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MANUAL FOR CHILDREN'S LAWYERS
Representing Children In Juvenile Delinquency Proceedings: Competency To Proceed

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COMPETENCY TO PROCEED

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I. Court-Ordered Examination

A. Issuance Of Order

At any proceeding under FCA Article Three, the court must order that the respondent be examined by 2 "qualified psychiatric examiners" [see CPL §730.10] to determine whether the respondent may be diagnosed as a person with mental illness or an intellectual or developmental disability when the court is of the opinion that the

respondent may be an incapacitated person. FCA §322.1(1); see Matter of Jaden P., 206 A.D.3d 737 (2d Dept. 2022) (no error in court's failure to order evaluation where reports of psychologist and psychiatrist noted that respondent may have had developmental disability and difficulty with judgment, insight, and impulse control, but also noted that he had grossly intact memory and was oriented, friendly, and of average intelligence; and, on several occasions, respondent appeared in court, spoke clearly and concisely, and cogently defended himself under questioning from judge); People v. Bellucci, 189 A.D.3d 869 (2d Dept. 2020) (when defense and People agree that examination is warranted, court should hesitate before disagreeing); People v. Hussari, 5 A.D.3d 697, 774 N.Y.S.2d 725 (2d Dept. 2004) (once court found that defendant's conduct warranted examination, court was required to follow statutory procedure; case remitted for reconstruction hearing to determine whether defendant was competent); see also CPL §730.20(5) (if examiners not in agreement, another qualified examiner must examine defendant). This requirement exists at the dispositional stage. People v. Rojas, 43 A.D.3d 413, 840 N.Y.S.2d 152 (2d Dept. 2007) (court may not sentence defendant who is incompetent).

An "incapacitated person" is "a respondent who, as a result of mental illness, or intellectual or developmental disability as defined in [Mental Hygiene Law §1.03(20) and (22)], lacks capacity to understand the proceedings against him or her or to assist in his or her own defense." FCA §301.2(13). See, e.g., People v. Phillips, 16 N.Y.3d 510, 924 N.Y.S.2d 4 (2011) (defendant found fit to stand trial where trial court found that defendant's experts performed abstract tests that did not properly determine whether defendant was competent for trial purposes, People's experts found that defendant evinced understanding of purpose of trial, actors in trial, their roles, nature of charges, and severity of potential conviction and sentence, and defense counsel's claims that defendant's condition impaired power to communicate with counsel and undermined ability to intelligently assist in defense were merely factors to be considered by court); People v. Francabandera, 33 N.Y.2d 429, 354 N.Y.S.2d 609 (1974) (defendant suffering from retrograde amnesia not incapacitated); People v. John Jackson, 60 A.D.3d 599, 877 N.Y.S.2d 244 (1st Dept. 2009), lv denied 12 N.Y.3d 916 (finding of competency proper despite opinion of two psychiatric examiners that defendant was not competent because

he insisted on pursuing defense of posthypnotic suggestion derived from his delusions; ultimate determination is a judicial, not medical, one); United States v. Schlueter, 276 Fed.Appx. 81 (2d Cir. 2008) (not competent determination proper where court found defendant “highly intelligent" and he sometimes assisted counsel, but schizoaffective disorder significantly impaired ability to assist in defense and court found that at certain points "something cracks in him and he loses that ability to communicate and loses that ability to listen as well"); People v. Reason, 44 A.D.2d 533, 353 N.Y.S.2d 449 (1st Dept. 1974), aff'd 37 N.Y.2d 351, 372 N.Y.S.2d 614 (1975) (court cannot credit its own psychoanalysis rather than unchallenged expert competency findings); United States v. Robinson, 2012 WL 5185538 (SDNY 2012) (defendant competent to stand trial where defense expert found that defendant had IQ of 70 in “borderline range of mental retardation” and “does not understand alternate pleas, for example, insanity, plea bargaining” or “the role of the Judge, prosecutor, defense attorney and jury,” but government’s expert testified that defendant lacked prior education rather than competency to stand trial and assist lawyer); People v. D.X.Z., 33 Misc.3d 1205(A) (Sup. Ct., Queens Co., 2011) (individual can have false beliefs, and/or be suffering from psychiatric illness, and not be incapacitated); People v. D.J.H., 32 Misc.3d 1231(A) (Sup. Ct., Queens Co., 2011) (defendant found competent where expert believed defendant’s ideas regarding pervasive conspiracy against him were so far-fetched they could not be true, but defendant’s belief that State was against him was accurate, and, since defendant alleged that hospital medicated patients against their will and used medication as management tool to handle patients, any belief he had that hospital was against him was not altogether delusional); Matter of Erick B., 4 Misc.3d 202, 777 N.Y.S.2d 253 (Fam. Ct., Kings Co., 2004) (respondent found incompetent where perceptual deficits, cognitive limitations, language comprehension and communication difficulties, limited awareness of social conventions, disorganized thought processes, and difficulty forming social relationships, impaired ability to understand judicial system and adversarial process, including roles of judge, prosecutor and defense attorney, develop working relationship with attorney, know what would be required of him to assist attorney, and comprehend attorney’s advice and process information to make informed choice about plea options

and theory of defense); see also In re Timothy J., 150 Cal.App.4th 847 (Cal. Ct. App., 3rd Dist., 2007) (incompetency finding may be based on developmental immaturity alone in absence of evidence of mental disorder or developmental disability).

A finding of incompetency does not equate to a finding that the respondent could not comprehend Miranda warnings. Matter of Jaime E.S., 134 A.D.3d 1126 (2d Dept. 2015).

The respondent is presumed competent, and has no right to have the capacity issue determined if the court is satisfied that there is no proper basis for questioning the respondent's capacity. A history of psychiatric illness does not in and of itself call into question the respondent's capacity, and the court may consider, inter alia, its own observations of the respondent during the proceeding, as well as the failure the child's attorney to request an examination. See, e.g., People v. Tortorici, 92 N.Y.2d 757, 686 N.Y.S.2d 346 (1999); People v. Morgan, 87 N.Y.2d 878, 638 N.Y.S.2d 942 (1995); People v. Gelikkaya, 84 N.Y.2d 456, 618 N.Y.S.2d 898 (1994); People v. Laudati, 35 N.Y.2d 696 (1974) (test for competency is not same as test for criminal responsibility); People v. Waller, 129 A.D.3d 407 (1st Dept. 2015), lv denied 26 N.Y.3d 972 (court not obligated, sua sponte, to order exam where defendant was examined in anticipation of raising psychiatric defense and was diagnosed with psychiatric illnesses, but neither defense expert expressed concerns about competency and defense counsel did not request examination or indicate any difficulty in communication); People v. Jefferson, 60 A.D.3d 1085, 876 N.Y.S.2d 153 (2d Dept. 2009) (matter remitted for report as to whether defendant was competent at plea allocution and sentencing where, when court asked defendant whether she was under influence of drugs, she responded, "Yeah, I just came from the psychiatric ward," and also stated "I'm confused," and, when court asked defendant what she was confused about, she responded, "I don't know" and "I'm depressed"); People v. Galea, 54 A.D.3d 686, 863 N.Y.S.2d 695 (2d Dept. 2008), lv denied, 11 N.Y.3d 854 (before accepting defendant's plea, court should have sua sponte ordered competency examination where defendant had long history of serious mental illness and numerous, prolonged hospitalizations for psychiatric treatment, including period of hospitalization while incarcerated pending trial, and defendant was on course of

four separate psychiatric medications, including at least one antipsychotic medication); Matter of Carlos S., 194 A.D.2d 436, 599 N.Y.S.2d 257 (1st Dept. 1993) (family court did not abuse discretion in ordering additional competency examination, after finding respondent not competent only months before, where testimony by State psychologist that respondent was competent conflicted with testimony of experts at prior hearing and was rejected by court); Matter of Ardon II, 175 A.D.2d 355, 572 N.Y.S.2d 433 (3rd Dept. 1991) (family court should have sua sponte ordered examination where it appeared that respondent was mentally retarded, brain damaged and unable to understand court proceedings).

Because the court can initiate this process, the child's attorney must be careful about raising issues other than capacity which might suggest to the court that there is a capacity problem. For instance, by making a strong argument at a suppression hearing that the respondent was incapable of understanding Miranda warnings, and presenting expert testimony to that effect, the child's attorney could cause the court to question the respondent's capacity to stand trial as well. In such cases, the attorney should explore the issue of capacity with the expert before calling her to testify, and ascertain whether, and to what extent, the expert's testimony would tend to establish incapacity to stand trial.

The statute appears to contemplate that 2 separate examinations will be conducted rather than one examination by 2 examiners - a practice employed by New York City Family Court Mental Health Services.

Notwithstanding the provisions of this or any other law, the court may direct that the examination be conducted on an outpatient basis. If the respondent is in custody at the time the court issues an order of examination, the examination may be conducted at the place where the respondent is being held in custody so long as no reasonable alternative outpatient setting is available. FCA §322.1(1). See also FCA §251 (authorizes remand for evaluation); CPL §730.20(1) (court may authorize psychiatrist or psychologist retained by defendant to be present).

The respondent has a right to have his/her attorney present during any examination. Lee v. County Court of Erie County, 27 N.Y.2d 432, 318 N.Y.S.2d 705 (1971) (defendant has right to counsel at pretrial examination regarding his insanity defense, but

defense counsel may not take active role; prosecutor is allowed to be present as well); People v. Guevara, 37 N.Y.3d 1014 (2021) (where, after defendant provided notice of intent to present psychiatric evidence, he was twice interviewed by People's clinical psychologist, who denied defense counsel admittance to second examination, constitutional error was not harmless); but see People v. Zhao, 35 Misc.3d 439 (Sup. Ct., Queens Co., 2012) (no authority to grant People's application for permission to be present at examination).

B. Content And Filing Of Reports

"Each report shall state the examiner's opinion as to whether the respondent is or is not an incapacitated person, the nature and extent of his examination and, if he finds the respondent is an incapacitated person, his diagnosis and prognosis and a detailed statement of the reasons for his opinion by making particular reference to those aspects of the proceedings wherein the respondent lacks capacity to understand or to assist in his own defense." FCA §322.1(3).

Statements made by the respondent to the examiners are inadmissible in the delinquency action on any issue other than that of respondent's mental condition. See CPL §730.20(6); People v. Quijano, 240 A.D.2d 186, 658 N.Y.S.2d 282 (1st Dept. 1997) (defendant waived protection in §730.20(6) by placing into issue his mental and cognitive ability to form criminal intent). See also People v. Pokovich, 141 P.3d 267 (CA 2006) (Fifth Amendment bars impeachment of defendant at trial with statements made to mental health professionals during court-ordered competency examination); Matter of James Q., 154 A.D.3d 58 (3d Dept. 2017) (Mental Hygiene Law §33.13(c) does not apply and require that record of insanity acquitee's retention proceeding be sealed).

The reports shall be filed within 10 days after entry of the order, but the court may extend the time upon a showing of special circumstances and a finding that a longer period is necessary. The proceedings shall be adjourned until the reports have been filed with the court, FCA §322.1(2), at which time the court shall conduct a hearing. FCA §322.2(1); see also Matter of Terrance W., 251 A.D.2d 1004, 674 N.Y.S.2d 529 (4th Dept. 1998), lv denied 92 N.Y.2d 810, 680 N.Y.S.2d 54 (no hearing required where presentment agency conceded incapacity and respondent raised no factual issue to warrant a hearing); cf. CPL

§730.20(2), (3), (4) (hearing mandated only when defendant or district attorney moves for one, or when examiners are not unanimous); People v. Pett, 148 A.D.3d 1524 (4th Dept. 2017) (court violated defendant's due process rights by accepting plea without conducting mandated competency hearing after one psychiatrist found defendant competent but the other found him incompetent).

C. Hearing To Determine Competency

The respondent and his attorney, the presentment agency, and the appropriate commissioner (of mental health or of developmental disabilities) shall be notified of the hearing at least 5 days before and be given an opportunity to be heard. FCA §322.2(1); see People v. Rivers, 44 A.D.3d 391, 844 N.Y.S.2d 201 (1st Dept. 2007) (while finding of incompetency may be confirmed on consent without hearing, trial court had no discretion to dispense with competency hearing and find defendant fit to proceed where both psychiatrists found defendant unfit); Lewis v. Zon, 573 F.Supp.2d 804 (SDNY, 2008) (due process violation found where court, not satisfied with evidence at competency hearing, had social worker examine petitioner and relied on social worker's written opinion in determining that petitioner was competent, but petitioner had no opportunity to challenge the social worker's opinion); see also United States v. Gillenwater, 717 F.3d 1070 (9th Cir. 2013) (defendant has constitutional right to testify at pretrial competency hearing and only defendant, not counsel, can waive right).

At the hearing, it is the presentment agency's burden to establish capacity. People v. Christopher, 65 N.Y.2d 417, 492 N.Y.S.2d 566 (1985) (hearing is "empty form" unless it takes place with right to examine and cross-examine witnesses). Given this burden of proof, it appears that the court has authority to order an examination by an expert selected by the presentment agency. See People v. DelRio, 220 A.D.2d 122, 646 N.Y.S.2d 117 (2d Dept. 1996), lv denied 88 N.Y.2d 983, 649 N.Y.S.2d 390.

Testimony given by the respondent at a probable cause hearing, including one held in connection with competency proceedings, cannot be introduced during trial or at any other hearing, but may be used for impeachment purposes should the respondent testify at a subsequent hearing. FCA §325.2(1)(b). It is not clear that the Legislature intended to incorporate this rule into competency hearings, but it appears that the same rule must be

applied. Pedrero v. Wainwright, 590 F.2d 1383, 1388, n. 3 (5th Cir. 1979); People v. Angelillo, 105 Misc.2d 338, 432 N.Y.S.2d 127 (County Ct., Suffolk Co., 1980); see Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967 (1968).

If the court finds that the respondent is not incapacitated, it shall continue the delinquency proceedings. FCA §322.2(2).

If the court finds that the respondent is an incapacitated person, it shall schedule a hearing to determine whether there is probable cause to believe that the respondent committed a crime. FCA §322.2(3). But see Matter of P.C., 10 Misc.3d 1073(A), 814 N.Y.S.2d 563 (Fam. Ct., Nassau Co., 2005) (after determining that respondent is incapacitated, court forgoes probable cause hearing and dismisses in furtherance of justice where respondent was receiving treatment, there was risk that removal from the home and placement could cause respondent harm and unravel years of treatment, there was no showing that there was an appropriate residential setting, and the victim and his family would have to relive disturbing events).

In United States v. Gomes, 289 F.3d 71 (2d Cir. 2002), the Second Circuit held that the governmental interest in restoring a pretrial detainee's competence to stand trial could override his liberty interest and justify the forced medication of a non-dangerous criminal defendant with antipsychotic drugs for the purpose of rendering him competent to stand trial. Heightened, but not strict, scrutiny is the appropriate standard for determining when a non-dangerous criminal defendant may be forcibly medicated The court must explicitly find by clear and convincing evidence: (1) that the proposed treatment is medically appropriate; (2) that the treatment is necessary to restore the defendant to trial competence; (3) that the defendant can be fairly tried while under the medication; and (4) that trying the defendant will serve an essential government interest. A court ordering involuntary medication must closely monitor the process to ensure that the dosage is properly individualized to the defendant, that it continues to be medically appropriate, and that it does not deprive him of a fair trial or the effective assistance of counsel. The Second Circuit noted that recent advances in antipsychotic medication reduce concerns that the defendant's health interests and fair trial rights cannot be adequately protected, and that, whatever the risks of side effects may be, they can be dealt with in the context of the

individual case.

D. Probable Cause Hearing

1. Procedure

The order of proceeding at the hearing shall be the same as it is at a probable cause hearing conducted pursuant to FCA §325.2 (that is, the presentment agency presents evidence and calls and examines witnesses and the respondent may cross-examine, and then the respondent may testify in his own behalf and call witnesses and the presentment agency may cross-examine). FCA §322.2(3).

According to FCA §325.2(1)(b), the respondent's testimony may not be introduced at any other hearing except to impeach his own testimony. It is not clear that the Legislature intended to incorporate this rule into competency proceedings, but it appears that the same rule must be applied. Pedrero v. Wainwright, supra, 590 F.2d 1383, 1388, n. 3; People v. Angelillo, supra, 105 Misc.2d 338; see Simmons v. United States, supra, 390 U.S. 377.

2. Orders

If the court finds probable cause to believe that the respondent committed a misdemeanor, it shall commit the respondent to the custody of the appropriate commissioner for a reasonable period not to exceed 90 days. Unless the court specifies that such commitment shall be in a residential facility, the commissioner may arrange for treatment in an appropriate facility or program, including an outpatient program, in accordance with Mental Hygiene Law § 7.09(e) or § 13.09(c-1). The court shall dismiss the petition, and such dismissal shall constitute a bar to further prosecution of the charge or charges contained in the petition. FCA §322.2(4). See Matter of Erick B., 4 Misc.3d 202, 777 N.Y.S.2d 253; People v. Fann, 47 Misc.3d 416 (Sup. Ct., Queens Co., 2015) (where finding of unfitness takes place in post-conviction context, usual requirement that misdemeanor charges be dismissed does not apply); see also Ritter v. Surles, 144 Misc.2d 945, 545 N.Y.S.2d 962 (Sup. Ct., West. Co., 1988) (statute allowing commitment for 90 days without proof by clear and convincing evidence, as required for civil commitment, violates equal protection; the statute improperly creates 2 classes of incapacitated people - those who have misdemeanor charges dismissed, and those who are considered

dangerous to themselves or others and are committed involuntarily); but see Charles W. v. Maul, 214 F.3d 350 (2d Cir. 2000) (post-Ritter practice of confining incapacitated persons for a 72-hour period to allow State to determine whether to commence civil commitment proceedings does not violate due process).

If the court finds probable cause to believe that the respondent committed a felony, it shall commit the respondent to the custody of the appropriate commissioner for an initial period not to exceed one year. Unless the court specifies that such commitment shall be in a residential facility, the commissioner may arrange for treatment in an appropriate facility or program, including an outpatient program, in accordance with Mental Hygiene Law § 7.09(e) or § 13.09(c-1). FCA §322.2(5)(a). See also Matter of Matthew P., 161 A.D.2d 1195, 555 N.Y.S.2d 980 (4th Dept. 1990) (finding of probable cause as to offense that was not charged, and was not lesser included offense, was invalid); Matter of Justin L., 56 Misc.3d 1167 (Fam. Ct., Kings Co., 2017) (where respondent was also involved in child welfare system, court notes that CPL §730.50 allows commitment of incapacitated defendant "for care and treatment on an out-patient basis," an option not available to family court, and expresses desire for more options) and Matter of Justin L., 58 Misc.3d 1220(A) (Fam. Ct., Kings Co., 2018) (after dismissing proceeding in which court had made determination of incapacity, court dismissed three other petitions in furtherance of justice, noting, *inter alia*, that Presentment Agency's intent was to withdraw petitions as soon as appropriate placement was secured and respondent was subject of voluntary placement proceeding and would be placed with ACS, but three pending petitions were hindering placement with ACS).

If the court finds probable cause to believe that the respondent committed a designated felony act, the court shall require that treatment be provided in a residential facility within the appropriate office of the department of mental hygiene or in an outpatient facility if the commissioner petitions the court pursuant to §322.2(7) and the court approves. FCA §322.2(5)(c).

In a criminal proceeding, the court may, with the consent of the District Attorney, commit the defendant for care and treatment on an out-patient basis. See, e.g., People v. Betty Y., 39 Misc.3d 579 (Sup. Ct., Kings Co., 2013).

II. Periodic Review By Commissoner

A. Timing Of Reviews

The commissioner shall review the respondent's condition within 45 days after commitment. A second review must be made within 90 days. Thereafter, the respondent's condition must be reviewed every 90 days. The respondent and his/her attorney must be notified of any review and be given an opportunity to be heard. FCA §322.2(5)(d).

B. Determination Of Future Incapacity

If and when the commissioner determines that there is a "substantial probability" that the respondent will remain incapacitated for the foreseeable future, the commissioner shall apply to the court, while providing written notice to the respondent, the presentment agency and the mental hygiene legal service if the respondent is in a residential facility, for an order dismissing the petition. The court may on its own motion hold a hearing to determine the "substantial probability" issue, and must conduct such a hearing if it is requested by the respondent or the mental hygiene legal service within 10 days after receipt of notice of the application; the respondent may also apply for dismissal of the petition. FCA §322.2(5)(d).

C. Release From Residential Facility

If the commissioner in a misdemeanor or felony case determines at any time that the respondent child may be more appropriately treated in a non-residential facility or on an outpatient basis, the commissioner may arrange for such treatment. If the commissioner in a designated felony case makes such a determination at any timethe commissioner may petition the family court for a hearing.

If the court finds after a hearing that treatment in a non-residential facility or on an outpatient basis would be more appropriate for the respondent, the court shall modify its order of commitment to direct the commissioner to transfer the respondent to a non-residential facility or arrange outpatient treatment. Application for a hearing may be made by the respondent. FCA §322.2(7).

In cases in which the commissioner believes at the outset that the respondent is incompetent, but also believes that treatment should be provided on an outpatient basis,

the child's attorney should argue that the hearing to which the commissioner or the respondent is entitled be held at the same time that the court is issuing the one-year commitment order mandated by FCA §322.2(5)(a), and that the respondent be released immediately; when it is inappropriate for the respondent to spend any time in confinement, it would be senseless to require the commissioner or the respondent to wait until after the commitment order is issued to make the application for a hearing.

III. Extensions Of Commitment Order In Felony Cases

A commitment may be extended annually upon application by the commissioner. The application must be made no more than 60 days prior to expiration of the commitment, and written notice of the application must be given to the respondent and his/her attorney, and the mental hygiene legal service if the respondent is at a residential facility. FCA §322.2(5)(a).

Upon receipt of the application, the court must hold a hearing to determine capacity. Compare CPL §730.50(2) (hearing required when demanded by defendant or mental hygiene legal service). If, upon a hearing, the court finds that the respondent is no longer incapacitated, the respondent shall be returned to family court and delinquency proceedings resume. If the court is satisfied that the respondent continues to be incapacitated, the court shall authorize continued custody in a facility or program for a period not to exceed one year. Extensions shall not continue beyond a reasonable period of time necessary to determine whether the respondent will attain the capacity to proceed to a fact-finding hearing in the foreseeable future, but in no event shall continue beyond the respondent's eighteenth birthday or, if the respondent was at least sixteen years of age when the act was committed, beyond the respondent's twenty-first birthday. FCA §322.2(5)(a). If a respondent is in the custody of the commissioner upon the respondent's eighteenth birthday, or if the respondent was at least sixteen years of age when the act resulting in the respondent's placement was committed, beyond the respondent's twenty-first birthday, the commissioner shall notify the clerk of the court that the respondent was in his custody on such date and the court shall dismiss the petition. FCA §322.2(5)(b). See also Jackson v. Indiana, 406 U.S. 715, 92 S.Ct. 1845 (1972) (defendant cannot be held

more than the reasonable time necessary to determine whether there is a substantial probability that he will attain capacity in foreseeable future; after that time, defendant must be released unless State initiates civil commitment proceeding); People v. Schaffer, 86 N.Y.2d 460, 634 N.Y.S.2d 22 (1995) (Jackson does not require automatic dismissal when defendant is released); CPL §730.50(3) (period of confinement cannot exceed 2/3 of authorized maximum term of imprisonment for highest class felony charged in indictment or the highest class felony of which defendant was convicted); CPL §730.50(4) (indictment must be dismissed if defendant remains confined at end of aforementioned period).

IV. Detention Time Credit

Time spent by the respondent in the custody of a commissioner, or in a local hospital or detention facility pending transfer to the custody of a commissioner after a finding of incapacity, "shall be credited and applied towards the period of placement specified in a dispositional order on the original petition." FCA §322.2(9). See People v. Lewis, 95 N.Y.2d 539, 720 N.Y.S.2d 87 (2000) (no due process violation where defendant was not entitled to credit for time spent in civil commitment).

V. Release Of Respondent Upon Dismissal

When the court dismisses the petition, the respondent shall be released. However, an order dismissing the petition does not preclude an application for voluntary or involuntary commitment in a facility or program pursuant to the provisions of the Mental Hygiene Law. FCA §322.2(6).

VI. Dismissal In Furtherance Of Justice

Finally, in addition to considering appellate remedies after the respondent is committed, the child's attorney should consider filing a motion to dismiss in furtherance of justice. It is true that the court in a criminal proceeding does not have the discretion to order dismissal in the interest of justice, since CPL §730.50(5), which permits the court to order dismissal under certain circumstances with the consent of the district attorney, was intended by the Legislature to be the exclusive remedy for incompetent defendants seeking dismissal for reasons consistent with the ends of justice. People v. Schaffer, supra, 86 N.Y.2d 460. However, FCA Article Three contains no counterpart to §730.50(5), and so there is room to argue for dismissal pursuant to FCA §315.2.

VII. Deciding Whether To Inform Court Of Competency Problem Or Otherwise Raise The Issue Of Respondent's Mental Condition

Given their lack of maturity and experience, children do not have the same capacity as adult criminal defendants to comprehend the nature of the proceeding, or assist in the preparation of a defense and in making crucial litigation decisions. Moreover, many children charged in delinquency proceedings suffer from educational and mental health deficiencies that further hamper their ability to participate effectively in the proceeding. The child's attorney may have difficulty communicating with the respondent, and, when the problems are severe, may be justified in requesting a competency determination.

It has been suggested that defense counsel has an ethical obligation to request a competency determination when it appears that the client is incapable of understanding the proceedings and assisting the lawyer in the preparation of a defense. See People v. Holt, 21 N.E.3d 695 (Ill. 2014) (where evidence clearly indicates defendant is unfit to stand trial, and defendant contends he/she is fit, defense counsel not obligated to adopt defendant's position; in doing so, counsel would be violating duty to client and suborning violation of due process, and it is contradictory to argue that defendant who may be incompetent can knowingly or intelligently direct counsel to waive right to have court determine capacity to stand trial); State v. Johnson, 395 N.W.2d 176 (Wis. 1986) (when defense counsel "has a reason to doubt the competency of his client to stand trial, he must raise the issue with the trial court"); Jones v. District Court, 617 P.2d 803 (Colo. 1980); Blakeney v. United States, 77 A.3d 328 (D.C. Ct. App. 2013) (defense counsel

must raise issue of competency with court if, considering circumstances, objectively reasonable counsel would have reason to doubt defendant's competency; failure to do so is constitutionally deficient performance); People v. Bolden, 99 Cal.App.3d 375 (Cal. Ct. App., 4th Dist., 1979); Informal Opinion No. 93-140, 1993 WL 851242 (Pa. Bar Assoc. Committee on Legal Ethics and Professional Responsibility, 1993) (if client appears to be incompetent, lawyer is obligated to ensure that competency is adequately determined because no plea or verdict could be properly entertained if client is not competent); Formal Ethics Opinion No. 92-F-129, 1992 WL 738911 (Board of Professional Responsibility of the Supreme Court of Tennessee, 1992) (lawyer has independent professional responsibility to court and public and the fair administration of justice as well as an allegiance to client, and should, notwithstanding doubts about what is in client's legal interest, move for independent examination whenever good faith doubt arises as to competency); ABA Criminal Justice Mental Health Standards, 7-4.2(c) (1989) ("Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubts of competence"); see also Lynda E. Frost and Adrienne E. Volenik, The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent, 14 Wash. U. J.L. & Pol'y 327, 346-347 (2004) (because adult cases suggest that failing to raise competency issue constitutes ineffective assistance of counsel, counsel must consider whether she can ethically choose not to raise issue); New York State Rules of Professional Conduct, Rule 1.14(a), (b) (when client's capacity to make adequately considered decisions is diminished because of minority or mental impairment, and client is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in his/her own interest, lawyer may take reasonably necessary protective action); People v. Christopher, supra, 65 N.Y.2d 417 (whatever may be the right of a defendant to make determinations regarding trial strategy, it does not include right to waive competency hearing counsel has requested).

In raising a competency issue, the child's attorney should not reveal any

communications protected by the attorney-client privilege. ABA Criminal Justice Mental Health Standards, 7-4.2(f); but see New York State Rules of Professional Conduct, Rule 1.14(c) (information relating to representation of client with diminished capacity is protected by confidentiality rules, although when taking protective action for client with diminished capacity who cannot adequately act in his own interests and is at risk of substantial physical, financial or other harm, lawyer is impliedly authorized under Rule 1.6(a) to reveal information about client, but only to extent reasonably necessary to protect client's interests).

However, the better view is that the attorney's primary duty is to protect the legal interests of the client while providing loyal and zealous representation, not to act on behalf of the court in order to safeguard the integrity of the judicial process. Prejudicial mental health-related information disclosed during competency proceedings might haunt the juvenile client in pending and future litigation even if he or she is found competent. Moreover, court-ordered mental health evaluations are often conducted in haste and are of low quality, and there is a risk that the respondent will be found incompetent when he or she is not. Thus, before raising a competency issue in court, the better view is that the child's attorney should obtain whatever information and guidance the respondent and his or her family can provide, determine whether a competency problem clearly exists, and then weigh the benefits and risks associated with raising it. See Commentary to Rules of Professional Conduct, Rule 1.14 ("Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information"); Frost and Volenik, The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent, 14 Journal of Law & Policy 327, 344-350 (authors voice concern that raising competency question makes counsel a friend of the court rather than a zealous advocate, discuss degree of certainty regarding competency issue counsel should have before raising issue, and instruct counsel to consider whether decision to raise competency issue rests with client, whether client who clearly and voluntarily wishes to go to trial may waive competence, and the impact raising issue over client's objection will have on the attorney-

client relationship); State Bar Ethics Opinion 746, 2001 WL 901079 (seeking guardian is appropriate only when client's diminished capacity is severe and no other practical method of protecting client's best interests is available).

Ideally, the child's attorney should seek professional assistance in determining whether to request a competency examination. If the respondent already has a relationship with a mental health professional, the attorney should attempt to obtain information regarding the respondent's condition, as well as suggestions as to how the attorney might communicate more effectively with the respondent. If no mental health professional is involved and the respondent's family can afford it, the attorney should discuss with them the possibility of retaining an expert to conduct a confidential evaluation. See generally Frost and Volenik, The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent, 14 Journal of Law & Policy 327, 336-343 (authors discuss process of evaluating client's competency using various sources of information).

When concerned about competency, the child's attorney should consider whether any assistance from the respondent is actually needed given the facts of the case. For instance, when the respondent admits guilt, and potential defense claims, if any, involve purely legal issues, the respondent's lack of capacity may not hamper the attorney at all. Similarly, if there are several strong defense witnesses who can testify to the critical events, the respondent's inability to recall, or to describe events coherently, may not matter.

The child's attorney must also consider the potential consequences of a finding of incompetency. In misdemeanor cases, a finding of incompetency results in a 90-day commitment and dismissal of the petition, and so raising a competency issue might well be advisable when the risk of placement is high. In felony cases, the risk of long-term involuntary commitment -- possibly until the respondent's 18th birthday -- militates against raising a competency issue.

Also to be considered in this regard are the likelihood that, if there is no determination of incompetency, there will be a delinquency finding and the respondent will be placed, and the likelihood that, if the respondent were found incompetent and committed, the commissioner would apply for release of the respondent pursuant to

§322.2(7). Of course, these strategic concerns should not discourage the child's attorney from assisting the respondent and family in obtaining needed mental health services. Indeed, if the respondent is in desperate need of treatment and is open to the possibility of institutional care, the attorney is less constrained when deciding whether to request a competency determination. On the other hand, involuntary commitment may, or may not, result in the necessary treatment.

Expert testimony can also be used to establish a defense of mental disease or defect; to demonstrate that the respondent was incapable of knowingly and intelligently waiving the Miranda rights; to prove that the respondent was unusually susceptible to police pressure; or to provoke sympathy from the judge at disposition. Yet, each time the child's attorney presents mental health evidence, he/she must consider the risk that the judge will use the evidence as grounds for a competency examination, or reason to direct some type of institutional care at disposition.

The inherent risk is greatest with expert testimony presented in support of a defense of mental disease or defect. The same testimony that establishes clearly that the respondent suffered from a mental disability so profound that it precluded the formation of criminal intent, might also suggest to the judge that the respondent is incompetent to stand trial. Presentation of evidence that focuses on less severe and more common problems, such as educational deficiencies, that do not even fall within the realm of mental illness, is far safer. For instance, lay testimony -- from a family member or a school teacher -- can describe routine interaction with the respondent in order to establish the respondent's impaired language skills or limited ability to understand difficult concepts.

If expert testimony must be presented in order to pursue a defense strategy and there is a substantial risk that the judge will become concerned about competency, the child's attorney should consider foregoing the strategy, particularly when the risk of placement is low. Sometimes, the risk can be reduced by structuring the testimony, and coaching the expert, so that the expert avoids making statements that would raise red flags for the judge. The attorney should also consider whether the respondent's serious deficiencies are so apparent that they will inevitably be detected during a mental health examination ordered at the dispositional stage, in which case presenting the expert testimony at fact-finding may involve no additional risk.