

SPECIAL DIRECTIVE 20-03

TO: ALL DEPUTY DISTRICT ATTORNEY PERSONNEL

FROM:  JOSEPH P. ESPOSITO
Chief Deputy District Attorney

SUBJECT: REVISIONS TO LEGAL POLICIES MANUAL SECTIONS 16.02.06
AND 16.02.08 - MENTAL INCOMPETENCY AND CONSERVATORSHIPS

DATE: APRIL 28, 2020

This Special Directive amends certain procedures involving mentally incompetent defendants and Murphy conservatorships due to new court practices and laws.

Legal Policies Manual section 16.02.06 is hereby amended to read as follows:

16.02.06 DEFENDANT FOUND MENTALLY INCOMPETENT

Upon a finding that a defendant is mentally incompetent under Penal Code § 1370, the deputy shall:

- Ensure that the findings of the defendant's mental incompetence are put on the record.
- Ensure that the court orders a placement report for a date within 15 court days as required by Penal Code § 1370(a)(2). The Department of State Hospitals (DSH) and the Community Program Director (Gateways) have adopted a procedure to prepare placement reports to comply with Penal Code § 1370(a)(2) and the Los Angeles Superior Court rules. For defendants who are in custody, DSH's Forensic Services Division will prepare a report with a recommendation of either the state hospital or out-patient. For defendants who are out-of-custody, Gateways Conrep will prepare a report with their recommendation as to whether the defendant can be safely treated for competency restoration on an out-patient basis. Misdemeanor and pre-preliminary hearing cases will continue to be handled by the Mental Health Division's (MHD) Psychiatric Section. Whenever these cases are transferred to Department 95, the assigned deputy shall send a copy of the complaint, police report, and rap sheet directly to the Psychiatric Section.

Post-preliminary hearing cases in the trial courts should be handled as follows:

1. If the defense requests an immediate commitment to the state hospital without a placement report, the assigned deputy shall object unless the defense agrees to a commitment order to the State Hospital.

2. If the state hospital is recommended, absent unusual circumstances, the assigned deputy shall submit on the recommendation.
3. Out-of-custody defendants are evaluated by Gateways Conrep for out-patient treatment consideration. Gateways can only recommend out-patient treatment if they determine the defendant is not a danger to the health and safety of others, and the Court shall consider defendant's dangerousness when deciding whether to grant out-patient status. (PC § 1602(a)(2).) Unlike a recommendation to a state hospital, there is a statutory right to a hearing if out-patient treatment is recommended, or if the Court is considering granting out-patient treatment in spite of a recommendation by Gateways against it. (PC § 1602 (b).) If there are facts available to refute Gateways' assessment of dangerousness, or if there is no available identified appropriate program, the assigned deputy shall litigate the appropriateness of a community placement. Similarly, if the Court is considering granting out-patient competency-restoration treatment in spite of a recommendation against it, the assigned deputy shall litigate the appropriateness of community placement by way of a hearing.

When the defendant is committed, the deputy shall:

1. Request the court to calendar the matter for a 90-day progress report.
2. Request the court to order the hospital medical director or outpatient supervisor to submit a 90-day status report to the court clerk with copies for the deputy and defense counsel which should address the following issues:
 - Is the defendant now able to understand the nature of the proceedings against him or her? If not, will the defendant be able to do so in the foreseeable future?
 - Is the defendant now able to cooperate rationally with his or her attorney? If not, will the defendant be able to do so in the foreseeable future?
 - If compulsory medication is warranted, can the medication be effectively administered by the agency having custody of the defendant? (PC § 1369(a).)
3. Request the court to order the clerk to provide copies of the 90-day status report to the deputy and defense counsel.
4. Prepare a file to be sent to the facility to which the defendant is committed, which shall contain copies of:
 - The complaint or information;
 - The police reports or a summary of defendant's criminal behavior;
 - The mental health experts' reports upon which the court based its determination of incompetence;
 - The probation report, if any; and

- Any other information the deputy deems to be relevant.

This information should be directed to the medical director or executive director of the treatment facility to which the defendant is committed. Contact the Psychiatric Section for mental health administrators' contact information.

If a defendant has been returned to court and deemed restored to competency pursuant to Penal Code § 1372, and the defendant's attorney then attempts to declare a new doubt, the deputy shall point out to the judge that the defendant is presumed competent unless the defense presents to the court "a substantial change in circumstances or new evidence casting a serious doubt on the validity of that [competency] finding." (*People v. Kelly* (1992) 1 Cal.4th 495, *People v. Taylor* (2009) 47 Cal.4th 850, and *People v. Buenrostro* (2018) 6 Cal.5th 367.)

Legal Policies Manual section 16.02.08 is hereby amended to read as follows:

16.02.08 INITIATION OF CONSERVATORSHIP PROCEEDINGS

One of the functions of the Psychiatric Section is to maintain conservatorships for violent offenders. A conservatorship is established under Welfare and Institution Code § 5008(h)(1)(B) after a defendant, who has been deemed incompetent to stand trial, has been confined in a treatment facility for *two years* or the maximum term of imprisonment provided by law for the most serious offense charged in the indictment or information, whichever is *shorter*. These conservatorships are commonly referred to as "Murphy" conservatorships. Deputies shall pursue Murphy conservatorships in cases where the defendant is a violent offender and cannot be restored to competency.

In order to pursue a Murphy conservatorship, the defendant must be mentally incompetent per Penal Code § 1370 and all of the following conditions exist:

1. The indictment, information, or complaint with a finding of probable cause pursuant to Penal Code § 1368.1(a)(2) pending against the defendant at the time of commitment, charges a felony involving death, great bodily injury, or a serious threat to the physical well-being of another.
2. The indictment, information, or complaint with a finding of probable cause pursuant to Penal Code § 1368.1(a)(2) has not been dismissed.
3. As a result of a mental disorder, the defendant is unable to understand the nature and purpose of the proceedings against him or her and to assist counsel in the conduct of his or her defense in a rational manner. (WIC §§ 5008(h)(1)(b)(i-iii).)

When calendaring a Penal Code § 1368.1(a)(2) hearing, it is important not to cause a defendant who is being treated at a locked state hospital treatment facility to be removed from that facility and booked into the county jail. Defendants who are being treated at a locked state hospital facility should be ordered specially transported to and from that state hospital facility and court in the same day. In this way, the defendant's treatment is not interrupted, and the hospital witnesses who testify in a conservatorship trial will be able to give up-to-date testimony as to the defendant's psychiatric condition and dangerousness.

In addition to the criteria enumerated in Welfare and Institution Code §§ 5008(h)(1)(b)(i-iii), case law requires the court to find that, by reason of a mental disease, defect, or disorder, the defendant represents a substantial danger of physical harm to others. (*Conservatorship of Hofferber* (1980) 28 Cal.3d 161, 176-177.)

When an incompetent defendant is returned to the committing court and meets the above criteria for establishing a conservatorship, the court shall order the conservatorship investigator to initiate conservatorship proceedings. (PC § 1370(c)(2).) In Los Angeles County, this is the responsibility of the Public Guardian of the Department of Mental Health. If the Public Guardian recommends a conservatorship be established under Welfare and Institution Code § 5008(h)(1)(B), County Counsel will file a petition in the Hollywood Mental Health Courthouse, and the MHD's Psychiatric Section shall handle all proceedings. Most importantly, the indictment, information, or complaint must *not* be dismissed, even after a conservatorship has been established. In lieu of dismissal, the deputy shall request that the proceedings be suspended indefinitely for good cause, pending the possible restoration of the defendant's competency. There are two situations that require special attention and handling. First, if a defendant charged with a felony involving death, great bodily injury, or a serious threat to the well-being of another is found to be incompetent *prior to the preliminary hearing* and either the maximum commitment date is near or it has been determined the defendant is unlikely to regain competency before the maximum commitment date, it may be necessary to obtain a Grand Jury indictment or conduct a Penal Code § 1368.1(a)(2) hearing so a conservatorship may be put in place. Having in hand a certified copy of an indictment or certified minute order reflecting that probable cause has been found after a Penal Code § 1368.1(a)(2) hearing at the time the defendant is returned to the committing court allows the handling deputy to request the court to appoint an investigator from the Public Guardian's Office to initiate conservatorship proceedings.

The second situation occurs when the Public Guardian refuses to initiate a conservatorship for a violent, incompetent defendant and either the maximum commitment date is near or it has been determined that the defendant is unlikely to ever regain competency. Under the *Kennebrew* case (*County of Los Angeles v. Superior Court* (2013) 222 Cal.App.4th 434), the court can order the Public Guardian to file a Murphy conservatorship if it finds that the Public Guardian's refusal to file constituted an abuse of its discretion.

The deputy handling the case shall inform his or her Head Deputy or Deputy-in-Charge when he or she becomes aware that an incompetent defendant charged with a felony involving death, great bodily injury, or a serious threat to the well-being of another is either approaching the maximum commitment date or it has been determined that the defendant is unlikely to be restored to competency before the maximum commitment date. It is the responsibility of the Head Deputy or Deputy-in-Charge to make the final determination on whether a Grand Jury indictment or probable cause finding pursuant to Penal Code § 1368.1(a)(2) should be pursued so that a conservatorship could be filed by the Public Guardian.

The following options are available to the court when a civil commitment is desired and the case does not meet the requirements for a Murphy conservatorship:

1. If the defendant is in a state hospital, the court may order the hospital staff to initiate conservatorship proceedings by applying to the Public Guardian for such a petition (WIC §§ 5008(h)(1)(A) and 5352) or
2. If the defendant is in local custody, the court may order the Forensic Mental Health Unit of the Los Angeles County Mental Health Department to initiate conservatorship proceedings through the Office of the Public Guardian.

In all cases, conservatorship proceedings should be instituted before the maximum term of commitment expires so that the court will still have jurisdiction to keep the defendant in custody pending the conservatorship process. Dismissal of charges will preclude initiation or renewal of any civil commitment per Welfare and Institution Code § 5008(h)(1)(B).

In cases that do not meet the requirements for a Murphy conservatorship, the calendar deputy responsible for the pending case shall prepare a Disposition Report recommending whether civil conservatorship proceedings should be initiated pursuant to the Lanterman-Petris-Short Act (WIC §§ 5008(h)(1)(A) and/or 5350 et seq.). The Head Deputy shall decide whether to request initiation of civil commitment. The charges shall be dismissed only after completion of the civil commitment process.

Juvenile proceedings in this area are governed by Welfare and Institution Code § 705 which authorizes the court to proceed pursuant to Penal Code section 4011.6. In all other respects, the juvenile court deputy shall follow the procedures set forth above.

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