, the court should evaluate the request in light of other objective evidence of the defendant's competence. For additional discussion, see §§63.11, 63.13–63.15.

b. [§63.5] Retroactive Determination Not Required

Penal Code §1368 does not provide for a retroactive determination of a defendant's competence. Thus, the court does not have a duty to determine the question of competence at the time of trial when the question is tendered by defense counsel after the verdict. *People v Day* (1988) 201 CA3d 112, 120, 247 CR 68 (evidence presented to court for the first time at sentencing hearing).

2. Procedure When Court Doubts Defendant's Competence

a. [§63.6] Inquiry Into Defendant's Competence

A trial court's doubt about the defendant's competence usually arises from the defendant's erratic courtroom behavior or defense counsel's

statement that the defendant is uncooperative or appears to be incompetent. The court should question the defendant to determine the defendant's understanding of the criminal proceedings. The court should ask, for example, whether the defendant is taking antipsychotic or psychotropic medication for a mental or emotional disorder. An inquiry about medications may lead to information regarding the defendant's past mental health, including the name of a treating physician and whether the unusual courtroom behavior is the result of a failure to take medication.

b. [§63.7] Stating Court's Doubt on Record

If a doubt arises in the judge's mind about the defendant's mental competence during a proceeding before judgment, or during revocation proceedings for a violation of probation, mandatory supervision, PRCS or parole, the judge must state that doubt in the record. Pen C §1368(a). This provision requires the trial judge, on his or her own motion, to inquire into the defendant's mental competency whenever evidence presented during trial or before sentencing raises a bona fide doubt. The doubt that triggers the trial judge's obligation to order a hearing is not subjective, but rather determined objectively from the record. *People v Stiltner* (1982) 132 CA3d 216, 222, 182 CR 790.

c. [§63.8] Requesting Counsel's Opinion

After stating the doubt in the record, the judge must ask whether defense counsel believes defendant is mentally competent. Pen C §1368(a). Defense counsel is not required, however, to respond to the court's inquiry. The statute merely affords counsel an opportunity to answer, and counsel's election not to take this opportunity to respond is not a basis for a contempt order. *Tarantino v Superior Court* (1975) 48 CA3d 465, 470, 122 CR 61. The opinion of counsel must include a statement of specific reasons supporting that opinion to constitute substantial evidence of incompetence. Cal Rules of Ct 4.130(b)(2).

Defense counsel's expression of an opinion of defendant's mental competence under Pen C §1368(a) does not violate the attorney-client privilege (Evid C §954). Although the attorney's opinion of competence may be principally drawn from confidential communications with the client, merely giving the opinion does not reveal any protected information. *People v Bolden* (1979) 99 CA3d 375, 378, 160 CR 268. However, the court may allow defense counsel to present an opinion regarding defendant's competency in camera if the court finds that there is reason to believe that attorney-client privileged information will be inappropriately revealed if the hearing is conducted in open court. Cal Rules of Ct 4.130(b)(2).

d. [§63.9] Appointing Counsel and Declaring Recess

The judge must appoint an attorney for a defendant who is not represented by counsel. Pen C §1368(a); *People v Robinson* (2007) 151 CA4th 606, 611–616, 60 CR3d 102 (reasonable doubt as to defendant's competency to stand trial extends to defendant's competency to waive counsel and to represent himself or herself).

The trial court may not permit a defendant to waive counsel and to represent himself or herself at the competency proceeding. *People v Lightsey* (2012) 54 C4th 668, 691–694, 143 CR3d 589. Neither the state constitutional right to assistance of counsel in criminal cases nor the general right to due process guarantees a criminal defendant's right to waive counsel, thus a defendant has no right to self-representation under the state constitution that trumps the statutory requirement of legal representation in competency proceedings. And the statutory requirement of Pen C §1368(a) does not violate a defendant's federal constitutional rights. 54 C4th at 694–698. The California Supreme Court has left open the question of whether a defendant may participate as co-counsel at a competency hearing. See *People v D'Arcy* (2010) 48 C4th 257, 283 n13, 106 CR3d 459.

At the request of the defendant or defendant's counsel, or on the court's own motion, the court must recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion about the defendant's present mental competence. Pen C §1368(a).

e. [§63.10] Appointing Mental Health Expert

Trial courts frequently order mental health examinations before deciding whether a full-scale Pen C §1368 competency hearing is warranted. See *e.g.*, *People v Sattiewhite* (2014) 59 C4th 446, 462, 174 CR3d 1. Evidence Code §730 authorizes the trial court to appoint an expert when it appears that expert evidence is or may be required by the court or a party. Moreover, based on the constitutional right to a fair trial, a trial court must appoint an expert for an indigent defendant if the defendant shows the expert's services are reasonably necessary to his or her defense. *People v Campbell* (1987) 193 CA3d 1653, 1662, 239 CR 214; *People v Worthy* (1980) 109 CA3d 514, 520, 167 CR 402.

If there is a reasonable possibility, even if it does not rise to the level of substantial evidence, that the defendant is unable to understand the proceedings or assist in his or her own defense, the trial court must order a mental health examination before deciding there is no need for a Pen C §1368 hearing. *People v Visciotti* (1992) 2 C4th 1, 35, 5 CR2d 495 (granting motion for appointment of an expert under Evid C §730 before consideration by counsel and the court of whether either has a doubt about

the defendant's competence); *People v Campbell*, *supra*, 193 CA3d at 1663 (trial court did not abuse discretion by failing to order mental health evaluation of defendant who testified coherently in "stream of consciousness" style).

A mental health expert appointed by the court should be ordered to provide a report to the court, with copies for defense counsel and the prosecutor. The purpose of the report is to guide the court in determining whether to order a competency hearing. If the hearing is ordered, one or two additional experts must be appointed and the defendant must be afforded due process rights to challenge their conclusions as part of that hearing. See Pen C §1369; *People v Pennington* (1967) 66 C2d 508, 520, 58 CR 374.

f. [§63.11] Court's Action on Counsel's Opinion

Penal Code §1368(b) specifies a court's options, based on counsel's opinion regarding a defendant's competence, when the court already has expressed a doubt about the defendant's competency under Pen C §1368(a). It does not, however, provide an independent basis for requiring a competency hearing. See *People v Claxton* (1982) 129 CA3d 638, 667, 181 CR 281 (language of Pen C §1368(b) is not self-initiating; it can only be read as a response to subdivision (a)).

If counsel states that he or she believes the defendant is or may be mentally incompetent, "the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to [Penal Code] sections 1368.1 and 1369." Pen C §1368(b). A literal reading of this section suggests that the defendant has an absolute right to a hearing when defense counsel doubts the defendant's competence. However, this provision has been interpreted to mean that there must be objective substantial evidence of doubt about the defendant's mental competence before he or she is entitled to a full competency hearing under Pen C §1368. *People v Hayes* (1999) 21 C4th 1211, 1281, 91 CR2d 211; *People v Welch* (1999) 20 C4th 701, 737–738, 742, 85 CR2d 203.

Just as defendant's counsel is not the final arbiter of the defendant's lack of competence, counsel's opinion that the defendant is competent is not the determining factor. The court has discretion under Pen C §1368(b) to order a hearing based on its assessment even if counsel states the belief that the defendant is mentally competent. Pen C §1368(b).

Despite the discretionary nature of the language of Pen C §1368, the court must order a competency hearing, regardless of counsel's or the judge's personal opinion, when substantial evidence of the defendant's incompetence has been introduced. Cal Rules of Ct 4.130(b)(1). Substantial evidence of incompetence is sufficient to require a full competency hearing even if the evidence is in conflict. *People v Welch*,

supra, 20 C4th at 738. If the evidence casting doubt on the defendant's present competence is less than substantial, the court has discretion in deciding whether to order a competency hearing. 20 C4th at 742.

g. [§63.12] Judge's Continuing Duty

The trial judge has a continuing duty to make proper inquiry regarding a defendant's mental competency or to understand the nature of the sentencing procedure. This duty may not be avoided by relying solely on a pretrial decision or pretrial psychiatric reports when, during the trial or prior to sentencing, the judge is presented with a substantial change of circumstances or with new evidence that casts a serious doubt on the validity of the pretrial finding of incompetence. *People v Tomas* (1977) 74 CA3d 75, 91, 141 CR 453 (evidence of incompetence sufficient to require hearing contained in diagnostic report prepared in connection with sentencing); *People v Zatko* (1978) 80 CA3d 534, 548, 145 CR 643 (doctor's trial testimony did not present change of circumstances or new evidence casting serious doubt on pretrial finding of present sanity). The court is obligated to initiate new Pen C §1368 proceedings, however, only if the defendant presents substantially new evidence or changed circumstances. *People v Murrell* (1987) 196 CA3d 822, 827, 242 CR 175. For discussion of situations requiring a second competency hearing, see §63.32.

3. Determining What Constitutes Substantial Evidence

a. [§63.13] General Guidelines

The question of what constitutes substantial evidence of a defendant's incompetence under Pen C §1368 cannot be answered by a simple formula applicable to all situations. *People v Laudermilk* (1967) 67 C2d 272, 283, 61 CR 644. Evidence is substantial if it raises a reasonable or bona fide doubt concerning the defendant's ability to understand the nature of the criminal proceedings or to assist in his or her defense. *People v Rogers* (2006) 39 C4th 826, 847, 48 CR3d 1; see *People v Hayes* (1999) 21 C4th 1211, 1282, 91 CR2d 211 (in penalty phase of capital murder prosecution, judge properly denied defendant's motion for competency hearing, when defense counsel had no doubt about defendant's competence, and defendant's actions as co-counsel demonstrated that he was fully aware of nature of proceedings and able to assist counsel).

Evidence of incompetence is not substantial if it raises merely a suspicion of lack of present competence but does not purport to state facts of a present lack of ability, through mental illness, to participate rationally in a trial. *People v Hayes, supra,* 21 C4th at 1281; *People v Medina* (1995) 11 C4th 694, 733, 47 CR2d 165.

As a practical matter, the substantial evidence analysis answers only the question of whether a competency hearing is mandatory or discretionary. The hearing must be ordered if there is substantial evidence of the defendant's incompetence. The court has discretion to order the hearing if the evidence is less than substantial. *People v Hale* (1988) 44 C3d 531, 540, 244 CR 114; *People v Pennington* (1967) 66 C2d 508, 518, 58 CR 374. If the court exercises this discretion by ordering a hearing, it is unlikely that this decision will be disturbed on appeal as long as the hearing is actually held. See *People v Marks* (1988) 45 C3d 1335, 1343–1344, 248 CR 874 (trial court ordered hearing based solely on defense counsel's expressed doubt about defendant's competence, but hearing was not held).

b. [§63.14] What Constitutes Substantial Evidence

The substantial evidence test is satisfied if a qualified mental health expert who has had sufficient opportunity to examine the defendant states under oath with particularity that, in his or her professional opinion, due to mental illness, the defendant is incapable of understanding the purpose or nature of the criminal proceedings or assisting in his or her defense or cooperating with counsel. *People v Pennington* (1967) 66 C2d 508, 519, 58 CR 374; *People v Tomas* (1977) 74 CA3d 75, 91, 141 CR 453. A single doctor's report that concludes that the defendant is incapable of standing trial, even in the face of other reports to the contrary, is substantial evidence requiring that a Pen C §1368 proceeding be instituted. *People v Burney* (1981) 115 CA3d 497, 503, 171 CR 329; *People v Zatko* (1978) 80 CA3d 534, 547–548, 145 CR 643.

c. [§63.15] What Does Not Constitute Substantial Evidence

Courts have held that each of the following factual situations, standing alone, did *not* present substantial evidence of doubt about defendant's mental competence:

- Defendant's bizarre actions or statements. *People v Welch* (1999) 20 C4th 701, 742, 85 CR2d 203; *People v Cooks* (1983) 141 CA3d 224, 324, 190 CR 211 (bizarre answers to questions on cross-examination demonstrated hostility to prosecution and court but not incompetence to testify).
- Disruptive courtroom behavior. *People v Elliott* (2012) 53 C4th 535, 581–583, 137 CR3d 59 (defendant threw apples at the judge and at jurors and cursed when judge ordered that he be restrained); *People v Medina* (1995) 11 C4th 694, 735, 47 CR2d 165 (defendant's cursing and disruptive actions required removal from the courtroom).

- Statements of defendant's family that defendant suffered from migraine headaches and that he had a possible epileptic seizure when he was 2 or 3 years old; defense psychiatrist's undetailed opinion that defendant suffered from drug dementia, and opinion based on reports from another psychiatrist that had examined defendant. *People v Rodrigues* (1994) 8 C4th 1060, 1110, 36 CR2d 235.
- Psychiatrist's testimony that high doses of medication had been prescribed for defendant, that defendant had experienced short-term memory loss on one occasion, and that defendant may have been suffering from underlying depression. *People v Danielson* (1992) 3 C4th 691, 726, 13 CR2d 1, disapproved on other grounds in 25 C4th 1046, 1069 n13 (no evidence that defendant was so overmedicated that he could not understand the nature of the criminal proceedings or cooperate with counsel). See also *People v Medina*, *supra*, 11 C4th at 732 (defendant's assertion that antipsychotic medicine concealed his incompetence was based on unsupported speculation).
- Defense counsel's statements that defendant was incapable of cooperating in his or her defense. *People v Welch, supra*, 20 C4th at 742 (disagreement between defense counsel and defendant about which defense to employ did not require court to order competency hearing).
- Defendant's "paranoid distrust of the judicial system," and statements that defense counsel was in league with the prosecution. 20 C4th at 739, 742.
- Mental health expert's testimony that defendant was immature, dangerous, psychopathic, or homicidal, or similar diagnosis that includes few references to defendant's ability to assist in his or her own defense. 20 C4th at 742. See also *People v Hays* (1976) 54 CA3d 755, 760, 126 CR 770 (psychiatric reports found defendant depressed and suffering from mild psychosis but expressed no doubt about defendant's mental competence).
- Mental health report that did not express any opinion on defendant's ability to assist in defense, cooperate with counsel, or understand the purpose or nature of the criminal proceedings. *People v Beivelman* (1968) 70 C2d 60, 73, 73 CR 521 (disapproved on other grounds in 27 C3d at 33). See also *People v Leever* (1985) 173 CA3d 853, 864, 219 CR 581 (letter paraphrasing doctor's report gave no hint of doctor's opinion of competence); *People v Burney* (1981) 115 CA3d 497, 503, 171 CR

329 (medical reports related to defendant's sanity at time of offense rather than competence at trial).

- Psychiatrist's testimony that defendant appeared to be schizophrenic and delusional, which was based solely on observations of defendant's in-court demeanor, and not from any actual examination or testing of defendant. *People v Weaver* (2001) 26 C4th 876, 952–954, 111 CR2d 2.
- Counsel's statement that defendant did not understand the proceedings; psychiatrist's report that defendant showed no mental abnormality and was able to cooperate and assist trial counsel. *People v Stewart* (1979) 89 CA3d 992, 995, 153 CR 242.
- Psychiatrist's testimony that the defendant suffered some type of dissociative disorder that probably rose to the level of a multiple personality disorder; no testimony that the defendant was likely to disassociate during the trial or that the alleged disorder would interfere with defendant's ability to understand the trial process or assist defense counsel. *People v Rogers* (2006) 39 C4th 826, 848–849, 48 CR3d 1.
- Defendant's inappropriate emotional response to a serious trial; statements of stepparents that defendant's behavior during trial was strange; earlier diagnosis by a court-appointed psychiatrist that defendant had a personality disorder; the fact that defendant had suffered head injuries at an unspecified time in the past. *People v Claxton* (1982) 129 CA3d 638, 667, 181 CR 281 (counsel had declined to put on witnesses, saying his remarks alone were sufficient under Pen C §1368(b)). See also *People v Stiltner* (1982) 132 CA3d 216, 222, 182 CR 790 (court held that similar factors did not constitute substantial evidence).
- Defendant's acts of pleading guilty to a capital offense and waiving a jury trial, allegedly amounting to a suicide attempt; defendant's waiver of a penalty jury. *People v Deere* (1985) 41 C3d 353, 359, 222 CR 13 (disapproved on other grounds in 48 C3d at 1228 n9). See also *People v Mai* (2013) 57 C4th 986, 1035, 161 CR3d 1 (defendant's decision not to argue in favor of life imprisonment or present mitigating evidence).
- Psychiatrist's testimony that defendant suffered permanent amnesia of the events surrounding the criminal offense. *People v Amador* (1988) 200 CA3d 1449, 246 CR 605.
- Testimony of two psychiatrists that defendant was unable to tolerate stressful situations and that the stress of a trial would make it difficult for him to testify on his own behalf; counsel's statements that defendant could not retain information long enough

to prepare his testimony. *People v Frye* (1998) 18 C4th 894, 948–953, 77 CR2d 25.

- Defendant's assertion that he was "mentally" absent because his chronic back pain and associated symptoms prevented him from concentrating on the proceedings or communicating with counsel; defendant was lucid, coherent, and rational, and the court reasonably accommodated the special needs of the defendant. *People v Avila* (2004) 117 CA4th 771, 778–781, 11 CR3d 894.

Even though no single factor constitutes substantial evidence, several factors in combination may support a reasonable inference of lack of present mental capacity within the meaning of Pen C §§1367–1368. See *People v Humphrey* (1975) 45 CA3d 32, 38, 119 CR 74 (evidence supporting reasonable inference of lack of present competence required trial court to order hearing).

4. [§63.16] Suspension of Proceedings

When substantial evidence appears, a doubt about the competence of the defendant exists, no matter how persuasive other evidence may be to the contrary, and the trial court must order a Pen C §1368 competency hearing. Once the court has ordered a competency hearing, the criminal proceedings must be suspended until a trial on defendant's competency has been concluded and the defendant either is found mentally competent or has competency restored under Pen C §1372 (see §63.83). Pen C §1368(c); Cal Rules of Ct 4.130(c)(1); *People v Hale* (1988) 44 C3d 531, 540, 244 CR 114 (court is divested of jurisdiction to proceed pending express determination of competence). Furthermore, neither the defendant nor counsel can waive the question of competence after substantial evidence of incompetence has been presented and the competency hearing has been ordered. 44 C3d at 541.

When the criminal proceedings are suspended, and a jury has been impaneled and sworn to try the defendant, the court must discharge the jury only if it appears to the court that undue hardship would result if the jury is retained on call. Pen C §1368(c).

5. Hearing Specified Matters During Suspension

a. [§63.17] Demurrer, Suppression Motion, and Motion To Dismiss

Proceedings to determine mental competence must be held before the filing of an information unless defense counsel requests a preliminary hearing under Pen C §859b. Pen C §1368.1(a); Cal Rules of Ct 4.130(b)(3). At the preliminary hearing, defense counsel may demur, move to dismiss the felony complaint, or move to suppress evidence under

Pen C §1538.5. Pen C §1368.1(a). Similarly, in misdemeanor cases, defense counsel may demur, move to dismiss the misdemeanor complaint, or move to suppress evidence under Pen C §1538.5. Pen C §1368.1(b).

If the proceeding involves an alleged violation of probation, mandatory supervision, PRCS, or parole, defense counsel may move to reinstate supervision on the ground that there is not probable cause to believe that the defendant violated the terms of his or her supervision. Pen C §1368.1(c). In ruling on a demurrer or on these motions, the court may hear any matter that is capable of fair determination without the defendant's personal participation. Pen C §1368.1(d).

The court should be cautious in evaluating a defense request for a preliminary hearing before the defendant's competence has been determined. A preliminary hearing held when the defendant is mentally incompetent deprives the defendant of due process. *People v Duncan* (2000) 78 CA4th 765, 93 CR2d 173; *Chambers v Municipal Court* (1974) 43 CA3d 809, 813, 118 CR 120. When the defendant is determined to be incompetent after the filing of the information, defense counsel may move to set aside the information under Pen C §995 after the defendant has been restored to competence. If defense counsel can establish at an evidentiary hearing on the motion that the defendant was mentally incompetent during the preliminary hearing, the motion must be granted and a second preliminary hearing must be held after the filing of a new information. *People v Duncan*, *supra*; *Bayramoglu v Superior Court* (1981) 124 CA3d 718, 729, 176 CR 487; *Miller v Superior Court* (1978) 81 CA3d 132, 146 CR 253. But see *Booth v Superior Court* (1997) 57 CA4th 91, 95, 66 CR2d 758 (defendant found incompetent 3 months after defendant held to answer; if no doubt about competence raised at preliminary hearing, defendant presumed competent and legally committed by magistrate).

Similar caution should be used when ruling on related matters under Pen C §1368.1(d). The statute does not specify what matters are "capable of fair determination without the personal participation of the defendant." The court should not place itself in the position of adjudicating matters that may later prove to have been invalid because of the defendant's incompetence.

b. [§63.18] Conditional Examination of Witness

In exercising its inherent discretion to control the criminal proceedings before it, the court may allow a conditional examination to be taken of a witness before proceeding with a competency hearing if extraordinary circumstances so warrant. *People v Cadogan* (2009) 173 CA4th 1502, 1509–1513, 93 CR3d 881 (court upheld examination of defendant's wife who was terminally ill and not likely to survive until trial; defendant's intransigence caused significant delay in holding of competency hearing). If a conditional examination is taken and it is later

determined that the defendant was incompetent at the time of the examination, it may not be admitted at trial. 173 CA4th at 1513.

c. [§63.19] Substitution of Counsel; Self-Representation

Substitution of Counsel. The court may hear a motion for substitution of counsel (*Marsden* motion) before proceeding with a competency hearing. *People v Taylor* (2010) 48 C4th 574, 600–601, 108 CR3d 87; *People v Stankewitz* (1990) 51 C3d 72, 89, 270 CR 817; *People v Solorzano* (2005) 126 CA4th 1063, 24 CR3d 735 (defendant entitled to new trial when trial court refused to hear his motion for substitution of counsel while competency hearing was pending).

Self-Representation. However, the court may not hear a motion for self-representation (*Faretta* motion). *People v Horton* (1995) 11 C4th 1068, 1108, 47 CR2d 516. See also *People v Hightower* (1996) 41 CA4th 1108, 1116, 49 CR2d 40 (competency standards for waiving right to counsel and standing trial are same). In *Indiana v Edwards* (2008) 554 US 164, 169–178, 128 S Ct 2379, 171 L Ed 2d 345, the U.S. Supreme Court held when a defendant is competent to stand trial and seeks to conduct his own defense at trial rather than enter a guilty or no-contest plea, a trial court many deny the a motion for self-representation if the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present a defense without the help of counsel. The California Supreme Court has expressly held that trial courts may deny self-representation in those cases where *Edwards* permits it. *People v Johnson* (2012) 53 C4th 519, 525–531, 136 CR3d 54.

For a comprehensive discussion of motions for substitution of counsel and pro per motions, see California Judges Benchguide 54: *Right to Counsel Issues* (Cal CJER).

6. [§63.20] Appointment of Experts/Evaluation of Defendant

Before the hearing, the court must inquire whether the defendant or defense counsel seeks a finding of mental incompetence. Cal Rules of Ct 4.130(d)(1). If the defendant or defense counsel informs the court that the defendant is seeking a finding of mental incompetence, the court must appoint at least one psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. Pen C §1369(a); Cal Rules of Ct 4.130(d)(1)(A). If the defendant or defense counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court must appoint two psychiatrists, licensed psychologists, or a combination of the two. Pen C §1369(a); Cal Rules of Ct 4.130(d)(1)(B). In this case, the defense and the prosecution may each name one of the psychiatrists or licensed psychologists. Pen C §1369(a); Cal Rules of Ct 4.130(d)(1)(B). When the defendant personally claims that

he or she is competent, but defense counsel seeks a finding of incompetence, the court should appoint two experts. *People v Harris* (1993) 14 CA4th 984, 996, 18 CR2d 92. If the defendant desires to present testimony of a psychiatrist or psychologist of his or her own choosing, the court may not place conditions on the admission of the testimony, such as cooperation with the court-appointed psychiatrist or requiring that no public funds be used to hire the defendant's psychiatrist. *People v Mayes* (1988) 202 CA3d 908, 248 CR 899.

The examining psychiatrists or psychologists must evaluate the nature of the defendant's mental disorder, if any, and the defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in presenting a defense in a rational manner. Pen C §1369(a). The reports of the examining psychiatrists or psychologists must be submitted to the court, defense counsel, and the prosecutor. Cal Rules of Ct 4.130(d)(2).

Regardless of the conclusions or findings of the court-appointed psychiatrist or psychologist, the court that has initiated mental competency proceedings under Cal Rules of Ct 4.130(b) must conduct a trial on the defendant's competency. Cal Rules of Ct 4.130(e)(1).

The court has authority under the Code of Civil Procedure to order the defendant to submit to a mental examination given by a prosecution expert. CCP §2019(a)(4); *Baqleh v Superior Court* (2002) 100 CA4th 478, 488–492, 122 CR2d 673 (civil nature of competency hearing vests trial court with authority to use appropriate rules set forth in the Code of Civil Procedure, including civil discovery statutes). For a discussion of sanctions for failure to comply with an order to submit to an examination issued under CCP §2019(a)(4), see §63.24.

If the court suspects that the defendant is developmentally disabled, the following procedures should be observed (Pen C §1369(a)):

- The court must appoint the director of the regional center for the developmentally disabled to examine the defendant.
- The court may order the developmentally disabled defendant to be confined for examination in a residential facility or state hospital.
- The regional center director must recommend to the court a suitable facility or hospital, and the court must consider the recommendation before making its confinement order.
- The defendant must receive necessary care and treatment during confinement.

a. [§63.21] Appropriateness of Antipsychotic Medication

In addition to evaluating the defendant's competence, the examining psychiatrists or licensed psychologists must evaluate whether treatment

with antipsychotic medication is medically appropriate for the defendant and whether antipsychotic medication is likely to restore the defendant to mental competence. Pen C §1369(a).

If an examining psychologist is of the opinion that antipsychotic medication may be medically appropriate for the defendant and that the defendant should be evaluated by a psychiatrist to determine if antipsychotic medication is medically appropriate, the psychologist must inform the court of this opinion and a recommendation as to whether a psychiatrist should examine the defendant. Pen C §1369(a).

☛ JUDICIAL TIP: Although Pen C §1369(a) authorizes the appointment of either psychiatrists or psychologists, the court may prefer to appoint psychiatrists only. Psychiatrists are licensed to evaluate and prescribe medications, but psychologists generally are not.

The examining psychiatrists or licensed psychologists must also address the issues of whether the defendant has capacity to make decisions regarding antipsychotic medication and whether the defendant is a danger to self or others. If the defendant is examined by a psychiatrist and the psychiatrist forms an opinion as to whether treatment with antipsychotic medication is medically appropriate, the psychiatrist must inform the court of an opinion as to the likely or potential side effects of the medication, the expected efficacy of the medication, possible alternative treatments, and whether it is medically appropriate to administer antipsychotic medication in the county jail. Pen C §1369(a).

The court may order the administration of antipsychotic medications in county jails to defendants found to be mentally incompetent and unable to provide informed consent. See Pen C §1369.1(a). As expressed in Section 1 of Stats 2007, ch 556 (SB 568), the purpose of Pen C §1369.1 is to ensure timely and humane access to court-approved psychiatric medications to defendants being held in jail and awaiting transfer to a state psychiatric hospital for restoration of competency.

b. [§63.22] Use of Defendant's Statements in Subsequent Proceedings

Neither the statements made by a defendant to a psychiatrist appointed under Pen C §1369, nor any evidence derived from these statements may be used by the prosecution to prove its case-in-chief as to either defendant's guilt or penalty. Cal Rules of Ct 4.130(d)(3); *People v Jablonski* (2006) 37 C4th 774, 802–804, 38 CR3d 98; *People v Arcega* (1982) 32 C3d 504, 520, 186 CR 94. Further, any statements made during competency examinations may not be used to impeach a defendant who testifies at trial. *People v Pokovich* (2006) 39 C4th 1240, 1246–1253, 48 CR3d 158. Neither the United States Supreme Court nor California courts

have confronted the question of whether a defendant who chooses to testify at trial may have that testimony impeached by prior statements made during a court-ordered examination initiated by the defense's voluntary decision to present *mental-state evidence on the issue of guilt or penalty*. *Maldonado v Superior Court* (2012) 53 C4th 1112, 1125 n9, 140 CR3d 113.

If defendant places his or her mental state in issue, the statements to the court-appointed psychiatrist are admissible at the guilt phase of the trial. *People v McPeters* (1992) 2 C4th 1148, 1190, 9 CR2d 834; *People v Williams* (1988) 44 C3d 883, 934, 245 CR 336. If the defendant raises a mental status defense and calls one of the competency examination experts to the stand, the prosecutor may impeach the psychiatrist with the evidence used to base that expert opinion, which may include hospital records and the competency reports, including the testifying psychiatrist's own report. *People v Taylor* (2010) 48 C4th 574, 617–621, 108 CR3d 87.

The rule of immunity in competency proceedings extends to statements to employees of health facilities charged with restoring the defendant's competency under Pen C §1370. *In re Hernandez* (2006) 143 CA4th 459, 475–476, 49 CR3d 301 (defense counsel committed prejudicial error at sanity phase of trial by failing to object to testimony of prosecution's expert witness whose opinion of defendant's mental state was based on defendant's statements to that expert during interviews and testing conducted while defendant was confined to state hospital under Pen C §1370(a)(1)(B)(i)).

c. [§63.23] Presence of Defense Counsel During Examination

The court may permit defense counsel to be present as an observer at the defendant's examination if the examining psychiatrist does not object. *In re Spencer* (1965) 63 C2d 400, 413, 46 CR 753. However, a defendant is not entitled to have his or her counsel present provided the following conditions are met:

- Counsel is informed of the appointment of psychiatrists.
- The court-appointed psychiatrists are not permitted to testify at the guilt phase unless the defendant places his or her mental condition in issue.
- If the defendant places his or her mental condition in issue and the psychiatrist testifies, the court instructs the jury that the testimony about the defendant's incriminating statements should not be regarded as proof of the facts disclosed by the statements, but may be considered only for the purpose of showing the information on which the psychiatrist based that opinion. *In re Spencer*, *supra*, 63 C2d at 412; *Tarantino v Superior Court* (1975) 48 CA3d 465, 469, 122 CR 61; CALCRIM 360. See also *Baqleh v Superior Court*

(2002) 100 CA4th 478, 503–505, 122 CR2d 673 (defendant has no Sixth Amendment right to counsel at examination; judicially declared rule of immunity that prohibits use at trial of information obtained at examination protects the interest that might otherwise entitle defendant to counsel's presence at examination).

d. [§63.24] Consequences of Refusal To Submit to Examination

If the defendant refuses to submit to a mental examination by a prosecution expert when properly ordered to do so under the provisions of the Civil Discovery Act (CCP §§2016–2036), the court may impose issue and evidence sanctions under CCP §2032(f), which includes disclosure to a jury of the defendant's refusal. *Baqleh v Superior Court* (2002) 100 CA4th 478, 506, 122 CR2d 673.

e. [§63.25] Stipulated Hearing on Doctors' Reports

A formal adversary hearing on the issue of competence is not required if the prosecutor and defense counsel stipulate that the competency determination be made by the court based on the written reports of the court-appointed psychiatrists. *People v Weaver* (2001) 26 C4th 876, 903–905, 111 CR2d 2; *People v McPeters* (1992) 2 C4th 1148, 1169, 9 CR2d 834 (counsel's waiver of rights attendant to formal hearing does not violate defendant's due process rights).

☛ JUDICIAL TIP: When proceedings are suspended, courts routinely order the defendant back in court within 2–3 weeks to review the reports and determine if the parties will stipulate to the finding(s) of the psychiatrist(s). If the parties stipulate, the court makes a finding of competency or incompetency. If the parties do not stipulate, the court then sets a date for a formal competency hearing.

C. Competency Hearing

1. [§63.26] Hearing Judge

There is no requirement that the competency hearing be held before the same judge who declared a doubt about the defendant's competence. *People v Hill* (1967) 67 C2d 105, 113, 60 CR 234. In fact, competency proceedings are commonly assigned to another department and judge for hearing. See *People v Lawley* (2002) 27 C4th 102, 133–134, 115 CR2d 614.

2. [§63.27] Right to Jury Trial

Hearing to determine competency to be tried or sentenced. A competency hearing is a special proceeding rather than a criminal action, and the defendant has only a statutory, not a constitutional, right to a jury trial of the competency issue. Pen C §1369; *People v Hill* (1967) 67 C2d 105, 114, 60 CR 234. See also *Baqleh v Superior Court* (2002) 100 CA4th 478, 490–491, 122 CR2d 673 (civil nature of competency hearing vests trial court with authority to use rules applicable to civil proceedings). A defendant must request a jury trial, and absent that request, the court is under no duty to advise the defendant of that right if the defendant is represented by counsel. *People v Hill*, *supra*, 67 C2d at 114. If the prosecution requests a jury trial, the court must grant that request, even if the defendant requests a court trial. *People v Superior Court* (McPeters) (1985) 169 CA3d 796, 215 CR 482.

Because the defendant's competence is in doubt and the defendant cannot be entrusted to make basic decisions regarding the conduct of the competency hearing, defense counsel may waive the defendant's right to a jury trial, and make other decisions regarding a jury trial, even over the defendant's objection. *People v Masterson* (1994) 8 C4th 965, 970, 35 CR2d 679 (counsel stipulated to use of an 11-person jury over defendant's objection). See also *People v McPeters* (1992) 2 C4th 1148, 1168, 9 CR2d 834 (defense counsel's decision to submit competency issue based on stipulated record did not violate defendant's rights).

Because a competency hearing is a special proceeding that is civil in nature, the parties to the hearing are entitled only to the number of peremptory challenges provided for in civil trials (CCP §231), even if the underlying crime is punishable by death or life imprisonment. *People v Stanley* (1995) 10 C4th 764, 807, 42 CR2d 543.

Hearing to determine competency to have probation, mandatory supervision, PRCS, or parole revoked. Only a trial court is required to determine competency in any proceeding for a violation of probation, mandatory supervision, PRCS, or parole. Pen C §1369(g).

3. [§63.28] Appointment of Independent Counsel

When a defendant's attorney believes that the defendant is incompetent, but the defendant objects, the trial court may appoint an additional attorney to represent the defendant in arguing the defendant is competent, while permitting the defendant's trial counsel to present the case for incompetence in the belief it is in the defendant's best interests. *People v Stanley* (1995) 10 C4th 764, 804–807, 42 CR2d 543. *Stanley* permits, but does not require, the appointment of independent counsel when defense counsel and the defendant disagree on the defendant's

competency. See *People v Blacksher* (2011) 52 C4th 769, 853, 130 CR3d 191.

4. [§63.29] Presumption of Competence; Burden of Proof

The defendant is presumed competent at the start of the competency hearing. Pen C §1369(f). The burden is on the defendant to prove incompetence by a preponderance of the evidence. Pen C §1369(f); Cal Rules of Ct 4.130(e)(2); *Medina v California* (1992) 505 US 437, 112 S Ct 2572, 120 L Ed 2d 353; *People v Medina* (1990) 51 C3d 870, 885, 274 CR 849 (presumption and burden of proof under Pen C §1369(f) do not violate due process); CALCRIM 3451. However, the prosecution may present evidence of the defendant's mental incompetence if the defense declines to do so. Pen C §1369(b)(2). In this case, the burden of proof falls on the prosecution. Cal Rules of Ct 4.130(e)(2); *People v Mixon* (1990) 225 CA3d 1471, 1484 n12, 275 CR 817 (burden of proof falls on party who challenges presumption).

When neither the prosecution nor the defendant seeks a finding of incompetence, the trial court may take the initiative and assume the burden of producing evidence of incompetence. *People v Skeirik* (1991) 229 CA3d 444, 459, 280 CR 175. When the court produces evidence of incompetence, it should instruct the jurors on the legal standard they are to apply to the evidence without allocating the burden of proof to either the defendant or the prosecution. 229 CA3d at 460.

5. [§63.30] Presentation of Evidence

Penal Code §1369 outlines the procedure for the presentation of evidence in a competency hearing:

- Defense counsel offers evidence of defendant's mental incompetence. Pen C §1369(b)(1). If defense counsel does not offer such evidence, the prosecutor may do so. Pen C §1369(b)(2).
- The prosecutor offers evidence of defendant's present mental competence. Pen C §1369(c).
- Each party may offer rebuttal testimony, unless the court, for good reason and in the furtherance of justice, also permits other evidence in support of the original contention. Pen C §1369(d).
- The prosecution makes its final argument, followed by the defense counsel's final argument. The parties may submit the case without final argument. Pen C §1369(e).

Defense counsel may present evidence of the defendant's incompetence even when the defendant desires to be found competent. *People v Stanley* (1995) 10 C4th 764, 804, 42 CR2d 543; *People v Bolden* (1979) 99 CA3d 375, 379, 160 CR 268 (defense counsel must advocate

the position that he or she perceives to be in the defendant's best interests even when that interest conflicts with the defendant's stated position). In that event, defense counsel should allow the defendant to testify as to his or her own present competence. *People v Harris* (1993) 14 CA4th 984, 993, 18 CR2d 92. However, it is defense counsel's decision whether the defendant should testify. *People v Bell* (2010) 181 CA4th 1071, 1079–1086, 105 CR3d 259 (trial court erred by allowing defendant to testify over defense counsel's objection). Such conflict does not establish sufficient grounds to warrant substitution of counsel (*Shephard v Superior Court* (1986) 180 CA3d 23, 33, 225 CR 328) or the appointment of second counsel to oppose commitment (*People v Salter* (2012) 210 CA4th 769, 776–777, 148 CR3d 652; *People v Jernigan* (2003) 110 CA4th 131, 135–137, 1 CR3d 511).

The common forms of evidence introduced in a competency hearing include:

- Testimony of psychiatrists or psychologists appointed under Pen C §1369(a), including testimony of experts critical of other expert testimony.
- Testimony of additional experts or relevant witnesses called by defense counsel or the prosecutor in addition to the psychiatrists or psychologists appointed by the court. Cal Rules of Ct 4.130(e)(3).
- Testimony of the defense attorney. (*Note:* Because the defendant is presumed competent, he or she may prevent defense counsel from testifying by asserting the attorney-client privilege in the absence of any evidence that the defendant is incapable of asserting the privilege. *People v Mickle* (1991) 54 C3d 140, 184, 286 CR 511.)
- Testimony of defendant. It is defense counsel's decision whether the defendant should testify. *People v Bell*, *supra*.
- Testimony of lay witnesses about defendant's behavior. Evid C §800; *People v Medina* (1990) 51 C3d 870, 887, 274 CR 849 (peace officer's testimony that defendant was responsive during conversation); *People v Marshall* (1997) 15 C4th 1, 30, 61 CR2d 84 (jail deputy's testimony that defendant acted in rational manner and conversed normally in lockup facility). See also *People v Clark* (2011) 52 C4th 856, 891–893, 131 CR3d 225 (court reporter's testimony reciting the comments made by defendant at prior hearing as reported in the reporter's transcript; bailiff's testimony concerning comments made by defendant during the proceedings).
- Nontestimonial behavior of the defendant in the courtroom. *People v Prince* (1988) 203 CA3d 848, 856, 250 CR 154

- Records of hospitalization or other treatment for defendant's mental condition, police reports, school records, and reports from other professional personnel, such as social workers and probation officers. *People v Rodrigues* (1994) 8 C4th 1060, 1109, 36 CR2d 235.

6. [§63.31] Verdict and Findings

When the competency issue is tried by the jury, the court must instruct the jury on all matters of law necessary to render a verdict. Pen C §1369(f). The verdict of the jury must be unanimous and supported by substantial evidence. Pen C §1369(f); Cal Rules of Ct 4.130(e)(4)(A); *People v Samuel* (1981) 29 C3d 489, 505, 174 CR 684. The court may reverse a jury verdict of competence and render a judgment notwithstanding the verdict under CCP §629 if the court finds that there is no substantial evidence to support the verdict. *People v Conrad* (1982) 132 CA3d 361, 182 CR 912.

If the defendant is found mentally competent, the criminal proceedings will resume, the trial on the charged offense(s) or hearing on the alleged violation of probation, mandatory supervision, PRCS, or parole will proceed, and judgment may be pronounced. Pen C §§1370(a)(1)(A), 1370.01(a)(1); Cal Rules of Ct 4.130(f)(1). For discussion of calculating time when criminal proceedings are reinstated, see §63.69.

When the defendant is found mentally incompetent, the criminal proceedings remain suspended, and the court must order the defendant confined to a state hospital or other treatment facility, or placed on outpatient status. Pen C §§1370(a)(1)(B)(i), 1370.01(a)(1); Cal Rules of Ct 4.130(f)(2). If the court has not already done so, it must discharge any jury impaneled and sworn to try the defendant. Pen C §1368(c).

When the issue of competence is decided by the trial court, the court must expressly state on the record, either orally or in writing, its determination whether the defendant is mentally competent, as well as the evidence considered and the reasoning in support of its finding. Cal Rules of Ct 4.130(e)(4)(B); *People v Marks* (1988) 45 C3d 1335, 1343, 248 CR 874.

7. [§63.32] Situations Requiring Second Hearing

When a competency hearing has already been held and the defendant has been found competent to stand trial, the court is not required to hold a second competency hearing unless it is presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of the competency finding. *People v Taylor* (2009) 47 C4th 850, 863–864, 102 CR3d 852; *People v Lawley* (2002) 27 C4th 102, 136, 115 CR2d 614; *People v Kaplan* (2007) 149 CA4th 372, 383–387, 57 CR3d

143 (court erred in not ordering second competency hearing when defendant's mental condition had deteriorated since the first hearing as a result of a significant change in defendant's psychotropic medications). The court may take its personal observations of the defendant into account in determining whether there has been a significant change in the defendant's mental state. *People v Jones* (1991) 53 C3d 1115, 1153, 282 CR 465.

8. [§63.33] Consequences of Erroneous Denial of Hearing; Retrospective Hearing

An erroneous denial of a competency hearing compels reversal of the judgment, because the trial court has no power to proceed with the trial once a doubt arises about the defendant's competence. *People v Ary* (2011) 51 C4th 510, 515 n1, 120 CR3d 431; *People v Young* (2005) 34 C4th 1149, 1216–1217, 24 CR3d 112. However, the due process violation of denial of a competency hearing may be cured by holding a retrospective or postjudgment competency hearing in rare cases when there is sufficient evidence of a defendant's mental state at the time of trial on which to base a subsequent competency determination. See *People v Robinson* (2007) 151 CA4th 606, 617–618, 60 CR3d 102 (case remanded to trial court for a retrospective competency hearing; disputed competency hearing occurred only 2 years previously; trial record contained both expert's report on defendant's mental competence at that time and statements by defendant from which his mental competence could be assessed); *People v Ary* (2004) 118 CA4th 1016, 1025–1029, 13 CR3d 482 (case remanded to trial court for a determination of whether retrospective hearing should be held; trial court record contained information potentially relevant to a competency hearing, *i.e.*, extensive expert testimony regarding defendant's intellectual disability presented at a pretrial hearing on the defendant's competence to waive his *Miranda* rights and the voluntariness of his confession).

Four factors are considered in assessing whether a meaningful retrospective competency determination can be made consistent with a defendant's due process rights (*People v Ary*, *supra*, 51 C4th at 520 n3; *People v Robinson*, *supra*, at 151 CA4th at 617):

- The passage of time;
- The availability of contemporaneous medical evidence, including medical records and prior competency determinations;
- Any statements by the defendant in the trial record; and
- The availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with defendant before and during trial.

Should the trial court on remand determine that a retrospective hearing if feasible after considering the above factors, the hearing must be calendared and held. If such a hearing is not feasible, defendant is entitled to a new trial. In the event such a retrospective competency hearing is held and defendant is found to have been competent at the time of trial, the trial court must reinstate the judgment. If, after the hearing, the defendant is found not to have been competent at the time of trial, the defendant is entitled to a new trial. See 151 CA4th at 619; *People v Kaplan* (2007) 149 CA4th 372, 390, 57 CR3d 143.

At a retrospective competency hearing, the defendant has the burden of proving, by a preponderance of the evidence, that he or she was mentally incompetent when tried. This is the same showing that is required of a defendant at a competency hearing held at the time of trial. *People v Ary*, *supra*, 51 C4th at 519–521 (no due process violation to assign burden to defendant).

D. Commitment to Treatment Facility or Outpatient Status Placement—Defendant Charged With Felony or Alleged To Have Violated Felony Probation or Mandatory Supervision

1. [§63.34] Placement Recommendation by Community Program Director

If the defendant is found mentally incompetent, the court (1) must commit the defendant to a state hospital for the care and treatment of the mentally disordered, or a public or private treatment facility, including a local county jail treatment facility or community-based residential treatment system if the facility has a secured perimeter or a locked and controlled treatment facility, or (2) order the defendant be placed on outpatient status. Pen C §1370(a)(1)(B)(i).

However, before making its commitment order, the court must order the community program director (or designee) to evaluate the defendant and submit to the court within 15 judicial days of the order a written recommendation as to whether the defendant should be placed on outpatient status or committed to a state hospital or other treatment facility. Pen C §1370(a)(2)(A). A defendant may not undergo any form of treatment without first being evaluated by the community program director (or designee). Pen C §1370(a)(2)(A).

☛ JUDICIAL TIP: If the defendant is charged with a felony that is listed in Pen C §1601(a) or other violent felony, indicate this on the order so that the community program director makes a placement recommendation that is consistent with the statutory requirements of Pen C §§1370(a)(1) and 1601. See Appendix for list of Pen C §1601(a) felonies.

2. Administration of Antipsychotic Medication

a. [§63.35] Determination of Defendant's Capacity to Make Decisions Regarding Medication

The court must hear and determine whether the defendant lacks capacity to make decisions regarding the administration of antipsychotic medication. The court must consider opinions in the psychiatric examination or evaluation reports prepared under Pen C §1369(a) (see §63.20) and hear and determine whether any of the following is true (Pen C §1370(a)(2)(B)(i)):

- The defendant lacks capacity to make decisions regarding antipsychotic medication, the defendant's mental disorder requires medical treatment with antipsychotic medication, and if the defendant's mental disorder is not treated with antipsychotic medication, it is probable that serious harm to the physical or mental health of the patient will result. Probability of serious harm to the physical or mental health of the defendant requires evidence that the defendant is presently suffering adverse effects to his or her physical or mental health, or the defendant has previously suffered these effects as a result of a mental disorder, and his or her condition is substantially deteriorating. The fact that a defendant has a diagnosis of a mental disorder does not alone establish probability of serious harm to the physical or mental health of the defendant. Pen C §1370(a)(2)(B)(i)(I).
- The defendant is a danger to others, in that the defendant has inflicted, attempted to inflict, or made a serious threat to inflict substantial physical harm on another while in custody, or the defendant had inflicted, attempted to inflict, or made a serious threat to inflict substantial physical harm on another that resulted in his or her being taken into custody, and the defendant presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm on others. Demonstrated danger may be based on an assessment of the defendant's present mental condition, including a consideration of past behavior of the defendant within 6 years before the time the defendant last attempted to inflict, inflicted, or threatened to inflict substantial physical harm on another, and other relevant evidence. Pen C §1370(a)(2)(B)(i)(II).
- The defendant has been charged with a serious crime; involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial; 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; less intrusive treatments are unlikely to have substantially the same results; and antipsychotic medication is in the patient's best medical interest in light of his or her medical condition. Pen C §1370(a)(2)(B)(i)(III).

Note: Penal Code §1370(a)(2)(B)(i)(III) complies with the holding in *Sell v U.S.* (2003) 539 US 166, 123 S Ct 2174, 156 L Ed 2d 197. See *People v O'Dell* (2005) 126 CA4th 562, 569–572, 23 CR3d 902; see also *Carter v Superior Court* (2006) 141 CA4th 992, 1001, 46 CR3d 507 (trial court order authorizing state hospital to involuntarily administer antipsychotic medication not supported by substantial evidence; trial court's order did not meet *Sell* criteria or comply with Pen C §1370(a)(2)(B)(i)(III)); *People v McDuffie* (2006) 144 CA4th 880, 887–888, 50 CR3d 794 (evidence showing defendant had 50 to 60 percent chance of being restored to competency if treated with recommended antipsychotic medication does not meet "substantial likelihood" standard adopted by Pen C §1370(a)(2)(B)(i)(III)).

b. [§63.36] Defendant Lacks Capacity

If the court finds any of the conditions described in Pen C §1370(a)(2)(B)(i) to be true, the court must issue an order authorizing involuntary administration of antipsychotic medication to the defendant when and as prescribed by the defendant's treating psychiatrist at any facility housing the defendant. Pen C §1370(a)(2)(B)(ii). However, the court may not order involuntary administration of antipsychotic medication under Pen C §1370(a)(2)(B)(i)(III) unless it first finds that the defendant does not meet the criteria for involuntary administration of antipsychotic medication under both Pen C §1370(a)(2)(B)(i)(I) and (II). Pen C §1370(a)(2)(B)(ii); *People v O'Dell* (2005) 126 CA4th 562, 570 n3, 23 CR3d 902. The order authorizing treatment does not need to state with specificity basic limitations as to the type of medication the defendant's treating physician may administer, the maximum dosage, or the duration of the authorization. *People v Coleman* (2012) 208 CA4th 627, 637–639, 145 CR3d 329.

In all cases, the treating hospital, facility, or program may administer medically appropriate antipsychotic medication prescribed by a psychiatrist in an emergency as defined in Welf & I C §5008(m). Pen C §1370(a)(2)(B)(iii).

c. [§63.37] Defendant Has Capacity and Consents to Medication

If the court determines that the defendant has the capacity to make decisions regarding antipsychotic medication, and if the defendant, with

advice of defendant's counsel, consents, the court order of commitment must include confirmation that antipsychotic medication may be given to the defendant as prescribed by a treating psychiatrist pursuant to the defendant's consent. Pen C §1370(a)(2)(B)(iv). The commitment order must also indicate that if the defendant withdraws consent for antipsychotic medication, after the treating psychiatrist complies with the provisions under Pen C §1370(a)(2)(C), the defendant must be returned to court for a hearing in accordance with Pen C §1370(a)(2)(D) regarding whether antipsychotic medication will be administered involuntarily. Pen C §1370(a)(2)(B)(iv). See §63.38.

d. [§63.38] Defendant Has Capacity and Does Not Consent or Withdraws Consent; Medication Review Hearing

If the court determines that the defendant has the capacity to make decisions regarding antipsychotic medication and if the defendant, with advice of defendant's counsel, does not consent, or subsequently withdraws consent, and the treating psychiatrist determines that antipsychotic medication has become medically necessary and appropriate, the treating psychiatrist must make efforts to obtain informed consent from the defendant for antipsychotic medication. Pen C §1370(a)(2)(B)(v), (a)(2)(C). If informed consent is not obtained from the defendant, and the treating psychiatrist is of the opinion that the defendant lacks capacity to make decisions regarding antipsychotic medication as described in Pen C §1370(a)(2)(B)(i)(I), or that the defendant is a danger to others as described in Pen C §1370(a)(2)(B)(i)(II), the treating psychiatrist must certify whether the lack of capacity and any applicable condition described above exist. Pen C §1370(a)(2)(C). This certification must contain an assessment of the current mental state of the defendant and the opinion of the treating psychiatrist that involuntary antipsychotic medication has become medically necessary and appropriate. Pen C §1370(a)(2)(C).

If the treating psychiatrist certifies that antipsychotic medication has become medically necessary and appropriate under Pen C §1370(a)(2)(C), antipsychotic medication may be administered to the defendant for not more than 21 days, provided, however, that, within 72 hours of the certification, the defendant is provided a medication review hearing before an administrative law judge to be conducted at the facility where the defendant is receiving treatment. Pen C §1370(a)(2)(D)(i). The treating psychiatrist must present the case for the certification for involuntary treatment and the defendant must be represented by an attorney or a patients' rights advocate. The attorney or patients' rights advocate must be appointed to meet with the defendant no later than 1 day prior to the

medication review hearing to review the defendant's rights at the medication review hearing, discuss the process, answer questions or concerns regarding involuntary medication or the hearing, assist the defendant in preparing for the hearing and advocating for his or her interests at the hearing, review the panel's final determination following the hearing, advise the defendant of the right to judicial review of the panel's decision, and provide the defendant with referral information for legal advice on the subject. Pen C §1370(a)(2)(D)(i).

If the administrative law judge determines that the defendant meets the criteria specified in either Pen C §1370(a)(2)(B)(i)(I) or Pen C §1370(a)(2)(B)(i)(II), then antipsychotic medication may continue to be administered to the defendant for the 21-day certification period. Pen C §1370(a)(2)(D)(ii). Concurrently with the treating psychiatrist's certification, the treating psychiatrist must file a copy of the certification and a petition with the court for issuance of an order to administer antipsychotic medication beyond the 21-day certification period. Pen C §1370(a)(2)(D)(i), (ii). The court may, for a period not to exceed 14 days, extend the certification and continue the hearing by stipulation of the parties or on a finding of good cause. In determining good cause, the court may review the petition filed with the court, the administrative law judge's order, and any additional testimony needed by the court to determine if it is appropriate to continue medication 14 days beyond the 21-day certification period. Pen C §1370(a)(2)(D)(vii).

If the administrative law judge disagrees with the certification, medication may not be administered involuntarily until the court determines that antipsychotic medication should be administered. Pen C §1370(a)(2)(D)(iii). The court must provide notice to the prosecuting attorney and to the attorney representing the defendant, and must hold a hearing, no later than 18 days from the date of the certification, to determine whether antipsychotic medication should be ordered beyond the certification period. Pen C §1370(a)(2)(D)(iv). If, as a result of the hearing, the court determines that antipsychotic medication should be administered beyond the certification period, the court must issue an order authorizing the administration of the medication. Pen C §1370(a)(2)(D)(v). The court must render its decision on the petition and issue its order no later than 3 calendar days after the hearing and, in any event, no later than the expiration of the 21-day certification period. Pen C §1370(a)(2)(D)(vi).

The district attorney, county counsel, or representative of any facility where a defendant found incompetent to stand trial is committed may petition the court for an order to administer involuntary medication pursuant to the criteria specified in Pen C §1370(a)(2)(B)(i)(II) or Pen C §1370(a)(2)(B)(i)(III). Pen C §1370(a)(2)(D)(viii).

An order by the court authorizing involuntary medication of the defendant must be valid for no more than 1 year. Pen C §1370(a)(7)(A). The court must review the order at the time of the review of the initial 90-day report and the 6-month progress reports pursuant to Pen C §1370(b)(1) (see 63.44) to determine if the grounds for the authorization remain. In the review, the court must consider the reports of the treating psychiatrist or psychiatrists and the defendant's patients' rights advocate or attorney. The court may require testimony from the treating psychiatrist or psychiatrists and the patients' rights advocate or attorney, if necessary. Pen C §1370(a)(7). The court may continue the order authorizing involuntary medication for up to another 6 months, or vacate the order, or make any other appropriate order. Pen C §1370(a)(7)(A).

Within 60 days before the expiration of the one-year involuntary medication order, the district attorney, county counsel, or representative of any facility where a defendant found incompetent to stand trial is committed may petition the committing court for a renewal, subject to the same conditions and requirements as in Pen C §1370(a)(7)(A). Pen C §1370(a)(7)(B). The petition must include the basis for involuntary medication set forth in Pen C §1370(a)(2)(B)(i) (see §63.35). Notice of the petition must be provided to the defendant, the defendant's attorney, and the district attorney. Pen C §1370(a)(7)(B). The court must hear and determine whether the defendant continues to meet the criteria set forth in Pen C §1370(a)(2)(B)(i). The hearing on any petition to renew an order for involuntary medication must be conducted prior to the expiration of the current order. Pen C §1370(a)(7)(B).

3. [§63.39] Commitment Order

After reviewing the placement recommendation of the community program director (or designee), the court must order that:

- The defendant be placed on outpatient status in, or delivered by the sheriff to, a state hospital for the care and treatment of the mentally disordered or an available public or private treatment facility, including a local county jail treatment facility or community-based residential treatment system if the facility has a secured perimeter or a locked and controlled treatment facility, approved by the community program director that will promote the defendant's restoration to mental competence (Pen C §1370(a)(1)(B)(i)); *and*
- On receiving a copy of the filing of a certificate of restoration of competence, the sheriff must return the defendant to the court without any further order from the court (Pen C §1370(a)(1)(C)).

☛ JUDICIAL TIP: When committing the defendant to the state hospital or a facility, order the sheriff to transport the defendant to the facility within approximately 3–4 weeks. Schedule a "status of

transportation" date on the court calendar to confirm the defendant's timely admission to the hospital or other facility. See Judicial Tip in §63.40.

The commitment order exonerates any bail bond, undertaking, or deposit on file by or on behalf of the defendant. Pen C §1371.

4. [§63.40] Admissions Documents

When the court orders that the defendant be committed to a state hospital or other treatment facility, the court must provide copies of the following admissions documents to the state hospital or treatment facility prior to the defendant's admission to the state hospital of treatment facility (Pen C §1370(a)(3)):

- The commitment order, including a description of the charges.
- A computation or statement indicating the maximum term of commitment in accordance with Pen C §1370(c) (see §63.45).
- A computation or statement indicating any amount of credit for time served to be deducted from the maximum term of commitment (see §63.45).
- State's summary criminal history information.
- Any arrest reports prepared by the police department or other law enforcement agency.
- Any court-ordered psychiatric examination or evaluation reports.
- The community program director's placement recommendation report.
- Records of any finding of mental incompetence under Pen C §§1367–1375.5, arising out of a complaint charging a felony sex offense specified in Pen C §290, or any pending Pen C §1368 proceeding arising out of a charge of a Pen C §290 offense.
- Any medical records.

☛ JUDICIAL TIP: Schedule a "status of packet" date on the court calendar 3 to 5 days after the commitment is ordered to make sure that the packet of admissions documents has been sent by the clerk to the designated facility. After the court is satisfied that the packet has been sent, set a mandatory admission date approximately 3 weeks later and a "status of transportation" non-appearance date approximately 4 weeks later to make sure that the defendant has been timely transported to the facility.

5. [§63.41] Transfer of Defendant to Another Facility

The court may, on receiving a written recommendation of both the community program director and the medical director of the state hospital, transfer a defendant initially committed to a state hospital to an approved treatment facility. Pen C §1370(a)(6)(A). If the defendant was initially committed to a treatment facility, the court may transfer the defendant to a state hospital or to another approved treatment facility on the recommendation of the community program director. Pen C §1370(a)(6)(A). The court must notify the defendant, defense counsel, the prosecuting attorney, and the community program director (or designee) before making a transfer order. Pen C §1370(a)(6)(A).

The prosecutor or the defendant may contest the transfer order by filing a petition with the court for a hearing, which must be held if the court determines that sufficient grounds exist. Pen C §1370(a)(6)(A). At the hearing, the prosecutor or the defendant may present evidence bearing on the transfer order. The court must employ the same standards that are used in conducting probation revocation hearings under Pen C §1203.2. Pen C §1370(a)(6)(A). For a discussion of probation revocation hearings, see California Judges Benchguide 84: *Probation Revocation* (Cal CJER).

6. [§63.42] Outpatient Status Placement

A defendant may be placed on outpatient status by order of the court in accordance with the procedures contained in Pen C §§1600–1620. Pen C §1370(a)(1)(B)(i). For discussion of these procedures see §§63.76–63.80.

7. [§63.43] Placement in County Jail Treatment Facility or Community-Based Residential Treatment Facility

A defendant may be placed in a local county jail treatment facility or in community-based residential treatment system if the facility has a secured perimeter or a locked and controlled treatment facility, approved by the community program directory. Pen C §1370(a)(1)(B)(i). If a local county jail treatment facility or community-based residential treatment facility is selected, the California Department of State Hospitals must provide treatment at the facility and reimburse the facility for the cost of treatment. Pen C §1370(a)(2)(A). The six-month limitation in Pen C §1369.1 does not apply to individuals deemed incompetent to stand trial who are being treated to restore competency within a county jail treatment facility pursuant to Pen C §1370. Pen C §1370(a)(2)(A).

8. [§63.44] Progress Reports

The medical director of the state hospital or other treatment facility must provide to the court and the community program director (or

designee) a written report within 90 days of the commitment order addressing the defendant's progress toward recovery of mental competence and whether the administration of antipsychotic medication remains necessary. Pen C §1370(b)(1). If the defendant is on outpatient status, the outpatient treatment staff must provide a written progress report to the community program director, and the director must report to the court within the 90-day period. Pen C §1370(b)(1).

Before the report may be prepared, the state hospital must have sufficient time to evaluate the defendant and provide treatment that will promote a defendant's restoration of competency. Therefore, when the court orders a defendant committed to a state mental hospital, it must also ensure that the defendant is actually transferred to the state hospital within a reasonable period of time. *In re Mille* (2010) 182 CA4th 635, 649–650, 105 CR3d 859 (transfer 84 days after commitment order not timely). See Judicial Tip in §63.40.

The report must include a description of any antipsychotic medication administered to the defendant and its effects and side effects, including effects on the defendant's appearance or behavior that would affect 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. Pen C §1370(a)(2)(B)(vi).

If the defendant has not recovered mental competence, but the report indicates a substantial likelihood that the defendant will regain mental competence in the foreseeable future, the defendant must remain in the state hospital, treatment facility, or on outpatient status. Pen C §1370(b)(1).

If the report indicates that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future, the court must order the defendant to be returned to the court for proceedings pursuant to Pen C §1370(c)(2) (see §63.47) no later than 10 days following receipt of the report. The court must transmit a copy of its order to the community program director or a designee. Pen C §1370(b)(1)(A). The medical director of the state hospital or other treatment facility to which the defendant is confined must do both of the following (Pen C §1370(b)(1)(B):

- Promptly notify and provide a copy of the report to the defense counsel and the district attorney.
- Provide a separate notification, in compliance with applicable privacy laws, to the committing county's sheriff that transportation will be needed for the patient.

Subsequent written progress reports (following above procedure) must follow at six-month intervals or until the defendant becomes mentally competent. Pen C §1370(b)(1). The court must provide copies of

all progress reports to the prosecutor and defense counsel. Pen C §1370(b)(1), (c)(4).

After reviewing each progress report, the court must determine whether or not grounds for the order authorizing involuntary administration of antipsychotic medication still exist and must do one of the following (Pen C §1370(b)(3)):

- If the original grounds for involuntary medication still exist, allow the order authorizing the treating facility to involuntarily administer antipsychotic medication to the defendant to remain in effect.
- If the original grounds for involuntary medication no longer exist, and there is no other basis for involuntary administration of antipsychotic medication, vacate the order for the involuntary administration of antipsychotic medication.
- If the original grounds for involuntary medication no longer exist, and the report states that there is another basis for involuntary administration of antipsychotic medication, the court must set a hearing within 21 days to determine whether the order for the involuntary administration of antipsychotic medication will be vacated or whether a new order for the involuntary administration of antipsychotic medication will be issued. The hearing must proceed as set forth in Pen C §1370(a)(2)(B) (see §63.38).

On review of each progress report, the court must determine if the security level of housing and treatment is appropriate and may make an order in accordance with its determination. Pen C §1370(b)(6).

9. [§63.45] Duration of Commitment; Credit for Precommitment Confinement

The maximum period of commitment is 3 years from the date of the court's commitment order, or the maximum term of imprisonment provided by law for the most serious offense charged in the information, indictment, or misdemeanor complaint, or the maximum term of imprisonment provided by law for a violation of probation or mandatory supervision, whichever is shorter, but no later than 90 days prior to the expiration of the defendant's commitment term. Pen C §1370(c)(1).

In calculating the maximum period of commitment, credit must be given for any time served in precommitment confinement attributable to the same criminal prosecution when the maximum commitment term is less than 3 years. *In re Banks* (1979) 88 CA3d 864, 152 CR 111 (commitment term measured by defendant's maximum potential criminal sentence). However, when a defendant's maximum potential criminal sentence is more than 3 years, such that the maximum competency term is

the three-year limit under Pen C §1370(c)(1), the defendant is not entitled have any pretrial credits applied against the three-year term. *People v G. H.* (2014) 230 CA4th 1548, 1555–1561, 179 CR3d 618; *People v Reynolds* (2011) 196 CA4th 801, 808–809, 126 CR3d 779.

If a defendant has served a period of confinement equal to the maximum time of commitment, the defendant may be subject to extended civil commitment proceedings under the LPS Act if he or she is considered dangerous to society. *In re Banks*, *supra*, 88 CA3d at 871.

The three-year limit refers to the aggregate of all commitments for incompetency on the same charges, not to each commitment after a finding of incompetence. *In re Polk* (1999) 71 CA4th 1230, 1238, 84 CR2d 389.

10. [§63.46] Defendant's Return to Court Before Recovery

The committing court must order the defendant returned to the court when any of the following circumstances occurs:

- The initial 90-day progress report or a follow-up 6-month progress report prepared by the medical director of the state hospital or other treatment facility, or outpatient treatment staff indicates that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future. Pen C §1370(b)(1).
- The defendant is still receiving treatment or is on outpatient status after the passage of 18 months. Pen C §1370(b)(4).
- The court determines that no treatment for the defendant's mental impairment is being conducted. Pen C §1370(b)(5).
- The defendant fails to regain mental competence after the passage of the maximum period of commitment. Pen C §1370(c)(1); see §63.45.

The court must transmit a copy of its order of defendant's return to the community program director (or designee). Pen C §1370(b)(1). If the defendant remains hospitalized or on outpatient status after 18 months, the court must hold another competency hearing under Pen C §1369. Pen C §1370(b)(4). If the defendant is returned to the court under Pen C §1370(b)(1), §1370(b)(4), or §1370(c)(1), the judge must determine whether to initiate conservatorship proceedings under the LPS Act, dismiss the charges against the defendant and order him or her released from confinement, or dismiss the charges and initiate civil commitment proceedings. Pen C §1370(c)(2), (e); *In re Davis* (1973) 8 C3d 798, 804, 106 CR 178.

11. [§63.47] Initiation and Effect of Conservatorship Proceedings

Whenever the defendant is returned to the committing court under Pen C §1370(b)(1), §1370(b)(4), or §1370(c)(1) (see §63.46), and it appears to the court that the defendant is "gravely disabled" as defined in Welf & I C §5008(h)(1)(B), the following procedures must be observed (Pen C §1370(c)(2)):

- The court must order the conservatorship investigator of the county to initiate conservatorship proceedings for the defendant under Welf & I C §§5350–5371; see *People v Karriker* (2007) 149 CA4th 763, 782–783, 57 CR3d 412 (phrase "initiate conservatorship proceedings" refers not to filing the petition, but to conducting the investigation that is required before a petition may be filed under the LPS Act.).
- Any hearings required in the conservatorship proceedings must be held in the superior court in the county that ordered the commitment.
- The court must transmit a copy of the order directing the initiation of conservatorship proceedings to the community program director (or designee), the sheriff and the district attorney of the county in which the criminal charges are pending, and the defendant's counsel of record.
- The court must notify the community program director (or designee), the sheriff and the district attorney of the county in which the criminal charges are pending, and the defendant's counsel of record of the outcome of the proceedings.

If a change in placement is proposed for a defendant who is committed under Welf & I C §5008(h)(1)(B), the court must provide notice and an opportunity to be heard with respect to the proposed placement to the sheriff and the district attorney of the county in which criminal charges or revocation proceedings are pending. Pen C §1370(c)(3).

The initiation of conservatorship proceedings or the existence of a conservatorship does not affect any pending criminal proceedings. Welf & I C §5352.5. For a sample order initiating conservatorship proceedings, see §63.92.

12. [§63.48] Dismissal of Criminal Action

With the exception of proceedings alleging a violation of mandatory supervision, criminal charges are subject to dismissal by motion of the court or on the prosecutor's application under Pen C §1385. Pen C §1370(d). In addition, Pen C §1370.2 allows the court to dismiss any

misdemeanor charge(s) pending against a mentally incompetent defendant. The prosecutor must be provided 10 days' notice of any motion to dismiss under Pen C §1370.2. The court must transmit a copy of the dismissal order to the community program director (or designee). Pen C §§1370(d), 1370.2.

When the charges are dismissed before the defendant regains competency, the defendant must be released from the commitment order, but this does not preclude the initiation of civil commitment proceedings under the LPS Act. Pen C §1370(a)(6)(A), (e).

In a proceeding alleging a violation of mandatory supervision, if the defendant is not placed under a conservatorship as described in Pen C §1370(c)(2) (see §63.47), or if a conservatorship is terminated, the court must reinstate mandatory supervision and may modify the terms and conditions of supervision to include appropriate mental health treatment or refer the matter to a local mental health court, reentry court, or other collaborative justice court available for improving the mental health of the defendant. Pen C §1370(d).

E. [§63.49] Commitment of Developmentally Disabled Defendants

The procedures for determining the competence of a defendant who is developmentally disabled, as defined in Pen C §1370.1(a)(1)(H), generally parallel those that govern the competency determination of nondevelopmentally disabled defendants. The commitment procedures in cases involving developmentally disabled defendants are outlined in Pen C §1370.1.

1. [§63.50] Placement Recommendation by Regional Center Director

If the defendant is found mentally incompetent and is developmentally disabled, the court must order that the defendant be admitted to a state hospital or developmental center for the care and treatment of the developmentally disabled or any other available residential facility approved by the director of a regional center for the developmentally disabled, or placed on outpatient status. Pen C §1370.1(a)(1)(B)(i). However, before making its commitment order, the court must order the regional center director (or designee) to evaluate the defendant and submit to the court within 15 judicial days of the order a written recommendation as to whether the defendant should be placed on outpatient status or committed to a state hospital or developmental center, or to any other available residential facility approved by the regional center director. Pen C §1370.1(a)(2).

☛ JUDICIAL TIP: If the defendant is charged with a felony that is listed in Pen C §1601(a) or other violent felony, indicate this on

the order so that the regional center director makes a placement recommendation that is consistent with the statutory requirements of Pen C §§1370.1(a)(1) and 1601. See Appendix for list of Pen C §1601(a) felonies.

2. [§63.51] Commitment Order

After reviewing the placement recommendation of the regional center director (or designee), the court must order that:

- The defendant be placed on outpatient status in, or delivered by the sheriff to, a state hospital or developmental center for the care and treatment of the developmentally disabled or any other available residential facility approved by the director of a regional center for the developmentally disabled (Pen C §1370.1(a)(1)(B)(i)); *and*
- On the defendant becoming competent, the sheriff must return the defendant to the court without any further order from the court (Pen C §1370.1(a)(1)(C)).

☛ JUDICIAL TIP: When committing the defendant to the state hospital or treatment facility, order the sheriff to transport the defendant to the facility within approximately 3–4 weeks. Schedule a "status of transportation" date on the court calendar to confirm the defendant's timely admission to the hospital or other facility. See Judicial Tip in 63.52.

3. [§63.52] Admissions Documents

When the court orders that the defendant be confined to a state hospital or other secure treatment facility under Pen C §1370.1(a)(1)(B)(ii) or (iii) (see §63.74), the court must provide copies of the following admissions documents that must accompany the defendant to the state hospital or other secure treatment facility (Pen C §1370.1(a)(3)):

- State's summary criminal history information.
- Any arrest reports prepared by the police department or other law enforcement agency.
- Records of a finding of mental incompetence under Pen C §§1367–1375.5, arising out of a complaint charging a felony sex offense specified in Pen C §290, or a pending Pen C §1368 proceeding arising out of a charge of a Pen C §290 offense.

☛ JUDICIAL TIP: Schedule a "status of packet" date on the court calendar 3–5 days after the commitment is ordered to make sure that the packet of admissions documents has been sent by the clerk to the designated facility. After the court is satisfied that the packet has been sent, set a mandatory admission date

approximately 3 weeks later and a "status of transportation" non-appearance date approximately 4 weeks later to make sure that the defendant has been timely transported to the facility.

4. [§63.53] Transfer of Defendant to Another Facility

The court may, on receiving a written recommendation of the executor director of a state hospital or developmental center and the regional center director, transfer a defendant initially committed to a state hospital or developmental center to a residential facility approved by the regional center director. Pen C §1370.1(a)(5)(A). If the defendant was initially committed to a residential facility, the court may transfer the defendant to a state hospital, developmental center, or another residential facility or to another approved treatment facility on the recommendation of the regional center director. Pen C §1370.1(a)(5)(A). The court must notify the defendant, defense counsel, the prosecuting attorney, and the regional center director (or designee) before making a transfer order. Pen C §1370.1(a)(5)(A).

The prosecutor or the defendant may contest the transfer order by filing a petition with the court for a hearing, which must be held if the court determines that sufficient grounds exist. Pen C §1370.1(a)(5)(A). At the hearing, the prosecutor or the defendant may present evidence bearing on the transfer order. The court must employ the same standards that are used in conducting probation revocation hearings under Pen C §1203.2. Pen C §1370.1(a)(5)(A). For a discussion of probation revocation hearings, see California Judges Benchguide 84: *Probation Revocation* (Cal CJER).

5. [§63.54] Outpatient Status Placement

The court may order the defendant to undergo outpatient treatment in accordance with the procedures contained in Pen C §§1600–1620 if the regional center evaluation opines that the defendant does not pose a danger to the health and safety of others if placed on outpatient status and will benefit from outpatient treatment, and the regional center director has obtained the agreement of the person in charge of a residential facility and of the defendant that the defendant will receive and submit to outpatient treatment. Pen C §1370.4. The person in charge of the facility must designate a person to be the outpatient supervisor of the defendant. Pen C §1370.4. For discussion of Pen C §§1600–1620 procedures, see §§63.76–63.80. (*Note*: Where the term "community program director" appears in Pen C §§1600–1620, the term "regional center director" must be substituted. And where the term "treatment facility" appears, the term "residential facility" must be substituted.)

6. [§63.55] Progress Reports

The executive director of the state hospital (or designee), developmental center, or other facility to which the defendant is committed, or the outpatient supervisor where the defendant is placed on outpatient status, must provide to the court and the regional center director (or designee) a written report addressing the defendant's progress toward recovery of mental competence within 90 days of the commitment order. Pen C §1370.1(b)(1).

Before the report may be prepared, the state hospital, developmental center, or other facility to which the defendant is committed, or where appropriate, the outpatient supervisor, must have sufficient time to evaluate the defendant and provide treatment that will promote a defendant's restoration of competency. Therefore, when the court orders a defendant committed to a state mental hospital, it must also ensure that the defendant is actually transferred to the state hospital within a reasonable period of time. *In re Mille* (2010) 182 CA4th 635, 649–650, 105 CR3d 859 (transfer 84 days after commitment order not timely). See Judicial Tip in §63.52.

If the defendant has not recovered mental competence, but the report indicates a substantial likelihood that the defendant will regain mental competence within the next 90 days, the court may order that the defendant must remain in the state hospital, developmental center, or other facility or on outpatient status for that period of time. Pen C §1370.1(b)(1).

A second progress report must be prepared within 150 days of the commitment order or if the defendant becomes mentally competent. Pen C §1370.1(b)(1). The court must provide copies of all progress reports to the prosecutor and defense counsel. Pen C §1370.1(b)(1).

On review of each progress report, the court must determine if the security level of housing and treatment is appropriate and may make an order in accordance with its determination. Pen C §1370.1(b)(4).

7. [§63.56] Duration of Commitment; Credit for Precommitment Confinement

The maximum period of commitment is 3 years from the date of the court's commitment order, or the maximum term of imprisonment provided by law for the most serious offense charged in the information, indictment, or misdemeanor complaint, or the maximum term of imprisonment provided by law for a violation of probation or mandatory supervision, whichever is shorter. Pen C §1370.1(c)(1)(A).

In calculating the maximum period of commitment, credit must be given for any time served in precommitment confinement attributable to the same criminal prosecution when the maximum commitment term is

less than 3 years. *In re Banks* (1979) 88 CA3d 864, 152 CR 111 (commitment term measured by defendant's maximum potential criminal sentence). However, when a defendant's maximum potential criminal sentence is more than 3 years, such that the maximum term under Pen C §1370.1(c)(1)(A) is 3 years, the defendant is not entitled have any pretrial credits applied against the three-year term. *People v Reynolds* (2011) 196 CA4th 801, 808–809, 126 CR3d 779.

If a defendant has served a period of confinement equal to the maximum time of commitment, the defendant may be subject to extended civil commitment proceedings under the LPS Act if he or she is considered dangerous to society. *In re Banks*, *supra*, 88 CA3d at 871.

The three-year limit refers to the aggregate of all commitments for incompetency on the same charges, not to each commitment after a finding of incompetence. *In re Polk* (1999) 71 CA4th 1230, 1238, 84 CR2d 389.

8. [§63.57] Defendant's Return to Court Before Recovery

The committing court must order the defendant returned to the court when any of the following circumstances occurs:

- The initial 90-day progress report or follow-up 150-day progress report (see 63.55) indicates that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future. Pen C §1370.1(b)(1).
- The defendant is still receiving treatment or is on outpatient status after the passage of 18 months. Pen C §1370.1(b)(2).
- The court determines that no treatment for the defendant's mental impairment is being conducted. Pen C §1370.1(b)(3).
- The defendant fails to regain mental competence after the passage of the maximum period of commitment. Pen C §1370.1(c)(1)(A); see §63.56.

The court must transmit a copy of its order of defendant's return to the regional center director (or designee) and to the executive director of the developmental center. Pen C §1370.1(b)(1)–(4), (c)(1).

If the defendant remains hospitalized or on outpatient status after 18 months, the court must hold another competency hearing under Pen C §1369. Pen C §1370.1(b)(2).

9. [§63.58] Dismissal of Criminal Action

With the exception of proceedings alleging a violation of mandatory supervision, the criminal action may be dismissed by the court on its own motion or on the prosecutor's application under Pen C §1385. Pen C §1370.1(d). In addition, Pen C §1370.2 allows the court to dismiss any

misdemeanor charge(s) pending against a mentally incompetent defendant. The prosecutor must be provided 10 days' notice of any motion to dismiss under Pen C §1370.2.

If at any time prior to the maximum period of time allowed for commitment, the regional center director concludes that the defendant's behavior related to the criminal offense has been eliminated during the time spent in court-ordered programs, the court may, on recommendation of the regional center director, dismiss the criminal charges. Pen C §1370.1(d). The court must transmit a copy of the dismissal order to the regional center director and to the executive director of the developmental center. Pen C §§1370.1(d); 1370.2.

10. [§63.59] Initiation of Conservatorship or Judicial Commitment Proceedings

On dismissal of criminal charges. When criminal charges are dismissed before the defendant regains competency, the defendant is subject to commitment or detention under either the LPS Act (Welf & I C §5000 et al) or the statutes governing judicial commitments to the California Department of Developmental Services under Welf & I C §6500 et al. Pen C §1370.1(a)(5)(A), (c)(2)(A).

If it is found that the defendant is not subject to commitment or detention, the defendant may not be subject to further confinement under Pen C §1370.1 and the criminal action remains subject to dismissal under Pen C §1385. Pen C §1370.1(c)(2)(A). The court must notify the regional center director and the executive director of the developmental center of any dismissal. Pen C §1370.1(c)(2)(A).

On return to court in revocation proceedings. In revocation proceedings alleging a violation of mandatory supervision in which the defendant remains incompetent on return, the defendant is subject to commitment or detention under either the LPS Act (Welf & I C §5000 et al) or the statutes governing judicial commitments to the California Department of Developmental Services under Welf & I C §6500 et al. Pen C §1370.1(a)(5)(A), (c)(2)(B).

If it is found that the person is not subject to commitment or detention, the court must reinstate mandatory supervision and modify the terms and conditions of supervision to include appropriate mental health treatment or refer the matter to a local mental health court, reentry court, or other collaborative justice court available for improving the mental health of the defendant. Pen C §1370.1(c)(2)(B). Actions alleging a violation of mandatory supervision may not be dismissed under Pen C §1385. Pen C §1370.1(c)(2)(B).

11. [§63.60] Diversion

Diversion under Pen C §§1001.20–1001.34 is an alternative to dismissal when the defendant is developmentally disabled and the offense is charged as, or reduced to, a misdemeanor. Pen C §1001.21. A defendant may not be diverted if he or she has been diverted within the previous 2 years. Pen C §1001.21(b). Furthermore, the court must consult the prosecutor, defense counsel, probation department, and the appropriate regional center for the developmentally disabled to determine whether a defendant may be diverted. Pen C §1001.22. The criminal charges must be dismissed on satisfactory completion of the diversion program. Pen C §1001.31. For a comprehensive discussion of diversion of developmentally disabled defendants, see California Judges Benchguide 62: *Deferred Entry of Judgment/Diversion* (Cal CJER).

F. Commitment to Treatment Facility or Outpatient Status Placement—Defendant Charged With Misdemeanor or Alleged To Have Violated Formal or Informal Misdemeanor Probation

1. [§63.61] Placement Recommendation by Mental Health Director

If the defendant is found mentally incompetent, the court must order that the defendant be admitted to a private or public treatment facility or placed on outpatient status. Pen C §1370.01(a)(1). However, before making its commitment order, the court must order the county mental health director (or designee) to evaluate the defendant and submit to the court within 15 judicial days of the order a written recommendation of whether the defendant should undergo outpatient treatment or be committed to a treatment facility. Pen C §1370.01(a)(2)(A).

A defendant may not undergo either form of treatment without first being evaluated by the county mental health director (or designee). Pen C §1370.01(a)(2)(A). In addition, a defendant may not be admitted to a state hospital unless the county mental health director finds that there is no less restrictive appropriate placement available, and the county mental health director has a contract with the California Department of State Hospitals for these placements. Pen C §1370.01(a)(2)(A).

2. Administration of Antipsychotic Medication

a. [§63.62] Voluntary Treatment

The court must hear and determine whether the defendant, with advice of defendant's counsel, consents to the administration of antipsychotic medication. If the defendant, with advice of counsel, consents, the court order of commitment must include confirmation that antipsychotic medication may be given to the defendant as prescribed by a

treating psychiatrist pursuant to the defendant's consent. Pen C §1370.01(a)(2)(B)(i).

The commitment order must also indicate that if the defendant withdraws consent for antipsychotic medication, after the treating psychiatrist complies with the provisions under Pen C §1370.01(a)(2)(C), the defendant must be returned to court for a hearing in accordance with Pen C §1370.01(a)(2)(B)(ii) regarding whether antipsychotic medication must be administered involuntarily. Pen C §1370.01(a)(2)(B)(i). See §63.63.

b. [§63.63] Involuntary Treatment

If the defendant does not consent to the administration of antipsychotic medication, the court must hear and determine whether any of the following is true (Pen C §1370.01(a)(2)(B)(ii)):

- The defendant lacks capacity to make decisions regarding antipsychotic medication, the defendant's mental disorder requires medical treatment with antipsychotic medication, and if the defendant's mental disorder is not treated with antipsychotic medication, it is probable that serious harm to the physical or mental health of the patient will result. Probability of serious harm to the physical or mental health of the defendant requires evidence that the defendant is presently suffering adverse effects to his or her physical or mental health, or the defendant has previously suffered these effects as a result of a mental disorder, and his or her condition is substantially deteriorating. The fact that a defendant has a diagnosis of a mental disorder does not alone establish probability of serious harm to the physical or mental health of the defendant. Pen C §1370.01(a)(2)(B)(ii)(I).
- The defendant is a danger to others, in that the defendant has inflicted, attempted to inflict, or made a serious threat to inflict substantial physical harm on another while in custody, or the defendant had inflicted, attempted to inflict, or made a serious threat to inflict substantial physical harm on another that resulted in his or her being taken into custody, and the defendant presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm on others. Demonstrated danger may be based on an assessment of the defendant's present mental condition, including a consideration of past behavior of the defendant within 6 years before the time the defendant last attempted to inflict, inflicted, or threatened to inflict substantial physical harm on another, and other relevant evidence. Pen C §1370.01(a)(2)(B)(ii)(II).

- The defendant has been charged with a serious crime; involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial; 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; less intrusive treatments are unlikely to have substantially the same results; and antipsychotic medication is in the patient's best medical interest in light of his or her medical condition. Pen C §1370.01(a)(2)(B)(ii)(III).

Note: Penal Code §1370.01(a)(2)(B)(ii)(III) complies with the holding in *Sell v U.S.* (2003) 539 US 166, 123 S Ct 2174, 156 L Ed 2d 197. See *People v O'Dell* (2005) 126 CA4th 562, 569–572, 23 CR3d 902.

If the court finds any of the conditions described in Pen C §1370.01(a)(2)(B)(ii) to be true, the court must issue an order authorizing the treatment facility to involuntarily administer antipsychotic medication to the defendant when and as prescribed by the defendant's treating psychiatrist. However, the court may order involuntary administration of antipsychotic medication under the conditions described in Pen C §1370.01(a)(2)(B)(ii)(III) only if the defendant does not lack capacity to make decisions regarding antipsychotic medication and is not a danger to others, within the meaning of Pen C §1370.01(a)(2)(B)(ii)(I) and (II). Pen C §1370.01(a)(2)(B)(iii); *People v O'Dell*, *supra*, 126 CA4th at 570 n3. The order authorizing treatment does not need to state with specificity basic limitations as to the type of medication the defendant's treating physician may administer, the maximum dosage, or the duration of the authorization. *People v Coleman* (2012) 208 CA4th 627, 637–639, 145 CR3d 329.

In all cases, the treating hospital, facility, or program may administer medically appropriate antipsychotic medication prescribed by a psychiatrist in an emergency as defined in Welf & I C §5008(m). 1370.01(a)(2)(B)(iv).

If the defendant consented to antipsychotic medication as described in Pen C §1370.01(a)(2)(B)(i), but subsequently withdraws consent, or if involuntary antipsychotic medication was not ordered under Pen C §1370.01(a)(2)(B)(ii), and the treating psychiatrist determines that antipsychotic medication has become medically necessary and appropriate, the treating psychiatrist must make efforts to obtain informed consent from the defendant for antipsychotic medication. Pen C §1370.01(a)(2)(C). If informed consent is not obtained from the defendant, and the treating psychiatrist is of the opinion that the defendant lacks capacity to make decisions regarding antipsychotic medication as described in Pen C §1370.01(a)(2)(B)(ii)(I), or that the defendant is a

danger to others as described in Pen C §1370.01(a)(2)(B)(ii)(II), the committing court must be provided notice and an assessment of the current mental status of the defendant and the opinion of the treating psychiatrist that involuntary antipsychotic medication has become medically necessary and appropriate. Pen C §1370.01(a)(2)(C). The court must provide notice to the prosecutor and to defense counsel and must set a hearing to determine whether involuntary antipsychotic medication should be ordered in the manner described in Pen C §1370.01(a)(2)(B). Pen C §1370.01(a)(2)(C).

3. [§63.64] Commitment Order

After the court has reviewed the placement recommendation of the county mental health director (or designee), the court must order that (Pen C §1370.01(a)(1)):

- The defendant be delivered by the sheriff to an available public or private treatment facility approved by the county mental health director that will promote the defendant's restoration to mental competence, *or* placed on outpatient status; *and*
- On the filing of a certificate of restoration of competence, the defendant be returned to court under Pen C §1372.

☛ JUDICIAL TIP: When committing the defendant to the state hospital or treatment facility, order the sheriff to transport the defendant to the facility within approximately 3–4 weeks. Schedule a "status of transportation" date on the court calendar to confirm the defendant's timely admission to the hospital or other facility. See Judicial Tip in §63.65.

The court must provide a copy of its order to the county mental health director (or designee). Pen C §1370.01(a)(1).

The commitment order exonerates any bail bond, undertaking, or deposit on file by or on behalf of the defendant. Pen C §1371.

4. [§63.65] Admissions Documents

When the court orders that the defendant be confined to a treatment facility under Pen C §1370.01(a)(3), the court must provide copies of the following admissions documents, which must be taken with the defendant to the treatment facility:

- The commitment order, including a description of the charges.
- A computation or statement indicating the maximum term of commitment in accordance with Pen C §1370.01(c) (see §63.69).

- A computation or statement indicating any amount of credit for time served to be deducted from the maximum term of commitment.
- State's summary criminal history information.
- Any arrest reports prepared by the police department or other law enforcement agency.
- Any court-ordered psychiatric examination or evaluation reports.
- The county mental health director's placement recommendation report.

☛ JUDICIAL TIP: Schedule a "status of packet" date on the court calendar 3–5 days after the commitment is ordered to make sure that the packet of admissions documents has been sent by the clerk to the designated facility. After the court is satisfied that the packet has been sent, set a mandatory admission date approximately 3 weeks later and a "status of transportation" non-appearance date approximately 4 weeks later to make sure that the defendant has been timely transported to the facility.

5. [§63.66] Transfer of Defendant to Another Facility

The court may, on receiving a written recommendation by the county mental health director, transfer the defendant to another approved treatment facility. Pen C §1370.01(a)(5). The court must notify the defendant, defense counsel, the prosecuting attorney, and the county mental health director (or designee) before making a transfer order. Pen C §1370.01(a)(5).

The prosecutor or the defendant may contest the transfer order by filing a petition with the court for a hearing, which must be held if the court determines that sufficient grounds exist. Pen C §1370.01(a)(5). At the hearing, the prosecutor or the defendant may present evidence bearing on the transfer order. The court must employ the same standards that are used in conducting probation revocation hearings under Pen C §1203.2. Pen C §1370.01(a)(5). For a discussion of probation revocation hearings, see California Judges Benchguide 84: *Probation Revocation* (Cal CJER).

6. [§63.67] Outpatient Status Placement

A defendant may be placed on outpatient status under the supervision of the county mental health director (or designee) by order of the court in accordance with the procedures contained in Pen C §§1600–1620. Pen C §1370.01(a)(4). For discussion of these procedures, see §§63.76–63.80. (*Note*: Where the term "community program director" appears in Pen C §§1600–1620, the term "county mental health director" must be substituted.)

7. [§63.68] Progress Reports

The medical director of the treatment facility must provide to the court and the county mental health director (or designee) a written report addressing the defendant's progress toward recovery of mental competence within 90 days of the commitment order. Pen C §1370.01(b). If the defendant is on outpatient status, the outpatient treatment staff must provide a written progress report to the county mental health director, and the director must report to the court within the 90-day period. Pen C §1370.01(b).

The report must include a description of any antipsychotic medication administered to the defendant and its effects and side effects, including effects on the defendant's appearance or behavior that would affect 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. Pen C §1370.01(a)(2)(B)(v).

Before the report may be prepared, the state hospital must have sufficient time to evaluate the defendant and provide treatment that will promote a defendant's restoration of competency. Therefore, when the court orders a defendant committed to a state mental hospital, it must also ensure that the defendant is actually transferred to the state hospital within a reasonable period of time. *In re Mille* (2010) 182 CA4th 635, 649–650, 105 CR3d 859 (transfer 84 days after commitment order not timely). See Judicial Tip in §63.65.

If the defendant has not recovered mental competence, but the report indicates a substantial likelihood that the defendant will regain mental competence in the foreseeable future, the defendant must remain in the treatment facility or on outpatient status. Pen C §1370.01(b).

Subsequent written progress reports (following the above procedure) must be provided at six-month intervals or until the defendant becomes mentally competent. Pen C §1370.01(b). The court must supply copies of the progress reports to the prosecutor and defense counsel. Pen C §1370.01(b).

☛ JUDICIAL TIP: The court may want to consider ordering monthly progress reports because the commitment term of the defendant charged with a misdemeanor will expire within 1 year (see §63.69).

8. [§63.69] Duration of Commitment; Credit for Precommitment Confinement

In misdemeanor cases, the maximum period of commitment is 1 year from the date of the court's commitment order, or the maximum term of imprisonment provided by law for the most serious offense charged in the misdemeanor complaint, whichever is shorter. Pen C §1370.01(c)(1).

In calculating the maximum period of commitment, credit must be given for any time served in precommitment confinement attributable to the same criminal prosecution. *In re Banks* (1979) 88 CA3d 864, 152 CR 111. However, if a defendant has served a period of confinement equal to the maximum time of commitment, he or she may be subject to extended civil commitment proceedings under the LPS Act if considered dangerous to society. 88 CA3d at 871.

9. [§63.70] Defendant's Return to Court Before Recovery

The committing court must order the defendant returned to the court under either of the following circumstances:

- The initial 90-day progress report prepared by the county mental health director or outpatient treatment staff indicates that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future. Pen C §1370.01(b).
- The defendant fails to regain mental competence after the passage of the maximum period of confinement. Pen C §1370.01(c)(1); see §63.67.

The court must provide a copy of its order of the defendant's return to the county mental health director (or designee). Pen C §1370.01(b)–(c)(1).

If the defendant is returned to the court, the judge must determine whether to initiate conservatorship proceedings under the LPS Act, dismiss the charges against the defendant and order him or her released from confinement, or dismiss the charges and initiate civil commitment proceedings. Pen C §1370.01(c)(2), (d)–(e); *In re Davis* (1973) 8 C3d 798, 804, 106 CR 178.

10. [§63.71] Initiation and Effect of Conservatorship Proceedings

Whenever the defendant is returned to the committing court under Pen C §1370.01(b) or §1370.01(c)(1), and it appears to the court that the defendant is "gravely disabled" as defined in Welf & I C §5008(h)(1)(A), the court must order the conservatorship investigator of the county to initiate conservatorship proceedings for the defendant under Welf & I C §§5350–5371. Pen C §1370.01(c)(2). Any hearings required in the conservatorship proceedings must be held in the superior court in the county that ordered the commitment. Pen C §1370.01(c)(2). The court must provide a copy of the order directing the initiation of conservatorship proceedings to the county mental health director (or designee) and must notify the director (or designee) of the outcome of the proceedings. Pen C §1370.01(c)(2). The initiation of conservatorship proceedings or the

existence of a conservatorship does not affect any pending criminal proceedings. Welf & I C §5352.5.

11. [§63.72] Dismissal of Criminal Action

The court may dismiss the criminal charge(s) on its own motion or on the application of the prosecutor under Pen C §1385. Pen C §1370.01(d). In addition, Pen C §1370.2 allows the court to dismiss any misdemeanor charge(s) pending against a mentally incompetent defendant. The prosecutor must be provided 10 days' notice of any motion to dismiss under Pen C §1370.2. The court must provide a copy of the dismissal order to the county mental health director (or designee). Pen C §§1370.01(d), 1370.2.

When the charges are dismissed, the defendant must be released from the commitment order, but this does not preclude the initiation of civil commitment proceedings under the LPS Act. Pen C §1370.01(a)(5), (e).

Actions alleging a violation of mandatory supervision may not be dismissed under Pen C §1385. Pen C §1370.1(c)(2)(B).

G. [§63.73] Procedure When Defendant Found Mentally Incompetent During a PRCS or Parole Revocation Hearing

If the defendant is found mentally competent during a PRCS or parole revocation hearing, the revocation proceedings must resume. The formal hearing on the revocation must occur within a reasonable time after resumption of the proceedings, but in no event may the defendant be detained in custody for over 180 days from the date of arrest. Pen C §§1370.02(a).

If the defendant is found mentally incompetent during a PRCS or parole revocation hearing, the court must dismiss the pending revocation matter and return the defendant to supervision. Pen C §§1370.02(b).

If the revocation matter is dismissed pursuant to this subdivision, the court may, using the least restrictive option to meet the mental health needs of the defendant, also do any of the following (Pen C §§1370.02(b)):

- Modify the terms and conditions of supervision to include appropriate mental health treatment.
- Refer the matter to any local mental health court, reentry court, or other collaborative justice court available for improving the mental health of the defendant.
- Refer the matter to the public guardian of the county of commitment to initiate conservatorship proceedings under Welf & I C §§5352 and 5352.5. The public guardian must investigate all

available alternatives to conservatorship under Welf & I C §5354. The court must order the matter to the public guardian pursuant to this paragraph only if there are no other reasonable alternatives to the establishment of a conservatorship to meet the mental health needs of the defendant.

Notwithstanding any other law, if a defendant subject to parole under Pen C §3000(b)(4) (parole for conviction of registerable sex offense and victim under 14 years of age) or Pen C §3000.1 (lifetime parole for defendant sentenced to life imprisonment) is found mentally incompetent, the court must order the parolee to undergo treatment under Pen C §1370 for restoring the defendant to competency, except that if the parolee is not restored to competency within the maximum period of confinement and the court dismisses the revocation, the court must return the parolee to parole supervision. Pen C §1370.02(c)(1).

If the parolee is returned to parole supervision, the court may, using the least restrictive option to meet the mental health needs of the parolee, do any of the following Pen C §1370.02(c)(2):

- Modify the terms and conditions of parole to include appropriate mental health treatment.
- Refer the matter to any local mental health court, reentry court, or other collaborative justice court available for improving the mental health of the parolee.
- Refer the matter to the public guardian of the county of commitment to initiate conservatorship proceedings under Welf & I C §§5352 and 5352.5. The public guardian must investigate all available alternatives to conservatorship under Welf & I C §5354. The court must order the matter to the public guardian pursuant to this subparagraph only if there are no other reasonable alternatives to the establishment of a conservatorship to meet the mental health needs of the parolee.

If a conservatorship is established for a defendant or under Pen C §1370.02(b) or §1370.02(c), the county or the Department of Corrections and Rehabilitation may not compassionately release the defendant or parolee or otherwise cause the termination of supervision or parole based on the establishment of that conservatorship. Pen C §1370.02(d).

H. [§63.74] Commitment of Mentally Incompetent or Developmentally Disabled Defendant Charged With Designated Felony Sex Offense

If a defendant who has been found to be mentally incompetent is charged with a felony sex offense specified in Pen C §290, the court must order that the defendant be admitted to a state hospital or other secure

treatment facility for the care and treatment of the mentally incompetent, or other secure treatment facility for the care and treatment of the developmentally disabled if the following procedures are followed (Pen C §§1370(a)(1)(B)(ii); 1370.1(a)(1)(B)(ii)):

- The prosecutor determines that the defendant previously has been found mentally incompetent to stand trial on a charge of a Pen C §290 offense, or that the defendant is currently the subject of a separate pending Pen C §1368 proceeding arising out of a charge of a Pen C §290 offense.
- The prosecutor notifies the court and the defendant in writing of the determination.
- There is an opportunity for a hearing.

In addition, any defendant who is charged with a felony sex offense specified in Pen C §290, and who has been denied bail under Cal Const art I, §12(b) because the court has found, based on clear and convincing evidence, a substantial likelihood that the defendant's release would result in great bodily harm to others, must be committed to a state hospital for the care and treatment of the mentally incompetent or to a state hospital for the care and treatment of the developmentally disabled. Pen C §§1370(a)(1)(B)(iii), 1370.1(a)(1)(B)(iii).

The court may order the defendant committed to a facility other than a state hospital or secure treatment facility if it makes specific findings on the record that an alternative placement would provide more appropriate treatment for the defendant and would not pose a danger to the health and safety of others. Pen C §§1370(a)(1)(B)(ii), (iii), 1370.1(a)(1)(B)(ii), (iii). The court must order that notice of any finding of mental incompetence arising out of a charge of a Pen C §290 offense be given to the appropriate law enforcement agencies having local jurisdiction at the site of the alternative placement facility. Pen C §§1370(a)(4), 1370.1(a)(4).

If the defendant is initially committed to a state hospital or secure treatment facility and is subsequently transferred to any other facility, copies of the commitment order and other documents specified in Pen C §1370(a)(3) (see §63.40) or Pen C §1370.1(a)(3) (see §63.52) must be taken with the defendant to each subsequent facility to which he or she is transferred. Pen C §1370(a)(6)(B).

I. [§63.75] Commitment of Mentally Incompetent or Developmentally Disabled Defendant Charged With Violent Felony

A mentally incompetent or developmentally disabled defendant charged with a violent felony, as defined in Pen C §667.5(c), may not be committed to a state hospital, treatment facility, residential facility, or

developmental center unless the hospital or facility has a secured perimeter or a locked and controlled treatment facility, and the court determines that the public safety will be protected. Pen C §§1370(a)(1)(D)–(E), 1370.1(a)(1)(E)–(F).

The defendant may be placed on outpatient status, in accordance with the procedures contained in Pen C §§1600–1620, if the court finds that the placement will not pose a danger to the health or safety of others. Pen C §§1370(a)(1)(F), 1370.1(a)(1)(G). If the court places a defendant charged with a violent felony on outpatient status, the court must serve copies of the placement order on defense counsel, the sheriff in the county where the defendant will be placed, and the district attorney for the county in which the charges are pending. Pen C §1370(a)(1)(F).

J. [§63.76] Outpatient Status Procedures

A court may grant outpatient status to a defendant found to be mentally incompetent or developmentally disabled instead of committing the defendant to a state hospital or other treatment facility. Pen C §§1370(a)(1)(B)(i), 1370.1(a)(1)(B)(i). The procedures for granting outpatient status are detailed in Pen C §1370.4 and §1600–1620. Before defendants charged with misdemeanors or felonies other than those serious felonies described in Pen C §1601 (see §63.77) may be placed on outpatient status, the court must consider all the following criteria (Pen C §1602(a)):

- In the case of a defendant who is an inpatient, whether the director of the state hospital or other treatment facility to which the defendant has been committed advises the court that the defendant will not be a danger to the health and safety of others while on outpatient status, and will benefit from this status.
- In all cases, whether the community program director (or designee) advises the court that the defendant will not be a danger to others while on outpatient status and will benefit from this status, and recommends an appropriate supervision and treatment program.

Prior to determining whether to place the defendant on outpatient status, the court must provide actual notice to the prosecutor, defense counsel, and to the victim, and must hold a hearing at which the court may specifically order outpatient status for the defendant. Pen C §1602(b).

The community program director (or designee) must submit the evaluation and treatment plan to the court within 15 calendar days of the court's request. Pen C §1602(c). However, if the defendant is an inpatient, the director has 30 calendar days to submit the evaluation. Pen C §1602(c). Any evaluations or recommendations of the community program director and the director of the treatment facility, if applicable, must include a review and consideration of complete, available

information regarding the circumstances of the criminal offense and the defendant's prior criminal history. Pen C §1602(d).

1. [§63.77] Restrictions on Release for Defendants Charged With Designated Serious Felonies

Defendants who are charged with, or convicted of, any of the felonies designated in Pen C §1601(a) cannot be placed on outpatient status without first being confined to a state hospital or other treatment facility for a minimum of 180 days, unless the court finds a suitable placement, including, but not limited to, an outpatient placement program, that would provide the defendant with more appropriate mental health treatment and the court finds that the placement would not pose a danger to the health or safety of others, including, but not limited to, the safety of the victim and the victim's family. Pen C §1601(a). See Appendix for list of Pen C §1601(a) felonies.

Before defendants charged with or convicted of any of these felonies can be placed on outpatient status after serving the 180-day minimum confinement requirement of Pen C §1601(a), the court must consider all of the following criteria (Pen C §1603(a)):

- Whether the director of the state hospital or other treatment facility to which the defendant has been committed advises the court that the defendant would no longer be a danger to the health and safety of others, including the defendant, while under supervision and treatment in the community, and will benefit from that status.
- Whether the community program director advises the court that the defendant will benefit from outpatient status, and identifies an appropriate program of supervision and treatment.

Prior to release of a defendant under Pen C §1603(a), the prosecutor must provide notice of the hearing date and pending release to the victim or next of kin of the victim of the offense for which the defendant was committed where a request for the notice has been filed with the court, and after a hearing in court, the court must specifically approve the recommendation and plan for outpatient status under Pen C §1604. Pen C §1603(b)(1). The burden is on the victim or next of kin to the victim to keep the court apprised of the party's current mailing address. Pen C §1603(b)(1).

In any case in which the victim or next of kin to the victim has filed a request for notice with the director of the state hospital or other treatment facility, he or she must be notified by the director at the inception of any program in which the committed defendant would be allowed any type of day release unattended by the staff of the facility. Pen C §1603(b)(2).

The community program director must prepare and submit the evaluation and treatment plan to the court within 30 calendar days of the

court's request. Pen C §1603(c). Any evaluations or recommendations of the community program director and the director of the state hospital or other treatment facility must include a review and consideration of complete, available information regarding the circumstances of the criminal offense and the defendant's prior criminal history. Pen C §1603(d).

2. [§63.78] Treatment Recommendation; Hearing and Determination by Court

After the court has received the recommendation from the director of the state hospital or other treatment facility to which the defendant has been committed indicating that the defendant is eligible for outpatient status as set forth in Pen C §1602(a)(1) or §1603 (see §63.77), the following procedures are required under Pen C §1604:

- The court must forward the recommendation to the community program director, the prosecutor, and defense counsel. Pen C §1604(a).
- Copies of the defendant's arrest report and state summary criminal history information must be provided to the community program director. Pen C §1604(a).
- Within 30 days of receiving the recommendation, the community program director (or designee) must prepare and submit his or her own recommendation regarding the defendant's eligibility for outpatient treatment to the court and, if appropriate, to the director of the state hospital or other treatment facility. Pen C §1604(b). This recommendation must include a plan for outpatient supervision and treatment, including specific terms and conditions to be followed by the defendant. Pen C §1604(b).
- The court must forward copies of the community program director's recommendation and treatment plan to the prosecutor and defense counsel. Pen C §1604(b).
- The court must hold a noticed hearing within 15 judicial days of the receipt of the community program director's report to determine whether to approve or disapprove the recommendation for outpatient status. Pen C §1604(c)–(d). The court must consider the circumstances and nature of the offense that led to the defendant's commitment and prior criminal history. Pen C §1604(c).
- On the court's approval, the defendant must be placed on outpatient status for no more than 1 year and subject to the terms and conditions in the recommendation and treatment plan. Pen C §§1604(d), 1606.

3. [§63.79] Progress Reports; Annual Review

The community program director (or designee) is responsible for supervising the defendant. Pen C §1605(c). It is also the director's responsibility to submit reports setting forth the defendant's status and progress to the court, the prosecutor, and defense counsel every 90 days. Pen C §1605(d).

At the end of the period of outpatient status approved by the court (no longer than 1 year), the court must hold a noticed hearing to determine whether to discharge the defendant from outpatient treatment, order the defendant confined to a treatment facility, or renew the defendant's outpatient status. Pen C §1606. Before the hearing, the community program director must provide a report and recommendation to the medical director of the state hospital, if appropriate, and to the court. The court must make the report available to the prosecutor and defense counsel. Pen C §1606.

4. [§63.80] Revocation of Outpatient Status

If the outpatient supervisor believes that the defendant requires extended inpatient treatment or refuses to accept further outpatient treatment and supervision, the community program director must file a written request for revocation with the superior court either in the county that approved the outpatient status or in the county where outpatient treatment is being provided. Pen C §1608. The community program director must provide copies of the request to defense counsel and the prosecutor in both counties if the request is made in the county of treatment rather than the county of commitment. Pen C §1608.

The court must hold a hearing within 15 judicial days of the filing of the request and either approve or disapprove the request. Pen C §1608. Outpatient status may be revoked if community program representatives establish by a preponderance of the evidence that the defendant is not manageable in the outpatient treatment program or that the defendant needs extended inpatient treatment. *People v DeGuzman* (1995) 33 CA4th 414, 420, 39 CR2d 1137. See also *In re McPherson* (1985) 176 CA3d 332, 222 CR 416 (procedural standards of probation revocation hearing generally applicable to outpatient revocation hearing). The court may consider whether the defendant presents a danger to public safety if allowed to continue outpatient treatment in determining whether to revoke the treatment. *People v DeGuzman*, *supra*, 33 CA4th at 421. If the court revokes the outpatient treatment, it must order the defendant confined in a state hospital or other treatment facility approved by the community program director. Pen C §1608.

The defendant may be confined in a state hospital, other treatment facility, or county jail, pending the court's decision on revocation if it is

the community program director's opinion that the defendant is a danger to himself or herself or to other persons and that to delay confinement until the hearing would pose an imminent risk of harm to the defendant or other persons. Pen C §1610.

K. [§63.81] Restoration of Mental Competence

If the appropriate directing supervisor of any commitment facility or outpatient program determines that the defendant has regained mental competence, he or she must immediately certify that fact to the court by filing a certificate of restoration with the court by certified mail, return receipt requested. Pen C §§1372(a)(1), 1374, 1607. If a conservatorship has been established under the LPS Act and Pen C §1370, the conservator must certify the fact of the defendant's restored competence to the sheriff and the district attorney of the county in which the defendant's case is pending, to the defendant's attorney of record, and to the court. Pen C §1372(b).

The sheriff must return the defendant to the committing court within 10 days of the filing of the certificate of restoration. Pen C §1372(a)(2). On the defendant's return to the court with a certificate of competence, the court must notify the appropriate treatment services director of the date of any hearing on the issue of defendant's competence and the court's finding of the restoration of competence. Pen C §1372(c). If the court finds that the defendant has regained mental competence, the criminal proceedings must be promptly resumed at the stage at which they were suspended. Pen C §§1370(a)(1)(A), 1370.01(a)(1), 1370.1(a)(1)(A); *People v Simpson* (1973) 30 CA3d 177, 106 CR 254 (unnecessary delay in resumption of proceedings may abridge speedy trial right).

1. [§63.82] Restoration Hearing

Although Pen C §1372 does not directly provide for a hearing in which the defendant may challenge the certification of competence, the numerous references in Pen C §1372 to a hearing indicate a legislative intent that such a hearing may be afforded. *People v Murrell* (1987) 196 CA3d 822, 826, 242 CR 175. However, absent a defendant's request for a hearing, the court may summarily approve the certification. *People v Mixon* (1990) 225 CA3d 1471, 1480, 275 CR 817 (Pen C §1372(c) and (d) imply approval authority without a hearing). The defendant is presumed competent at the hearing. *People v Rells* (2000) 22 C4th 860, 867, 94 CR2d 875. Once the defendant requests a hearing to challenge the certification, the defendant has the burden of proving by a preponderance of the evidence that he or she has not regained competence. 22 C4th at 868. However, the prosecution may present evidence that the defendant has not regained competence if the defense declines to do so. In this case,

the burden of proof falls on the prosecution. 22 C4th at 868 (burden falls on party who challenges presumption).

The defendant does not have a right to a jury at the competency restoration hearing. *People v Murrell*, *supra*, 196 CA3d at 826. However, the defendant must be represented by counsel. *People v Mixon*, *supra*, 225 CA3d at 1485.

2. [§63.83] Bail or Own-Recognizance Release

If the court approves the certification of restoration of competence for an in-custody defendant, the court must hold a hearing to decide whether the defendant is entitled to bail or an own-recognizance (OR) release pending the conclusion of the criminal proceedings. Pen C §1372(d). A defendant who was placed on outpatient status must remain released on OR or, in the case of a developmentally disabled defendant, either on the defendant's promise or on the promise of a responsible adult who would ensure the defendant's future court appearances. Pen C §1372(d). When the defendant has refused to come to court, the court must set bail and place the defendant in custody until bail is posted. Pen C §1372(d).

As an alternative to admission to bail or OR release, the court may, on the recommendation of the director of the facility where the defendant is receiving treatment, order the defendant's return to the same or another facility for continued treatment. Pen C §1372(e). The recommendation must be based on the opinion that continued treatment is necessary to maintain the defendant's mental competence or that placing the defendant in a jail would create a substantial risk that the defendant would again become incompetent to stand trial before the criminal proceedings could be resumed. Pen C §1372(e).

3. [§63.84] Commitment Time Credit

Time spent by a defendant in a hospital or other facility, or as an outpatient under Pen C §1600, as a result of a commitment for mental incompetence must be credited to the term of imprisonment, if any, for which the defendant is sentenced in the criminal case that was suspended under Pen C §1370, §1370.1, or §1370.01. Pen C §1375.5.

If the defendant is charged with a misdemeanor, time spent in the facility or on outpatient status may consume the entire potential sentence. The defendant would then be entitled to dismissal of the criminal charge and released from the facility or outpatient program unless he or she is subject to LPS Act proceedings. See Pen C §§1370(c), (e), 1370.01(c), (e), 1370.1(c).

Committed defendants cannot earn Pen C §4019 conduct and participation credits against a subsequent imprisonment term. *People v Waterman* (1986) 42 C3d 565, 229 CR 796. But see *People v Bryant*

(2009) 174 CA4th 175, 182–184, 94 CR3d 151 (committed defendant entitled to conduct credits at sentencing for time spent in the hospital, after its staff had notified the trial court that he had become competent; defendant had an equal protection right to credits he would have earned in the county jail had he obtained a timely trial competency determination).

4. [§63.85] Calculating Statutory Time Limitations When Criminal Proceedings Reinstated

When a defendant regains competence and the criminal proceedings are reinstated, the court should calculate the days remaining in which to commence trial. In felony cases, the 60-day period to bring a defendant to trial begins to run when the defendant is arraigned on an indictment or information. Pen C §§1049.5, 1382(a)(2). However, if the proceedings are suspended under Pen C §1368 after the arraignment, the 60-day period restarts when the proceedings are reinstated. Pen C §1382(a)(2); Cal Rules of Ct 4.130(c)(3)(B).

Under Pen C §859b, preliminary hearings must generally be held within ten court days of the defendant's arraignment or plea, whichever occurs later. However, if criminal proceedings are suspended, the ten-day period commences when the proceedings are reinstated. Pen C §859b; Cal Rules of Ct 4.130(c)(3)(A).

In misdemeanor cases, the 30-day or 45-day period to bring a defendant to trial begins to run when the defendant is arraigned or enters a plea, whichever occurs later. Pen C §1382(a)(3). However, if the criminal proceedings are suspended, the defendant must be brought to trial within 30 days after the proceedings are reinstated. Pen C §1382(a)(3); Cal Rules of Ct 4.130(c)(2).

IV. SAMPLE FORMS

A. [§63.86] Script: Judge Expresses Doubt About Defendant's Present Mental Competence Under Pen C §1368; Defense Counsel Agrees

(1) Describe the reason(s) for doubting the defendant's mental competence and state that doubt on the record.

In People versus _____, I have observed the conduct of [*Mr./Ms.*] [*name of defendant*] in the courtroom. [*Mr./Ms.*] [*name of defendant*] has [*describe conduct*].

This conduct [*and* [*describe additional reasons for doubting defendant's competence, e.g., defendant's responses to questions asked by the court*]] [*has/have*] caused a doubt to arise in the mind of the court about the present mental competence of [*Mr./Ms.*] [*name of defendant*], and I state that doubt for the record under Penal Code section 1368.

(2) Ask defense counsel his or her opinion of the defendant's competence. *(Note*: If the defendant is not represented by counsel, the court must appoint an attorney. In addition, the court must allow a recess, if requested or on the court's own motion, to permit defense counsel to form an opinion of the defendant's competence. Pen C §1368(a).)

[*Mr./Ms.*] [*name of defense counsel*], in your opinion, is [*Mr./Ms.*] [*name of defendant*] mentally incompetent? In other words, is [*Mr./Ms.*] [*name of defendant*]*,* as a result of a mental disorder, unable to understand the nature of the criminal proceedings or to assist you in the conduct of a defense in a rational manner?

[*Defense counsel agrees, e.g*.]

If the court please, I have tried to interview [*Mr./Ms.*] [*name of defendant*] on several occasions. I have been unable to communicate with [*him/her*]. [*Mr./Ms.*] [*name of defendant*] seems incapable of conducting a rational conversation. [*Mr./Ms.*] [*name of defendant*] states that [*he/she*] does not remember any recent event. I believe [*Mr./Ms.*] [*name of defendant*] may well be mentally incompetent.

[*Judge continues*]

(3) Order a competency hearing and suspend the criminal proceedings under Pen C §§1368.1 and 1369. (*Note*: The court may want to appoint a mental health expert under Evid C §730 to help the court to determine whether to suspend the proceedings.)

Thank you counsel. Based on what you have told me and on my observations of [*Mr./Ms.*] [*name of defendant*]'s conduct in court and the report of Dr. [*name of psychiatrist*] appointed under Evidence Code section 730 to help me resolve my initial doubt, I find there is substantial evidence of [*Mr./Ms.*] [*name of defendant*]'s mental incompetence. The court orders that the question of the mental competence of [*Mr./Ms.*] [*name of defendant*] be determined in a hearing under Penal Code sections 1368.1 and 1369. Further proceedings in this case are suspended until the question of the mental competence of [*Mr./Ms.*] [*name of defendant*] has been determined.

[*Mr./Ms.*] [*name of defense counsel*], I take it from your statements to the court that [*Mr./Ms.*] [*name of defendant*] is at this time seeking a finding of mental incompetence to stand trial?

[*Defense counsel responds*]

That is the position of [*Mr./Ms.*] [*name of defendant*].

(4) Advise the defendant of his or her rights.

[*Mr./Ms.*] [*name of defendant*], I advise you at this time that I have expressed a doubt about your mental capacity to stand trial. I have ordered a special hearing in which a determination will be made about your ability to stand trial. If you are found mentally able to do so, the criminal proceedings will continue. If you are found mentally incompetent to stand trial, you will be placed in a state hospital or other suitable facility, or placed on outpatient status until such time as you are mentally able to stand trial.

It is my duty to advise you of certain constitutional and statutory rights:

You are entitled to a speedy and public trial on the question of your mental capacity to stand trial.

You have a right to an attorney. If you cannot afford an attorney, an attorney will be appointed to represent you at no cost to you.

Your present attorney will continue to represent you in this special trial.

You are entitled to confront, that is, to face and hear all the witnesses who may testify against you, and you have the right, through your attorney, to cross-examine each witness.

You have the right to present evidence on your behalf.

You are entitled to have the process of this court to compel the attendance of witnesses and/or records on your behalf; that means that if there are witnesses whom you wish to testify, you may have the clerk of this court issue subpoenas for those witnesses at no cost to you.

You may be a witness at this special trial, but only if you wish to take the stand. However, no one can make you testify against yourself at any time.

Note: The court need not advise a defendant represented by counsel of the right to a jury trial; a jury trial must be requested by the defendant or defense counsel.

(5) Appoint psychiatric examiner(s). (*Note*: The court must appoint two psychiatrists or licensed psychologists if the defendant or defense counsel informs the court that the defendant is not seeking a finding of mental incompetence. One of the doctors may be named by the defense and the other named by the prosecution. Pen C §1369(a).)

Under Penal Code section 1369(a), I now appoint Dr. _____ [*and Dr.* _____] to examine [*Mr./Ms.*] [*name of defendant*] and report to the court in writing [*his/her/their*] opinion(s) about whether the

defendant is competent to stand trial. Specifically, the following questions must be addressed:

Is [*Mr./Ms.*] [*name of defendant*] presently able to understand the nature and purpose of the proceedings taken against [*him/her*]?

Is [*he/she*] presently able to comprehend [*his/her*] own status and condition in reference to the proceedings?

Is [*he/she*] presently able to cooperate in a rational manner with counsel in presenting a defense?

In addition, if the doctor(s) believe(s) the defendant is not competent, the following questions about the use of antipsychotic medications must be addressed:

Is it medically appropriate to treat the defendant's psychiatric condition with antipsychotic medication?

Is this medication likely to restore the defendant to mental competence?

Does the defendant have the capacity to make decisions about such medication?

What are the likely or potential side effects of such medication?

Is such medication likely 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 in a reasonable manner?

Are less intrusive treatments likely to have substantially the same results his medication?

If untreated with antipsychotic medication, will the defendant probably suffer serious harm to his or her physical or mental health?

Is the defendant a danger to himself or herself or to others?

(6) Set a date for the defendant to return to court to review the findings of the psychiatrist(s). (*Note*: Defense counsel and the prosecutor may stipulate to the findings of the psychiatrist(s) at this review hearing. If they do not, a formal revocation hearing date must be set.)

The case is continued to [*date*], at ___ __.m. for review and consideration of the doctors' findings on the question of defendant's present mental competence.

[*Mr./Ms.*] [*name of defendant*], at this review hearing you will be able to discuss with your counsel the report(s) filled by the doctor(s) that I have assigned to evaluate your competence to stand trial.

If you and your counsel agree with the conclusion(s) of the reports, you may request the court to make a determination of competency based on the reports. However, if you do dispute the conclusion(s) reached by the doctor(s) and therefore do not want the court to make a determination based solely on the report(s), the court will schedule a date for a formal competency hearing.

B. [§63.87] Script: Judge Expresses Doubt About Defendant's Present Mental Competence Under Pen C §1368; Defense Counsel Disagrees

[*Judge states doubt about the defendant's mental competence and asks defense counsel's opinion (see steps (1) and (2) in §63.86)*.]

[*Defense counsel states*]

If the court please, I respectfully disagree with the court's opinion. I have had many interviews with [*Mr./Ms.*] [*name of defendant*] and I have been able to communicate with [*him/her*]. [*Mr./Ms.*] [*name of defendant*] has an excellent memory about recent events, and I am satisfied [*Mr./Ms.*] [*name of defendant*] knows that [*he/she*] is on trial, what [*he/she*] is charged with, and the consequences of a conviction. I feel satisfied that with the assistance of [*Mr./Ms.*] [*name of defendant*] I will be able to prepare this case for a defense, and I see no necessity for a hearing on the question of [*his/her*] mental competence. In my considered judgment, [*Mr./Ms.*] [*name of defendant*] is mentally competent, and we will be prepared to proceed to trial in a timely and orderly fashion.

☛ JUDICIAL TIP: When there is a disagreement between the court and defense counsel about the defendant's mental competence, the court should, if it has not already done so, question the defendant and personally find out, on the record, if the defendant is aware of the nature of the proceedings, and if he or she can cooperate with defense counsel in preparing a defense.

[*Alternative 1: If court no longer doubts defendant's mental capacity and concludes that there is no substantial evidence of defendant's incompetence*]

Defense counsel, I respect your opinion and I appreciate your giving me your views for the record. Based on what you have told me and my questioning of [*Mr./Ms.*] [*name of defendant*], I find that there is no substantial evidence of [*Mr./Ms.*] [*name of defendant*]'s mental incompetence before me and therefore no need to order a competency

hearing. I will permit [*Mr./Ms.*] [*name of defendant*] to proceed with the criminal proceedings.

[*Alternative 2: If court still doubts defendant's mental capacity, court exercises discretion to order hearing when evidence of incompetence is less than substantial*]

I respect your opinion and I appreciate your giving me your views for the record. However, I am satisfied, based on the conduct of [*Mr./Ms.*] [*name of defendant*] that I have observed in the courtroom and [*his/her*] responses to my questions [*and the report of Dr.* [*name of psychiatrist or psychologist*] *appointed under Evidence Code section 730 to help me resolve my initial doubt*], that a serious question remains in the court's mind about [*Mr./Ms.*] [*name of defendant*]'s ability to stand trial, and I am still going to order that the question of [*Mr./Ms.*] [*name of defendant*]'s mental competence be determined in a hearing under Penal Code sections 1368.1 and 1369.

[*Alternative 3: Court finds that there is substantial evidence of incompetence*]

I respect your opinion and I appreciate your giving me your views for the record. However, I am satisfied, based on the conduct of [*Mr./Ms.*] [*name of defendant*] that I have observed in the courtroom and [*his/her*] responses to my questions [*and the report of Dr.* [*name of psychiatrist or psychologist*] *appointed under Evidence Code section 730 to help me resolve my initial doubt*], that the court is confronted with substantial evidence of [*Mr./Ms.*] [*name of defendant*]'s mental incompetence, and that I have no discretion, and no alternative, but to order that the question of [*Mr./Ms.*] [*name of defendant*]'s mental competence be determined in a hearing under Penal Code sections 1368.1 and 1369.

Further proceedings in this case are suspended until the question of the mental competence of [*Mr./Ms.*] [*name of defendant*] has been determined.

[*Mr./Ms.*] [*name of defense counsel*], I take it from your statements that [*Mr./Ms.*] [*name of defendant*] is not at this time seeking a finding of mental incompetence to stand trial?

[*Defense counsel responds*]

That is the defendant's position at this time.

[Advise defendant of his or her rights, appoint two psychiatric examiners, and set a hearing date (see steps 4–6 in §63.86).]

C. Scripts: Administration of Antipsychotic Medication Orders

1. [§63.88] Defendant Lacks Capacity To Make Decisions Regarding Antipsychotic Medication

The court receives into evidence the report of Dr. _____ by reference (and/or, has considered the testimony of Dr. _____). Based on the evidence, the court finds that defendant lacks the capacity to made decisions regarding the administration of antipsychotic medication.

More specifically [*select theory below which applies – lack of capacity, danger to others, or charged with a serious crime against person or property, and evidence that supports conclusions*],

Lack of capacity (Pen C §1370(a)(2)(B)(i)(I))

Defendant lacks the capacity to make decisions regarding antipsychotic medication;

Defendant's mental disorder requires medical treatment with antipsychotic medication; and

If defendant's mental disorder is not treated with antipsychotic medication, it is probable that defendant will suffer serious harm to his/her physical or mental health.

The court has heard and considered facts that show that defendant is presently suffering or previously suffered adverse effects of his/her mental illness (*e.g.*, command hallucinations, delusions, disorganized thoughts, mute, assaultive conduct, etc.), and his/her condition is substantially deteriorating.

The court authorizes [*hospital/facility*] to involuntarily administer antipsychotic medication to the defendant when and as prescribed by defendant's treating psychiatrist.

Danger to Others (Pen C §1370(a)(2)(B)(i)(II))

Based on the evidence, the court finds that defendant has inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm on another while in custody [*describe facts*]; or

Defendant had inflicted, attempted to inflict, or made a serious threat of inflicting substantial physical harm on another that resulted in him/her being taken into custody; and

Defendant presents, as a result of a mental disorder or defect, a demonstrated danger of inflicting substantial physical harm on others.

The court bases this finding on Dr._____'s assessment of defendant's present mental condition, including a consideration of past behavior of defendant within last 6 years prior to the time defendant last inflicted, attempted to inflict, or threatened to inflict substantial physical harm on another, and [other relevant evidence, if applicable].

The court authorizes [*hospital/facility*] to involuntarily administer antipsychotic medication to the defendant when and as prescribed by defendant's treating psychiatrist.

Defendant is Charged with a Serious Crime Against Person or Property (Pen C §1370(a)(2)(B)(i)(III))

[Note: The court may not base order on this section unless criteria for previous 2 sections (lack of capacity and danger to others) are not met.]

Based on the evidence [*likely doctor's report or testimony*], the court finds that:

Defendant has been charged with a serious crime against person or property; and

Involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial; and

The medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or assist counsel in conduct of a defense in a reasonable manner; and

Less intrusive treatments are unlikely to have substantially the same results; and

Antipsychotic medication is in the patient's best interest in light of his/her medical condition.

The court authorizes [*hospital/facility*] to involuntarily administer antipsychotic medication to the defendant when and as prescribed by defendant's treating psychiatrist.

Expiration of Involuntary Medication Order (Pen C §1370(a)(7)(A))

The involuntary medication order is in effect for 1 year. The expiration date is [insert 1-year date]. The 6-month review of the justification for that order will be [*insert 6-month date*]. The [*hospital/facility*] and the defendant's patients' right advocate or attorney are ordered to provide reports regarding the whether the involuntary medication order continues to be justified. That will be a non-appearance for the defendant.

Six-Month Review Hearing (Pen C §1370(a)(7)(A), (b)(3)).

The court has considered the reports of the hospital/facility and the patients' rights advocate/attorney and receives such report into evidence by reference. The court finds:

The original grounds for involuntary medication still exist, therefore, the order authorizing the treating facility to involuntarily administer antipsychotic medication to the defendant will remain in effect; OR

The original grounds for involuntary medication no longer exist and there is no other basis for involuntary administration of antipsychotic medication. Accordingly, the court vacates the order for involuntary medication; OR

While the original grounds for involuntary medication no longer exist, based on the report, there is another basis for involuntary administration of antipsychotic medication, the court sets the matter for hearing within 21 days to determine whether the order will be vacated or whether a new order for the involuntary administration of medication will be issued, in accordance with Penal Code §1370(a)(2)(B).

2. [§63.89] Defendant Has Capacity To Make Decisions Regarding Antipsychotic Medication and Consents

The court receives into evidence the report of Dr. _____ by reference (and/or, has considered the testimony of Dr. _____). Based on the evidence, the court finds that the defendant has the capacity to make decisions regarding antipsychotic medication and, with the advice of counsel [have record reflect that defendant has had an opportunity to consult with counsel and have defendant establish that s/he consents after having had an opportunity to consult with counsel and with advice of counsel] defendant has consented to the administration of antipsychotic medication as prescribed by a treating psychiatrist.

The court further orders that if defendant withdraws his/her consent for antipsychotic medication, after the treating psychiatrist complies with Pen C §1370(a)(2)(C), defendant must be returned to court for a hearing in accordance with Pen C §1370(a)(2)(C) and (D) regarding whether medication will be administered involuntarily.

3. [§63.90] Defendant Has Capacity To Make Decisions Regarding Antipsychotic Medication and Does Not Consent

The court receives into evidence the report of Dr. _____ by reference (and/or, has considered the testimony of Dr. _____). Based on the evidence (e.g., report or testimony or doctor), the court finds that defendant has the capacity to make decisions regarding

antipsychotic medication, however, with the advice of counsel, defendant does not consent to taking the medication. The court further orders that after the treating psychiatrist complies with Pen C §1370(a)(2)(C), the defendant must be returned to court for a hearing in accordance with Pen C §1370(a)(2)(C) and (D) regarding whether medication will be administered involuntarily.

D. [§63.91] Written Form: Letter Appointing Mental Health Expert Under Evid C §730

_____, 20___

In re: People vs.

_____

Case No. _____

To: _____

Pursuant to section 730 of the Evidence Code, you have been appointed by the Court, and under section 1368 of the Penal Code, you are to examine the defendant, who has been [*charged with/convicted of*] _____, [*and is awaiting sentencing*].

Please make an examination of this defendant and report your findings to the Court about the following:

1. Is the defendant presently able to understand the nature and purpose of the criminal proceedings being taken against [*him/her*]?

2. Does the defendant comprehend [*his/her*] own status and condition in reference to these proceedings?

3. Is the defendant presently capable of assisting defense counsel in conducting a defense, or able to conduct [*his/her*] own defense in a rational manner?

In addition, if you believe that the defendant is not competent, please address the following questions about the use of antipsychotic medications:

1. Is it medically appropriate to treat the defendant's psychiatric condition with antipsychotic medication?

2. Is this medication likely to restore the defendant to mental competence?

3. Does the defendant have the capacity to make decisions about such medication?

4. What are the likely or potential side effects of such medication?

5. Is such medication likely 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?

6. Are less intrusive treatments likely to have substantially the same results as this medication?

7. If untreated with antipsychotic medication, will the defendant probably suffer serious harm to his or her physical or mental health?

8. Is it medically appropriate to administer such medication in the county jail?

9. Is the defendant a danger to himself or herself or to others?

You are instructed to file your report no later than [*date*], and to submit your billing to the following: _____.

The next court proceeding is set for [*date*], at ___ __.m.

Thank you for your cooperation.

Very truly yours,

_____

Judge of the Superior Court

cc: _____, Attorney for Defendant

_____, Deputy District Attorney.

E. [§63.92] Written Form: Order for Examination and Determination of Mental Competence

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff,

vs.

_____,

Defendant.

NO. _____

ORDER FOR EXAMINATION AND DETERMINATION OF MENTAL COMPETENCE (PENAL CODE SECTION 1368)

On [*date*], the above-named defendant was charged in this Court with a violation of section(s) _____.

A doubt has arisen during the pendency of the action about the defendant's present mental competence.

The trial judge having therefore suspended all proceedings in the criminal action and ordered that a determination be made about the defendant's mental competence,

IT IS ORDERED THAT:

1. Proceedings be held in the Superior Court in accordance with Penal Code sections 1368 and 1369 on the issue of mental competence.

2. ❑ A forensic psychiatrist from the staff of [*name of facility*],

[*Or*]

❑ [*Name of psychiatrist*], M.D., [*and* [*name of psychiatrist*], *M.D*.,] [*is/are*] appointed to make a personal examination of the defendant to ascertain whether the defendant is presently mentally competent and whether treating the defendant with antipsychotic medication is medically appropriate; said examiner(s) [*is/are*] directed to file a written report of the result of the examination with the Court and to attend and testify, if needed, at the hearing.

3. The defendant is

❑ at liberty, and appointment for examination should be made through counsel.

[*Or*]

❑ in custody in the County Jail, where examination may be made at the convenience of the doctor(s).

4. The defendant must

❑ appear at

[*Or*]

❑ be transported by the Sheriff of _____ County to

the courtroom of the Superior Court, Department _____, on [*date*], at ____ __.m., which is fixed as the time and place for hearing and determination of the issue of present mental competence.

Dated: _____

_____

Judge of the Superior Court

F. [§63.93] Written Form: Order To Initiate Conservatorship Proceedings

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

THE PEOPLE OF THE STATE OF CALIFORNIA,

NO. _____

Plaintiff,

vs.

ORDER TO INITIATE CONSERVATORSHIP PROCEEDINGS (PENAL CODE SECTION 1370(c)(2))

_____,
Defendant.

The defendant, committed to a state hospital for care and treatment of the mentally incompetent, was returned to this Court pursuant to ❑ Penal Code section 1370(b)(1) ❑ Penal Code section 1370(b)(4) ❑ Penal Code section 1370(c)(1), and it appearing to the Court that the defendant is gravely disabled as defined in Welfare and Institutions Code section 5008(h)(1)(B),

IT IS ORDERED that the conservatorship investigator of _____ County initiate conservatorship proceedings under Welfare and Institutions Code section 5350.

Dated: _____

_____
Judge of the Superior Court

V. [§63.94] ADDITIONAL REFERENCES

California Criminal Law Procedure and Practice, chap 48 (Cal CEB 2014)
5 Witkin & Epstein, California Criminal Law, *Criminal Trial,* §§820–848 (4th ed 2012)

Appendix: Enumerated Offenses in Pen C §1601(a)

A defendant charged with and found incompetent on a charge of any of the following offenses may not be placed in outpatient status without first being confined in a state hospital or treatment facility for a minimum 180 days after having been committed under Pen C §1600, unless the court finds a suitable placement, including, but not limited to, an outpatient placement program, that would provide the defendant with more appropriate mental health treatment and the court finds that the placement would not pose a danger to the health or safety of others, including, but not limited to, the safety of the victim and the victim's family:

- Pen C §187—Murder
- Pen C §203—Mayhem
- Pen C §205—Aggravated Mayhem
- Pen C §207—Kidnapping *in which the victim suffered intentional infliction of GBI*
- Pen C §209—Kidnapping for ransom or extortion or kidnapping with intent to commit robbery or sex offense *in which the victim suffered intentional infliction of GBI*
- Pen C §209.5—Kidnapping in commission of carjacking *in which the victim suffered intentional infliction of GBI*
- Pen C §211—Robbery *with deadly or dangerous weapon or in which the victim suffers GBI*
- Pen C §215—Carjacking *with deadly or dangerous weapon or in which the victim suffers GBI*
- Pen C §220—Assault with intent to commit sex *offense in which the victim suffers GBI*
- Pen C §288—Lewd or lascivious acts
- Pen C §451(a)—Arson with GBI
- Pen C §451(b)—Arson of inhabited structure or property
- Pen C §261(a)(2)—Rape by force, violence, or threats
- Pen C §261(a)(3)—Rape of unconscious or intoxicated person
- Pen C §261(a)(6)—Rape by threatening to retaliate
- Pen C §262(a)(1)—Spousal rape by force, violence, or threats or
- Pen C §262(a)(4)—Spousal rape by threatening to retaliate
- Pen C §459—Burglary *in the first degree*
- Pen C §18715—Reckless or malicious possession of destructive device or explosive

- Pen C §18725—Carrying or placing destructive device or explosive on passenger aircraft, vessel or vehicle
- Pen C §18740—Possessing, exploding or igniting destructive device or explosive with intent to injure, intimidate or terrorize
- Pen C §18745—Igniting or exploding destructive device or explosive with intent to commit murder
- Pen C §18750—Igniting or exploding destructive device or explosive causing bodily injury
- Pen C §18755—Willfully or maliciously exploding or igniting destructive device or explosive causing death, mayhem or GBI
- *Any felony involving death, GBI, or an act which poses a threat of bodily harm to another person*

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