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Juvenile Competency Law and Remediation Programming: Santa Clara County's Experience Replicating the Virginia Model

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*Due process protections were first guaranteed for juveniles in 1967 with the Supreme Court Decision *In re Gault*. Juvenile competency law, one aspect of due process, has been adopted in only 21 states. In 2009, Santa Clara County, California, embarked on the journey of adopting juvenile competency legislation and programming, replicating a well-established juvenile remediation model formed in Virginia in 1999. This journey provides a platform for reflecting on some of the service delivery issues that are embedded first in establishing a remediation program for juveniles, and secondly, in attempting to transfer a model program from one state with a comprehensive set of laws to a second state with a less comprehensive set of laws regarding juvenile competency. This article provides a historical and procedural review of juvenile competency law and programming, and concludes by presenting Santa Clara County's journey of challenges, triumphs, and lessons learned, with the goal of offering guidance to other states contemplating adoption of critical protections for their juvenile defendants.*

Juvenile Competency Remediation Programming: Santa Clara County's Experience Replicating the Virginia Model

In 2016, 856,130 arrests of persons under age 18 were made by law enforcement across the country (OJJDP, 2017). Although not all arrests result in adjudication proceedings, a significant proportion do (California Department of Justice, 2011). And yet many of our youth involved in the juvenile justice system go without at least some due process protections, first guaranteed for juveniles in the 1967 Supreme Court Decision *In re Gault*. An avalanche of additional due process protections followed in the wake of *Gault*, including in some states the requirement that defendants be competent to stand trial. Prior to competency legislation, youth would have proceeded through the adjudicatory process, and perhaps been transferred to criminal court, unfettered by some due process protections. Juvenile competency law, one aspect of due process, adopted in some states has corrected this wrong to some extent, but the legislation differs widely among the only 21 states that even have juvenile competency legislation, with some states providing far greater protections than others (Bath & Gerring, 2014; Larson & Grisso, 2011; Lee, 2013). Recognizing this discrepancy, some states are calling for greater due process protections in the form of competency legislation for their juvenile defendants (e.g., Rapisarda & Kaplan, 2016). In 2009, Santa Clara County, California, embarked on the journey of adopting juvenile competency legislation and programming, replicating a well-established juvenile remediation model formed in Virginia in 1999 (Virginia Commission on Youth, 1999;

for program information visit <http://juvenilecompetency.virginia.edu/research>). This journey provides a platform for reflecting on some of the service delivery issues that are embedded first in establishing a remediation program for juveniles, and secondly, in attempting to transfer a model program from one state with a comprehensive set of laws to a second state with a less comprehensive set of laws regarding juvenile competency. This article provides a historical and procedural review of juvenile competency law and programming, and concludes by presenting Santa Clara County's journey of challenges, triumphs, and lessons learned, with the goal of offering guidance to other states contemplating adoption of critical protections for their juvenile defendants.

Defining Juvenile Competency

The Due Process Clause embedded in both the Fifth and Fourteenth Amendment guarantees protections for adult defendants against deprivation of life, liberty, or property, without due process of law. Due process stipulates legal obligations of the state to ensure legal fairness. In 1967, the United States Supreme Court reviewed a case from Arizona involving the juvenile, Gerald Gault (*In re Gault*) and concluded that juveniles charged with a delinquency offense had the right to be represented by an attorney (Feld, 1988). The Court opined that when proceedings may result in incarceration in an institution of confinement for youth (e.g., a juvenile detention center), "it would be extraordinary if our Constitution did not require the procedural regularity and exercise of care implied in the phrase *due process*" (pg. 387).

Multiple due process protections for juveniles flowed from *Gault* (Lawrence & Hemmens, 2008), including adjudicative competence, an extension of the right to be represented by an attorney. Adjudicative competence has been defined as a functional assessment (i.e., dependent on the presence or absence of particular abilities and not a particular diagnosis) that addresses capabilities rather than knowledge, is contextual in nature, and is calibrated according to the complexity of the legal situation facing each defendant (Jackson, Warren, & Jones Coburn, 2014, p. 2). Most, if not all, states looked to the adult standard of competence articulated by the United States Supreme Court in *Dusky v. United States* (1960) and elaborated further in *Drope v. Missouri* (1974) and *Godinez v. Moran* (1993). Due process protections reflected in *Dusky* require that defendants have "...sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding...and whether he has a rational as well as factual understanding of the proceedings against him" (p. 402). This translates into *understanding the charges against them* and an ability to *meaningfully participate in their own defense*. Defendants are considered incompetent to stand trial (IST) when these criteria are not met (Cruise & Rogers, 1998; Viljoen & Grisso, 2007). *Dusky* spawned an adult forensic service delivery system both for evaluating defendants concerning their trial competency and for ordering restoration services for adults who were determined to be incompetent to stand trial (often administered in state psychiatric hospitals where defendants are treated for active psychotic illnesses). Beginning in the 1990s, a comparable system for juveniles was initiated (Larson & Grisso, 2011).

Historical Context

Juvenile competency was rarely raised prior to the mid-1990s (Larson & Grisso, 2011), but was increasingly being raised at that time (Kruth & Grisso, 2008). The juvenile justice system was

developed at the end of the 20th Century intentionally to provide a more rehabilitative approach to youthful offending given their greater malleability. Starting in the early 1990s, however, interest in trial competence began to emerge in the juvenile court as many state legislatures began to respond to what was perceived to be a significant and serious crime wave by juvenile offenders (DeJulio, 1996; Sickmund, Snyder & Poe-Yamagata, 1997; Zimring, 1998), with youth being transferred to criminal court for certain offenses (Fagan & Zimring, 2000). Across the country juvenile courts began to adopt a more retributive focus that was not dissimilar to that found in adult criminal court (Bernard & Kurlychek, 2010; Mendiola-Washington & Emeka, 2014). Harsher sanctions were implemented for youth as young as 10 years, transfer of youth to criminal court became possible at younger ages and in response to a broader range of charges, youthful offenses were increasingly amended to mimic the harsher adult sentencing guidelines, and in some cases, rehabilitation was removed completely from state codes as a pertinent goal of the juvenile court (Butts & Mitchell, 2000; Logan, 1998; Redding, 1997; Tufts & Roberts, 2002).

It is within this context that adjudicative competence in juvenile court began to emerge as an important safeguard to the rights of children and an essential platform for ensuring the fairness of juvenile delinquency proceedings. Study commissions began to examine the legislative and clinical underpinning of the competency doctrine, and states began to formalize the procedures that could be used to have a youth evaluated and the results of the evaluation presented by trained forensic evaluators to the court (Fagan & Zimring, 2000; Grisso, 1997; Grisso, 1998; Melton, Petrila, & Poythress, & Slobogin, 2008; Morris, Haroun & Naimark, 2004; Redding & Frost, 2002; Viljoen, Roesch, Ogloff, & Zapf, 2003).

The Juvenile Competency Process

As noted, while there is a national trend toward adopting juvenile competency legislation, as of 2013 only 21 states had adopted such legislation (Beth & Gerring, 2014). The way a case involving juvenile competency typically proceeds through the court is reviewed below (see Figure 1).

Raising the Issue of Competency

The issue of juvenile competency is typically raised in cases in which a juvenile commits an offense that would be considered a crime (misdemeanor or felony) in the criminal justice system (as opposed to e.g., status offenses). In most courts, any member of the court has the option of raising the issue of juvenile competency: the prosecutor, the defense attorney, the judge, or the guardian ad litem (Larson & Grisso, 2011; Viljoen, McLachlan, Wingrove, & Penner, 2010). In adult court, if there is a genuine concern regarding the defendant's competency, the issue must be raised (*Drope v. Missouri* (1975)). However, this mandate is less stringent in the juvenile context.

Given the discretion allowed in raising the issue of competence, it is perhaps not surprising that only 53% of juvenile defense attorneys in a national survey indicated that they sought a competency evaluation in a typical case (Viljoen, McLachlan, Wingrove, & Penner, 2010). However, defense attorneys were more likely to raise the issue when the youth was younger, charged with a serious offense, and had greater legal deficits.

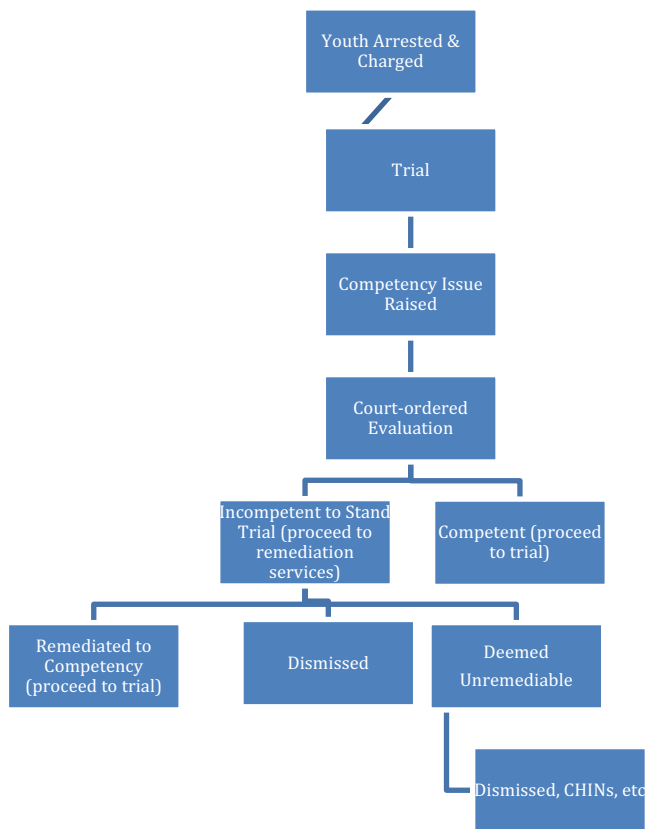


Figure 1. Flow chart of a case involving juvenile competency.

Although any member of the court may raise the issue of juvenile competence, it is the judge who decides whether to refer a youth for a competency evaluation. The adult standard for this initial referral is preponderance of the evidence (*Cooper v. Oklahoma* (1996)) rather than clear and convincing evidence or beyond a reasonable doubt. However, the Supreme Court has not opined on the standard for adjudicative competence (Larson & Grisso, 2011). According to Viljoen et al (2010), there are a number of factors dissuading a court from making a competency referral: the offense is minor, the youth/parents do not want a competency evaluation, a referral would delay proceedings, the youth would be found competent anyway, the legal standards are not sufficiently clear to know when a juvenile competency evaluation should be requested, the stigma associated with a competency evaluation, and court resistance. Thus, only a fraction of those youth where a competency concern exists will be referred for a competency evaluation, although the exact numbers are not available.

Importantly, youth are not required to submit to a competency evaluation. However, Larson and Grisso (2001) report that some youth proceed to competency evaluations without counsel or without counsel’s knowledge of the competency evaluation, in stark contrast to a case involving an adult. Whether or not to submit to an evaluation has important implications for the outcome

of the case and therefore it is highly recommended that youth have an opportunity to consult with their attorney prior to submitting to a competency evaluation.

The Juvenile Competency Evaluation

Regardless of who raises the issue, once the issue of competency has been raised and the judge finds merit in the petition, the judge is responsible for referring the youth for a competency evaluation (setting aside the issue of whether the youth submits to the evaluation) through the issuance of a court order. Although there are myriad forms of juvenile competence (Hoge, 2012), competence to stand trial evaluations are the most common forensic mental health evaluations conducted in the United States for both juveniles (Bonnie & Grisso, 2000) and adults (Melton, Petrila, Poythress, & Slobogin, 2007), with an estimated 60,000 competency evaluations performed annually (Appelbaum & Guthiel, 2007).

A comprehensive competency evaluation has multiple components. It ideally includes interviews with the youth and collaterals (e.g., parents, police, teachers), reviews of file information, and standardized assessment tools such as intelligence and personality, as well as competency instruments (Hoge, 2012). The inclusion of standardized instruments is believed to result in a superior conclusion than clinical judgment alone (Hoge, 2012). The Juvenile Adjudicative Competence Interview (Grisso, 2005) and the MacArthur Competence Assessment Tool-Criminal Adjudication (Poythress et al., 1999) are two well-respected instruments for assessing competence. However, no single factor (e.g., age, general level of cognitive ability, instrument score) can or should determine competence (Hoge, 2012). Rather, a conclusion about competency should flow from a confluence of sources with deficits shown to be directly related to the inability to participate in the judicial process. Throughout these domains, Larson and Grisso (2011) advocate for greater specificity in the statutory language stipulating what evaluators must consider. Such specificity is believed to result in greater uniformity in the ways in which evaluators assess adjudicative competence.

A forensic evaluation is designed to address a specific legal issue, in this case, adjudicative competence. There are legal and ethical standards that guide juvenile competency evaluations (Hoge, 2012). However, there is little consistency between states. For example, Warren, Rosenfeld, Fitch, and Hawk (1997) found that in the adult context, even when state standards were identical, states differed in their rates of referral and interpretation of the legal standards, resulting in different rates of adult incompetence to stand trial.

Typically, state statutes describe competency requirements as the ability to assist counsel in a defense and the ability to understand and/or appreciate the nature of the proceedings (Larson & Grisso, 2011). According to Larson and Grisso (2011), states use either a functional abilities approach or a cognitive concepts approach. A functional abilities approach delineates what abilities are required for competence (e.g., the youth can disclose facts to a defense attorney pertinent to the proceedings), whereas a cognitive concepts approach describes what a defendant should be able to do (e.g., the youth has a factual understanding that the defense attorney is working on his behalf). Although most state statutes describe the types of abilities required, whether juveniles are required to have the same or lesser degree of those abilities than adults have not been answered by most state statutes (Bonnie & Grisso, 2000). Using the same adult

standard would imply that consequences to youth are as serious as those of adults and thus would argue for the use of a higher threshold, resulting in a higher number of youth found incompetent to stand trial. Conversely, using youth as the standard honors the original rehabilitative intention of the juvenile courts, resulting in fewer youth being found incompetent to stand trial, holding back only those with the most serious deficits.

Research has identified several conditions that underlie incompetence. The relationship between serious mental illness or intellectual disability and a finding of incompetence has been well documented among adults referred for services (Hubbard, Zapf, & Ronan, 2003; Viljoen & Zapf, 2002; Viljoen, Zapf & Roesch, 2004; Warren, Murrie, Stejskal et al., 2006). These predicate conditions also have been found to be associated with significant deficits in the legal understanding of youth and their ability to actively engage in the legal process (Cowden & McKee, 1995; Grisso, Steinberg, Woolard et al., 2003; McKee, 1998; Warren, Aaron, Ryan, Chauhan, & DuVal, 2003). The significance of these influences is underscored by recent research indicating that two-thirds to three-quarters of detained juveniles suffer from at least one mental disorder (Teplin, Abram, McClelland, Dulcan, & Meracle, 2002; Wasserman, McReynolds, Lucas, Fisher, & Santos, 2002). These mental disorders are further compounded by learning disorders and other academic difficulties that are common among this population (Grisso et al., 2003; Redlich, Silverman & Steiner, 2003; Viljoen, Klaver, & Roesch, 2005). Both Grisso et al. (2003) and Warren et al. (2003) found intelligence and psychiatric factors impact juveniles' adjudicative competence. Furthermore, they found that intelligence, especially verbal intelligence, was a strong predictor of competence, at times overpowering the effects of psychiatric diagnoses.

Unique to the juvenile justice context is the role of immaturity on requisite competency abilities (Denny, 2012; Oberlander, Goldstein & Ho, 2001; Scott & Grisso, 1998; Scott, Reppucci & Woolard, 1995; Viljoen & Wingrove, 2007). While age is more narrow than developmental immaturity (e.g., impulsivity, judgement, decision-making capacities), it is a relevant component. Virtually all studies have found that younger compared to older age is indeed related to incompetence (Baerger, Griffin, Lyons & Simmons, 2003; Burnett, Noblin & Prosser, 2004; Cowden & McKee, 1995; Grisso et al., 2003; McKee, 1998; McKee & Shea, 1999; Savitsky & Karras, 1984; Viljoen, Klaver & Roesch, 2005; Viljoen & Roesch, 2005; Warren et al., 2003). However, no state statute currently has a presumption of incompetence based solely on age.

States differ in what they permit to form the basis of incompetency. Some require a predicate condition such as mental illness and/or intellectual disability (e.g., Florida) while others leave open the possibility of developmental immaturity forming the basis for a finding of incompetence (e.g., Virginia). Embedded in this issue are the concerns expressed by many states when drafting juvenile competence legislation that youth found incompetent due to developmental immaturity relates to their young age, making it impossible to remediate¹ them to competence over a reasonable period (Viljoen & Grisso, 2007).

As part of the competency evaluation, youth may be asked to recite the events that led to their arrest. Not uncommonly, important evidentiary information is obtained during the evaluation.

However, this information must be used exclusively to assess competency and is prohibited from being shared with members of the court or used as evidence (Larson & Grisso, 2011). In some states, evaluators can even omit incriminating information from their report to the court (Larson & Grisso, 2011).

The location of the competency evaluation is of considerable importance as well. Adult competency evaluations typically take place in psychiatric hospitals, primarily because mental illness and intellectual disabilities are the most frequent cause of incompetency among adults (Perelli, Gottdiener, & Zapf, 2011). However, youth may be evaluated in the evaluator's office or if youth are hospitalized for a psychiatric illness they might be evaluated in a secure setting. Regardless of where the evaluation takes place, evaluators are encouraged to observe firsthand the social and physical environment in which the youth lives.

State statutes typically stipulate the amount of time permitted to conduct the evaluation and submit a report to the court, ranging from 10 to 45 days (Larson & Grisso, 2011). The tension lies between providing sufficient time for the evaluator to gather relevant collateral information, while respecting the courts need for a speedy trial (Larson & Grisso, 2011). Given that a competency evaluation extends the time that the juvenile is in the pretrial legal process, Larson and Grisso (2011) persuasively recommend allowing a maximum of two weeks post-court order to conduct the evaluation and submit a report.

Juvenile Competency Evaluator Qualifications and Training

Juvenile competency evaluators are typically psychiatrists or psychologists who must be certified by their profession (Hoge, 2012). These professional organizations also provide their members with ethical guidelines (e.g., American Academy of Psychiatry and the Law, 2006). Psychiatric or psychological training is necessary but not sufficient to conduct juvenile competency evaluations (Larson & Grisso, 2011). These clinicians require specialized training to work with youth (American Psychological Association, 2010; Committee on Ethical Guidelines for Forensic Psychologists, 1991), but also must possess the skill to assess the types of abilities a defendant would need to meet the *Dusky* standard (Larson & Grisso, 2011; Warren, Jackson, & Jones Coburn, 2016). The tradeoff is the more stringent the evaluator requirements, the more difficulty a state may face in finding qualified evaluators (Larson & Grisso, 2011). Although psychiatrists and psychologists perform most forensic evaluations, numerous states explicitly allow other mental health professionals to conduct juvenile competency evaluations (Frost, de Camara & Earl, 2006). Virginia, for example, permits licensed clinical social workers to perform juvenile competency evaluations if properly certified.

There are certification programs in some states for professionals who wish to provide juvenile competency evaluations. For example, a model program is offered at the University of Virginia's Institute of Law, Psychiatry and Public Policy. For the past three decades, the Institute annually holds a 6-day training in juvenile forensic evaluation (<http://www.ilppp.virginia.edu/OREM/JuvenilePrograms>). The program was developed as part of Virginia's comprehensive juvenile competency legislation that requires completion of this training prior to a judge referring defendants for any type of forensic evaluation. The manualized instruction is provided by a variety of highly experienced professionals delivering

content interactively using real case examples to facilitate learning new evaluation skills. Completion of the training requires passing a multiple choice, open-book exam and the submission of a sample written assessment of juvenile adjudicative competency. Some states require continuing education for professionals conducting competency evaluations (Fein et al., 1991; Redding & Frost, 2001).

The Evaluation Report

Typically, evaluators are required to submit a report to the court, although they may testify as well. Larson and Grisso (2011) recommend a five-part evaluation report that contains: an assessment of any mental health issues and intellectual disabilities; an assessment of developmental status; an assessment of how functional abilities link to the competency-to-stand-trial elements in *Dusky*; the identified causes of deficits in competency; and an opinion as to the potential for remediation (if in the opinion of the clinician the defendant is incompetent to stand trial) (see also American Prosecutor's Research Institute, 2006; Grisso, 2003).

States differ in whether they require the evaluator to offer a conclusory statement regarding the juvenile's adjudicative competence (Borum & Grisso, 1996; Larson & Grisso, 2011). As competency is ultimately a legal question, some believe the judge should make a determination of competency based upon the objective information provided in the report regarding whether the defendant's impairments are sufficiently serious to jeopardize the fairness of the trial (Tilbrook, Mumley & Grisso, 2003). Alternatively, judges are aided by and often desire the opinions of highly qualified evaluators and remain free to disagree with the evaluator's opinion (Redding, Floyd, & Hawk, 2001; Rogers & Ewing, 2003). Interestingly, the Committee for Ethical Guidelines for Forensic Psychologists provides no guidance regarding the inclusion of conclusory statements in an evaluation report (Larson & Grisso, 2011).

With receipt of the competency report, the judge holds a hearing to make a determination of the youth's adjudicative competence. In practice, judges tend to adopt the position of evaluators (Kruh, Sullivan, Ellis, Lexcen, & McClellan, 2006). Most typically, the youth is either deemed competent and the case proceeds to trial or the youth is deemed incompetent to stand trial, in which case the judge may refer the youth for remediation services (in states that have such services).

Remediation Services Programming

After a judge adjudicates a youth incompetent, the legal proceedings are suspended while the judge refers the youth for remediation services (where available). Remediation services can only commence upon a court determination of incompetency to stand trial (Walker et al., 2017).

There is scant literature on remediation services and little guidance on the practice of such services (Beth & Gerring, 2014; see Warren et al., 2016, for a review). There are four well-established remediation programs in four states: Maryland, Virginia, Louisiana, and Florida (Warren et al., 2016). However, this section describes in detail the Virginia model for juvenile competency attainment as Santa Clara County chose to replicate this model.

The Virginia model for juvenile competency attainment. In Virginia, each youth referred for remediation services is offered an individualized curriculum that is uniquely responsive to their learning style and designed to address their specific barriers to competency identified in the competency evaluation. These services are offered in the context of a one-to-one relationship with a trained restoration counselor who meets with the youth on average two to three times a week, typically in the youth's home or some other place where the youth feels safe, for a duration of 3 to 6 months. Quarterly status reports are submitted to the court regarding the youth's progress toward competency.

The Virginia model is guided by six primary principles (<http://juvenilecompetency.virginia.edu/programming>). First, the model is community-based. All services are provided to youth in the least restrictive environment allowed by the courts. The goal is to ensure that, prior to adjudication, youth are not subject to unnecessary interruptions to their lives unless they pose a risk to the community and require placement in a secured facility as determined by the court. Therefore, for the administration of remediation services, secure placement is not required (although there may be other considerations that result in a youth's secure placement).

Second, consistent with the forensic principle of neutrality, the staff maintain a neutral role in the proceedings. The competency restoration staff are dedicated to assisting juveniles to exercise their constitutional right to be competent to stand trial, while maintaining neutrality to and separation from the adversarial process. This neutral stance ensures that attorneys on both sides are satisfied with the opinions issued by the program.

Third is a two-pronged principle in which the program employs a "triple check" process of opinions offered to the court and those opinions are offered by trained professionals. Restoration counselors provide direct services to youth, are supervised by a restoration supervisor, and both of those service providers are accountable to the program director. Entry into and exit out of the restoration program requires that the restoration counselor, the restoration supervisor, and the program director all agree on a finding before the program submits a quarterly report to the court outlining their opinion concerning the competency of the youth being reviewed (i.e., whether a youth is restored to competence, requires continued restoration services, or is irremediably incompetent). This process requires a shared understanding of how competency is defined and agreement on the qualities of a good assessment, a consensus that is achieved only through structured training of all professional staff. The Virginia model requires that all restoration counselors and restoration supervisors complete a 3-day training before they begin providing services to youth. In addition, restoration supervisors are required to complete the 6-day training offered at the University of Virginia for juvenile forensic evaluators (described earlier).

Forth, the program's structure protects all youth from self-incrimination. A central ethical component of the Virginia model requires that all youth are evaluated and, if necessary, provided remediation services to address any impairments contributing to their competency status without inadvertently opening themselves to self-incrimination. In Virginia, protection against self-incrimination is ensured by statute (Va. Code §16.1-360) and through inclusion of the statutory language in all court orders concerning the provision of remediation services which reads "No

statement or disclosure by the minor relating to the alleged offense(s) made during the provision of competency services may be used against the minor at the adjudication or disposition as evidence or as a basis for such evidence.”

Fifth, although restoration services are typically psychoeducational, restoration services must respond to the underlying reason(s) for incompetency and therefore must be individualized to some extent (Stepanyan, Sidhu, & Bath, 2016; Walker et al., 2017). These sessions are individualized to the strengths and unique learning styles of each youth. Specifically, restoration counselors have at their disposal many activities, each of which has been adapted to appeal to a variety of learning styles (e.g., tactile/kinesthetic, visual, auditory) and unique developmental, cognitive, and/or cultural requirements. The educational tools include interactive animated software, flashcards, workbooks, coloring books, board games, verbal conversation, role playing, and news articles. These activities are designed to appeal to youth’s interests and thereby are engaging for youth (Jackson et al., 2014).

Finally, restoration case management is provided to the extent necessary for helping the youth overcome identified barriers to competence (e.g., mental illness, sensory impairments). Case management activities are often diverse but central to the attainment of competency for each youth. Actions include, but are not limited to, facilitating a youth’s access to a psychiatric or developmental evaluation, ensuring compliance with prescribed medications, coordinating with school districts to gather complete education records, and/or identifying transportation alternatives so a youth can attend appointments at the proper time and place. Psychotherapy is never part of a restoration session.

However, these remediation activities cannot extend indefinitely. The U.S. Supreme Court ruled in *Jackson v. Indiana* (1972) that a defendant cannot be held for longer than the reasonable time necessary to determine whether there is substantial probability that he or she will attain competency in the foreseeable future (Advokat, Guidry, Burnett, Manguno-Mire, & Thompson, 2012; Mossman et al., 2007; Warren, Chauhan, Kois, Dibble, & Knighton, 2013; Zapf & Roesch, 2011). The rationale is that placement in restoration services cannot be simply for detainment purposes, but that progress must be made toward the goal of competency. Although *Jackson* does not articulate time limits explicitly, states with restoration services legislation tend to limit the amount of time restoration services may be provided to comply with the intent of *Jackson*.

In Virginia, restoration counselors submit a quarterly report to the court describing the youth’s progress. At any point, when the restoration team indicates the youth has achieved competence, the court will hold a hearing on the issue and likely proceed to trial. Alternatively, the youth may require additional remediation services. However, remediation services cannot last longer than 12 months, and typically lasts no longer than 6 months. At some point (depending on state statute), the restoration counselor must opine on the probability of attaining competence (Warren et al., 2016).

Post-Restoration Services: Outcomes

There is general agreement in the literature that competency evaluation research is much more robust than remediation services research. Across the few studies that have examined the

outcomes associated with juvenile remediation services, approximately 70% of youth are remediated after receiving remediation services (Chien et al., 2016; McGaha, Otto, McClaren & Pettila, 2001; Warren et al., 2009). This figure is only slightly lower than the adult competency literature, generally citing about 75% restored to competency (Zapf & Roesch, 2011; Gay, Vitacco, & Ragatz, 2017). However, Warren et al. (2009) found that among youth referred for restoration services differences emerged across conditions. That is, among youth deemed to have an intellectual disability singularly or in conjunction with a mental disorder, only 46% and 48% respectively were restored to competence. However, 84% of youth with only a mental disorder were ultimately remediated, as were 91% of youth who suffered from no mental disorder and no intellectual disability. More recently, in a small Connecticut sample of 58 youth in a locked facility receiving remediation services, only lower IQ predicted irremediable status despite a high prevalence of psychopathology (Chien et al., 2016).

Overall, youth with intellectual deficits (and especially co-morbid conditions), younger age (possibly developmental immaturity), and to a lesser extent mental illness, are less likely to attain competence. When factors that interfere with competency are amenable to medication (e.g., psychosis), the restoration process is more promising (Stein, Kan, & Henderson, 2016). However, when developmental immaturity and intellectual disability are at the root of incompetency, competence is more difficult to achieve, and in fact may not have been achieved prior to their contact with the juvenile justice system. For at least some of these youth, education alone will be insufficient to remediate them, resulting in a small percentage of youth being deemed irremediably incompetent (Chien et al., 2016).

Irremediably Incompetent Youth

If the service provider opines the defendant is unlikely to attain competence (i.e., is not responding to psychoeducational efforts), the court may relinquish jurisdiction of the defendant. However, the manner and method of relinquishment varies greatly by state (Larson & Grisso, 2011; Lee, 2013). In some states, the case is dismissed, and the youth is simply released. However, whether the case is dismissed with or without prejudice has implications for whether the case can be retried in the future (Lee, 2013). In other states (e.g., Kansas), civil commitment proceedings are immediately commenced for treatment and thus, although the juvenile justice system no longer has jurisdiction over the youth, the state retains jurisdiction over the youth (Lee, 2013). In Virginia, the court may petition for a Child in Need of Services (CHINS) to retain jurisdiction of the youth.

Only a minority of youth in the juvenile justice system are deemed irremediably incompetent (Warren et al., under review), but the public policy implications of such a status are formidable (Lee, 2013; Parker, 2012; Bath & Gerring, 2014). Youth with minor charges may be easier for a court to dismiss than those with serious charges, but none of the options (civil commitment until their 21st birthday for treatment, CHINS, or dismissed charges) are appealing and yet under *Jackson*, that is the reality.

A youth adjudicated incompetent who is released and commits another crime will likely again be adjudicated incompetent by the court. We know very little about what happens to youth whose cases are dismissed or youth who are found to be irremediably incompetent and released. As

public safety is the mission of the juvenile justice system, there are legitimate concerns about subsequent violations of the law. In the only study known of adults' reoffending post-dismissal, Snyder (2017) found that 3.03% were charged with a new crime over a 5-year period (p. 36). Only one study to our knowledge has had access to this information among juveniles. Warren et al. (under review) found that among over 1900 youth referred for remediation services, 7% at some point were in the remediation program again.

The Santa Clara County Experience

With this brief review of juvenile competency legislation and programming forming the backdrop, we now turn to Santa Clara County's experience in adopting this legislation and programming and the lessons learned while replicating the Virginia model. Two years after the initiation of the Santa Clara competency program, the program staff and key stakeholders embarked on an informal evaluation initiated to provide feedback to the still-evolving Santa Clara program while providing information about the implementation process to other counties as they might seek to determine how best to implement juvenile competency law and programming in their community. Results of the evaluation over the first two years of operation are presented below following a brief history of California legislation.

History of California Legislation

Since the trial of *James H. v. Supreme Court* in 1978, California law has held that minors cannot be tried for a crime if the judge, defendant's attorney, or the prosecutor doubts the youth's competence to stand trial. Despite this early ruling, it was not until early 2009 that the Juvenile Justice Court of Santa Clara County, California, began to experience an increase in the frequency with which the issue of competency was being raised. At the time, these referrals were being initiated according to WIC §§ 705, 8550, or 4011.6 which did not explicitly address the issue of competency, rather simply allowed for a youth to be held for 72 hours for a mental health assessment to determine if they were suffering from a possible mental illness. However, in September 2010, WIC §709 was passed by the California legislature allowing the juvenile court to explicitly address the competency issue in all delinquency proceedings. Section (a) of the statute reads:

During the pendency of any juvenile proceeding, the minor's counsel or the court may express a doubt as to the minor's competency. A minor is incompetent to proceed if he or she lacks sufficient present ability to consult with counsel and assist in preparing his or her defense with a reasonable degree of rational understanding, or lacks a rational as well as factual understanding, of the nature of the charges or proceedings against him or her. If the court finds substantial evidence raises a doubt as to the minor's competency, the proceedings shall be suspended. ... The court shall appoint an expert to evaluate whether the minor suffers from a mental disorder, developmental disability, developmental immaturity, or other condition and, if so, whether the condition or conditions impair the minor's competency. ...

This new law was hailed as an important step forward. The Santa Clara County juvenile court immediately convened a working group to develop procedures to implement the law with representation from the Superior Court, the Office of the Public Defender, the Alternative and

Independent Defenders Office, the Office of the District Attorney, the Probation Department, and the Santa Clara Department of Mental Health. The working group was tasked with developing procedures for determining a minor's mental ability to participate in juvenile proceedings, the competency evaluation of a youth, the competency hearing process, the provision of services to attain/remediate competency, judicial review, and the steps to be taken when a minor was determined to be irremediably incompetent.

In developing these procedures, the working group sought consultation with the developers of Virginia's juvenile competency program. The decision to replicate the Virginia model followed a careful review of the four statewide programs that were identifiable at the time (Florida, Louisiana, Maryland, Virginia). Based on the strength of the evidence published on the Virginia model (Warren et al., 2009), Santa Clara County entered into a contract with the University of Virginia to provide training, consultation and technical assistance to guide implementation in Santa Clara County over the first three years of program development.

After nearly two years of planning, the working group adopted the 88-page Santa Clara Superior Court Juvenile Competency Manual and Protocol (Superior Court of Santa Clara County, 2011). On January 3, 2012, the Juvenile Competency Restoration (JCR) program in Santa Clara County was formally launched.

Results of the Informal Program Evaluation

Description of youth referred for restoration services. The evaluation revealed that 71% of the petitions filed in the Juvenile Justice Court of Santa Clara County involved Latino defendants, although 90% of youth referred into the remediation services program on court order were Latino. While overrepresentation of Latinos in the remediation program was a concern in Santa Clara County, professionals were appeased to some extent as these youth would be covered by due process protections. A similar overrepresentation of African American youth has been identified in the Virginia remediation program (Warren et al, 2009), this being somewhat of an artifact of the overrepresentation of minority youth in the juvenile justice system nationally (Donnelly, 2017).

In terms of the conditions that led to a finding of incompetence, the presence of an intellectual disability was identified in 75% of the youth ordered into remediation services either singularly or in combination with a mental disorder and/or age. In Virginia, only 38% of the youth were diagnosed with an intellectual disability singularly or in combination with other impairments (Warren et al., 2009). While the California data is still preliminary, it suggests that attorneys are focused on intellectual disabilities and may not request evaluations as often as they do in Virginia when they encounter mental disorders and/or developmental issues.

Implementation of the least restrictive alternative. Santa Clara County adopted the least restrictive environment for providing remediation services, emphasizing in all court hearings that program staff were available to serve youth anywhere in the county in a timely basis. In Virginia, the community-based approach had received broad support from stakeholders due to the high cost of providing services in inpatient or custody settings. While 5% of youth in Virginia were hospitalized for stabilization or psychiatric evaluation (RYC, 2013), the clear majority were

served in the community. Santa Clara County's program saw similar hospitalization rates during its first two years in operation.

Length of time in remediation services. In Santa Clara County, youth remained in the formal portion of the program for an average of 245 days, nearly twice the length of time as youth in the Virginia program (Warren et al., 2009). This more extensive time period could be the result of missed sessions on the part of youth and/or staffing shortages on the programmatic side (discussed below), each contributing to a lower number of sessions being provided each week. In contrast, in the Virginia program restoration counselors consistently meet with youth 2 to 3 times a week resulting in the shorter duration of remediation services (Warren, et al., 2009).

Remediation services outcomes. Consistent with previous research (Chien et al., 2016; McGaha et al., 2001; Warren et al., 2009), the majority of youth ordered into the juvenile remediation program were remediated or assisted in attaining competency. Of the 10 youth who completed the remediation program, 7 youth were remediated, 2 were determined to be irremediably incompetent, and one case was dismissed. Caution must be exercised as only a small number of cases were completed in the first two years of operation (possible explanations are described under Lessons Learned). Nonetheless, these percentages are similar to a new outcome study in Virginia in which 70% of youth were remediated and 19% were determined to be irremediably incompetent (Warren et al., under review). Quality control measures stipulate that opinions submitted to the court utilize the "triple check" process described earlier. While attorneys on both sides expressed concerns about the conclusions submitted by program staff, judges did not. Over the course of two years, judicial rulings upheld the expert triple check opinion in every case. These results suggest that the remediation program was effective in accurately identifying and remediating incompetence when it was possible, and in identifying youth who were irremediably incompetent when it was not.

Lessons Learned

Santa Clara County opted to replicate an established juvenile competency program developed in Virginia. Generally, implementation of the juvenile remediation program proceeded smoothly. However, there are three areas where better planning might have improved implementation.

Planning for adequate staffing. It cannot be overemphasized that all parts of the legislation and programming are interrelated and must be developed in tandem. Funding constraints prompted Santa Clara County to initiate the remediation program with skeletal staffing, hoping to address the staffing problem in an incremental fashion. However, that strategy failed to account for the immediate increase in the number of cases in which the issue of juvenile competency was raised. This staffing shortage resulted in a 113-day wait list that was a universal area of concern and was far longer than any stakeholder group could accept long-term. This long wait list resulted from an insufficient number of trained staff upon launching the program and was compounded when the County was later unable to hire and train staff quickly enough to meet the volume of referrals over the first six months of operation. Fortunately, funding for an additional restoration counselor was provided by the Santa Clara County Probation Department, and that counselor was hired in early 2014. As a result, in the ensuing months wait times decreased with the wait list no longer necessary as the program entered its third year of operation. Programmatically, this

problem highlights the importance of identifying staffing needs prior to implementation to manage the influx of new referrals which often occurs immediately after the passage of new juvenile competency legislation and programming. The staff shortage also contributed to an inability to honor the triple check process, with some cases only receiving a double check, which defense attorneys asserted might result in bias. These issues suggest that the program will suffer if sufficient staff are not hired prior to program implementation.

Planning for adequate training. Hiring staff is necessary, but not sufficient. This specialty area requires extensive training as well. For example, Santa Clara County's juvenile competency evaluators utilized several standardized assessment tools: The Juvenile Adjudicative Competence Interview (JACI), the Revised Competency to Stand Trial Assessment Instrument (R-CAI), and the Fitness Interview Test-Revised (FIT-R). However, inter-rater reliability was identified as a challenge, suggesting the need for a greater training on instrument administration for evaluators. Furthermore, as part of quality control, all reports submitted to the court are first reviewed by the program director. In two cases, the program director observed that the conclusions of the report were inconsistent with the data described in the report. In these two cases, the program director consulted with the University of Virginia's expert evaluator who provided recommendations as to whether the report should be submitted to the court, a recommendation which was adopted in both cases by the program director. This situation further corroborates the need for extensive training for juvenile competency evaluators.

Self-incrimination. While the Virginia law and the model court orders had been written to ensure that no youth would incriminate himself during the assessment or remediation of their adjudicative competency, the 2010 California law did not address self-incrimination. This initially created an ethical road block in the transfer of the Virginia model to Santa Clara County. This was rectified through the cooperation of the juvenile court judges in Santa Clara County who voluntarily agreed to begin using a model court order fashioned in Virginia (described on p. 62-63). The quick response by judges emerged at least in part because of their involvement in developing the Santa Clara Superior Court Juvenile Competency Manual and Protocol and their commitment to ensuring that optimal remediation programming was maintained in their county.

Conclusions

This analysis provides a preliminary platform for reflecting on some of the service delivery issues that are embedded in establishing remediation law and programming for juveniles. Santa Clara County struggled with many of the issues outlined in this paper but quickly corrected course. The goal of this analysis was to encourage other communities to adopt this fundamental legislation by providing a pathway forward, thereby ensuring that the youth throughout our country are provided the due process protections commensurate with adults that they so richly deserve.

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¹ Restoration typically refers to adults and remediation typically refers to youth because some youth never attained competency (Viljoen & Grisso, 2007). This article uses the term remediation, acknowledging that some youth will have attained competency at a prior point.

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