

PROCEDURE 1 - INITIAL COMPETENCY HEARING AND ORDER FOR EVALUATION¹

1. Purpose: This procedure establishes standards for the initial evaluation of a criminal defendant's competence to stand trial/proceed, reporting to the court the results of the initial competency evaluation and court orders for the initial competency evaluation and subsequent orders.

2. References: Key references include:

Pennsylvania statutes 50 P.S. §§ 7402 and 7403

National Judicial College, *Mental Competency Best Practices Model* (hereafter NJC) (2012)

American Bar Association *Criminal Justice Standards on Mental Health*, adopted 8.8.16 (hereafter ABA Standards) (2016 ed.)

American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*

Dusky v. United States, 362 U.S. 402 (1960) (per curiam)

Jackson v. Indiana, 406 U.S. 715,738 (1972)

Clinical literature related to competence and competency restoration

3. Scope: This procedure applies to all individuals ordered for an initial evaluation of their competency to stand trial pursuant to 50 P.S. § 7402. This procedure includes the following sections:

Section 1: Purpose

Section 2: References

Section 3: Scope

Section 4: Definitions

Section 5: Roles of Participants

Section 6: Hearing on Request for Initial Competency Evaluation

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Section 8: Qualifications of the Evaluator

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Section 11: Court Hearing on Initial Competency Evaluation, Finding on Competence and Further Orders

4. Definitions:

¹ This procedure addresses Policy Research Associates ("PRA") recommendation number 3. See Reducing the Pennsylvania Incompetency to State Trial Restoration Waitlist: More than Just Beds, December 2017.

- a. Commonwealth: the Commonwealth of Pennsylvania.
- b. Competence/competent: a person charged with a crime who has a rational and factual understanding of the proceedings against him/her and the sufficient present ability to consult with his/her lawyer with a reasonable degree of rational understanding.²
- c. Competency evaluation: the clinical process of a thorough and impartial assessment of an individual's ability to participate in his/her defense and assist his/her legal counsel, and to understand relevant legal procedures.³
- d. Court: magisterial courts, municipal courts, mental health courts and courts of common pleas.
- e. Defendant: the defendant in a criminal case.
- f. Department: the Pennsylvania Department of Human Services.
- g. Evaluator: a psychiatrist or licensed psychologist qualified by certification, training or experience who conducts the evaluation as to the defendant's competence to stand trial/proceed.⁴ The evaluator may be an employee of the county or state or a contractor under contract with the state or county but should not be a member of the treatment team.⁵
- h. Incompetent: Lacking sufficient ability at the pertinent time to consult with counsel with a reasonable degree of rational understanding or to have a rational as well as a factual understanding of the proceedings.⁶
- i. Initial competency evaluation: the first evaluation of the defendant's competence.
- j. Jail-Based Competency Restoration: a program in the jail in which a defendant is provided mental health treatment and psycho-legal education services that are designed to restore a defendant's competence to stand trial.⁷
- k. Licensed psychologist: an individual licensed under the Professional Psychologists Practice Act.⁸
- l. Non-Restorable: there is not a substantial probability that defendant will become competent in the foreseeable future.⁹
- m. Outpatient competency restoration program: a program operated in a community setting other than the jail in which psychiatric and other related services necessary to restore a defendant's competence to stand trial are provided.¹⁰

² *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam). See also 50 P.S. §7402 (a) (paraphrased).

³ American Bar Association *Criminal Justice Standards on Mental Health*, adopted 8.8.16 (hereafter ABA Standards) (2016 ed.) § 7-1.3 (b).

⁴ ABA Standards at 7-1.3(b). See also National Judicial College *Mental Competency Best Practices Model* (2012) (hereafter NJC) at II.A (best practice is for the evaluator to be a licensed psychiatrist or psychologist with forensic training and/or certification)

⁵ NJC at II.B (“It is best practice, if not an ethical requirement, that the mental health professional who directly treats the defendant not also be the mental health professional who performs the competency evaluation.”); See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial* (hereafter “AAPL”), *Journal of Amer Academy of Psychiatry and the Law Online*, Mossman et al, December 2007, 35 (Supplement 4)(http://jaapl.org/content/35/Supplement_4/S3 at IV.B (“In general, treating psychiatrists should try to avoid conducting forensic evaluations on their own patients; ideally, independent non-treating psychiatrists should perform such evaluations”)).

⁶ *Com. v. Appel*, 689 A.2d 891, 899 (Pa. 1997), citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), *Com. v. Hughes*, 555 A.2d 1264, 1270 (Pa. 1989), 50 P.S. § 7402(a).

⁷ See Procedure 5 - Jail-Based Competency Restoration procedure.

⁸ 50 P.S. § 7402 (h).

⁹ *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

¹⁰ See Procedure 6 – Outpatient Competency Restoration Programs.

- n. Outpatient examination/evaluation: an examination conducted in a community setting, the jail or any setting other than a state psychiatric hospital.
- o. Psychiatrist: a licensed medical practitioner specializing in the diagnosis and treatment of mental illness.
- p. Restorable: a defendant for whom, with treatment and psycho-legal education, there is a substantial probability that he/she will become competent in the foreseeable future.¹¹
- q. Treatment: individualized services or supports provided to a defendant, including services or supports that are offered to a defendant to assist a defendant in becoming competent, to restore competence or to ensure the person will remain competent¹² and may include the appropriate use of psychotropic medications, habilitation services, psycho-educational services, group and individual therapies.¹³
- r. Treatment team: mental health professionals providing diagnostic, treatment and rehabilitative services to a defendant and should be independent from the evaluator.¹⁴

5. Roles of participants:

- a. Evaluator: The evaluator completes a thorough and impartial assessment of the defendant's condition, symptoms, capacity, functioning and behavior based upon sound evaluative methods to reach an objective opinion as to the defendant's competence.¹⁵ The evaluator should not disclose statements by the defendant during the course of the evaluation unless it relates solely to the defendant's present competence and disclosure is in accordance with law.¹⁶ The evaluator should explain to the defendant the purpose and nature of the evaluation, the limits of confidentiality, the potential uses of statements made during the evaluation, and who will have access to the results of the evaluation.¹⁷ The evaluator should not be the defendant's treatment provider.¹⁸
- b. Defense counsel: Attorneys who represent defendants with mental disorders should be prepared to raise the defendant's competence throughout the legal proceedings in appropriate cases where counsel has a good faith doubt about the defendant's competence.¹⁹
- c. Court: The court should, separate and apart from that of counsel for each of the parties, raise the issue of competence to proceed at any time the court has a good

¹¹ *Id.*

¹² D.C. ST. § 24-531.01.

¹³ ABA Standards at 7-1.1(d). See also *Standardizing Protocols for Treatment to Restore Competency to Stand Trial: Interventions and Clinically Appropriate Time Periods*, Washington State Institute for Public Policy, January 2013, http://www.wsipp.wa.gov/ReportFile/1121/Wsipp_Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods_Full-Report.pdf, pages 5-16.

¹⁴ See note 5 *supra*.

¹⁵ ABA Standards at 7-1.3 (b); NJC at II.C (evaluator should determine which clinical assessment tools are appropriate to be given in a competency evaluation.)

¹⁶ ABA Standards at 7-3.2 (a).

¹⁷ ABA Standards at 7-3.5 (b).

¹⁸ See note 5 *supra*.

¹⁹ ABA Standards at 7-1.4; 7-4.3(c). See also *Pate v. Robinson* 383 U.S. 375 (1966) ("bona fide" doubt).

faith doubt about the defendant's competence, and may raise the issue at any stage of the proceedings on its own motion.²⁰

- d. Prosecutor: The prosecutor should move for an evaluation of the defendant's competence whenever the prosecutor has a good faith doubt as the defendant's competence.²¹
- e. The attorney who makes the request for an evaluation of the defendant's competency should obtain and provide to the evaluator all records and other information that the attorney believes may be of assistance in facilitating a thorough evaluation of the defendant's competence.²² The attorneys should take appropriate measures to obtain and provide to the evaluator information that the evaluator regards as necessary for conducting the evaluation.²³
- f. If the evaluation is initiated by the court, both the defense attorney and prosecutor should obtain and provide the information to which they have access.²⁴
- g. Information that should be provided to the evaluator includes relevant medical records, psychosocial history, police and law enforcement reports, statements made by the defendant and transcripts of hearings.²⁵

6. Hearing on Request for Initial Competency Evaluation

- a. A motion for an order directing an evaluation of the defendant's competence to proceed may be made by an attorney for the Commonwealth, a person charged with a crime, his or her counsel or the warden or other official in charge of the institution or place in which the defendant is detained.²⁶
- b. A court may also on its own motion order a competency examination.²⁷
- c. In the case when a court on its own motion orders a competency examination, a hearing should be held if the defendant or his counsel objects to the examination.²⁸

7. Order for Initial Competency Evaluation

- a. In considering whether to order an initial competency evaluation, the court should consider the representations of the prosecutor and defense counsel regarding the defendant's competence. The court should also consider the defendant's behavior in the courtroom, prior mental health history, the nature of the proceedings in

²⁰ ABA Standards at 7-4.3 (a). NJC at I.A (either party or court has reasonable basis to believe competence is at issue); 50 P.S. § 7402 (d) (prima facie question of incompetence).

²¹ ABA Standards at 7-4.3 (b). NJC at I.A (either party or court has reasonable basis to believe competence is at issue)

²² ABA Standards at 7-3.4 (b). See also 7-3.5 (a).

²³ ABA Standards at 7-3.4 (b).

²⁴ *Id.*

²⁵ *Id.*

²⁶ 50 P.S. § 7402 (c). See also ABA Standards at 7-4.3 (a)-(c)

²⁷ 50 P.S. § 7402 (d). See also ABA Standards at 7-4.3 (a).

²⁸ Note the statute does not require a hearing be held unless the defendant or his counsel objects, but best practice guidelines suggest a hearing shall be held in all cases. NJC at I. B.; ABA Standards at 7-4.4 (a). See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial* (hereafter "AAPL"), *Journal of American Academy of Psychiatry and the Law Online*, Mossman et al, December 2007, 35 (Supplement 4), *supra* n. 5 at I.I.A ("the U.S. Supreme Court has construed the Sixth and Fourteenth Amendments as forbidding trial of incompetent defendants and as requiring courts to hold hearings about a defendant's fitness for trial whenever sufficient doubt about competence arises"). See also 50 P.S. 7402 (d).

which the defendant will be involved, the capacity (versus willingness) of a defendant to assist counsel, any reasons articulated by the defendant regarding his capacity or unwillingness to work with counsel and any other information known to or provided to the court relevant to the defendant's competence.²⁹

- b. In considering whether to order an initial competency evaluation, the court should consider conducting a colloquy with the defendant.³⁰ The colloquy should include basic questions that will provide information to the court as to whether there is a good faith basis to question the defendant's rational and factual understanding of the proceedings and or the defendant's ability to consult with this lawyer and assist in his defense.³¹
- c. If the court finds a good faith basis to order a competency examination, the court should order an evaluation into the defendant's competency.³² The order should specify that the examination be conducted on an outpatient basis unless the defendant is otherwise detained and an inpatient examination is authorized by other provisions of the law.³³
- d. The order should specify the nature of the evaluation to be conducted, the legal criteria to be addressed by the evaluator and the date by which the evaluation must be completed and report submitted.³⁴
- e. Unless a longer period is requested by the examiner due to the condition of the defendant, an initial competency examination should be completed, and a report filed within 15 calendar days of the court's initial competency evaluation order for a misdemeanor charge and within 30 calendar days of the court's initial competency evaluation order for a felony charge.³⁵

8. Qualifications of the evaluator

- a. An evaluator completing competency evaluations in criminal cases should be a licensed psychologist or psychiatrist with forensic training, experience or certification in performing competency evaluations.³⁶ Certification in forensic psychology by the American Board of Professional Psychology or certification in forensic psychiatry by the American Academy of Psychiatry and the Law is highly recommended.
- b. An evaluator completing competency evaluations in criminal cases should complete ten hours of continuing education in forensic evaluations every two years.³⁷

²⁹ NJC at I. A.; ABA Standards at 7-4.4 (a). See also *Drope v. Missouri*, 420 U.S. 162 (1975)

³⁰ NJC at I. B

³¹ NJC at I. B

³² NJC at I. A; ABA Standards at 7-4.3 (a)–(c) and 7-4.4 (a).

³³ 50 P.S. § 7402 (e) (1). In general, best practice provides that a defendant who is otherwise entitled to pretrial release should not be required to be confined solely because the defendant's competence has been raised and an examination or treatment has been ordered, unless permitted by law. A defendant should be evaluated in jail only when he is ineligible for release to the community, and in an inpatient facility only when an outpatient evaluation determines that the defendant must be admitted for a professionally adequate evaluation to be completed, the defendant is admitted to an inpatient facility for reasons unrelated to the evaluation or defendant won't submit to an outpatient evaluation as a condition of pretrial release. ABA Standards at 7-4.5. See also NJC at I.E. (best practice for court to order competency evaluation to be performed in least restrictive environment for level of risk the defendant presents; it is a bond decision that should be made using the same factors as in any other case, taking into account both public safety issues and needs of the potentially mentally ill person).

³⁴ ABA Standards at 7-4.4 (c).

³⁵ NJC at I D (15 days for misdemeanor; 21-30 days for a felony); 50 P.S. § 7402(e)(4).

³⁶ NJC at II.A; ABA Standards at 7-3.9 (a) and 7-3.10.

³⁷ NJC at II.A.

- c. The evaluator completing the competency evaluation should not be a member of the defendant's treatment team.³⁸

9. Conduct of initial competency evaluation

- a. The initial competency evaluation shall be conducted by an evaluator on an outpatient basis unless an inpatient examination is, or has been, authorized by law.³⁹ A defendant should not be detained or hospitalized in an inpatient facility for the sole purpose of completion of an initial competency evaluation unless the defendant is admitted to an inpatient facility for treatment unrelated to the evaluation or the defendant will not submit to an outpatient evaluation as a condition of pretrial release.⁴⁰
- b. Unless a longer period is requested by the evaluator due to the condition of the defendant, an initial competency examination should be completed and a report filed within 15 calendar days from the court order for a misdemeanor charge.⁴¹
- c. Unless a longer period is requested by the examiner due to the condition of the defendant, an initial competency examination should be completed and a report filed within 30 calendar days from the court order for a felony charge.⁴²
- d. The defendant is entitled to have counsel present during the evaluation and shall not be required to answer any questions or perform tests unless he has moved for or has agreed to the examination.⁴³ The prosecuting attorney should not be present during a competency evaluation.⁴⁴
- e. The Court may allow a psychiatrist or licensed psychologist retained by the defendant and/or a psychiatrist or licensed psychologist retained by the government to witness and participate in such an examination.⁴⁵
- f. If a defendant who is financially unable to retain such expert has a substantial objection to the conclusions reached by the court-appointed psychiatrist or licensed psychologist, the court shall allow reasonable compensation for the employment of a psychiatrist or licensed psychologist of his selection.⁴⁶
- g. Nothing said by the defendant during the examination may be used as evidence against him on any issue other than his mental condition relating to the determination of competence.⁴⁷
- h. The evaluation of competence to stand trial should include:
 - i. an assessment of the defendant's rational understanding of the charges, verdicts and potential consequences of each and the roles of the trial participants and trial process⁴⁸;

³⁸ NJC at II.B.

³⁹ 50 P.S. § 7402 (e) (1) and (2). NJC at I.E (provides for evaluation in LRE); ABA Standards at 7-4.5 (a).

⁴⁰ ABA Standards at 7-4.5.

⁴¹ NJC at I.D (15 days for misdemeanor); ABA Standards at 7-4.4(d) (14 days and up to one 14-day extension)

⁴² NJC at I.D (21-30 days for a felony); ABA Standards at 7-4.4(d) (14 days and up to one 14-day extension)

⁴³ 50 P.S. § 7402(e)(3). See also ABA Standards at 7-3.5 (c) (i)

⁴⁴ ABA Standards at 7-3.5(c)(iv).

⁴⁵ 50 P.S. § 7402 (f).

⁴⁶ 50 P.S. § 7402 (f).

⁴⁷ 50 P.S. § 7402 (d) (3). See also ABA Standards at 7-3.2(a).

⁴⁸ This would include whether he has a rational understanding of the allegations and potential sentences/consequences if convicted, his intended plea and rationale for it, his understanding of potential witnesses and evidence in the case, his ideas for his or her attorney to present, his thoughts about plea bargaining and his thoughts about defenses. Virginia Manual, Appendix D. See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n.5, at IX.B.

- ii. an assessment of the defendant's ability to assist counsel in the defense and to make decisions in those matters committed to the defendant⁴⁹;
- iii. an assessment of the defendant's factual understanding of and capacity to discuss matters relating to the legal proceedings, and his ability to appreciate the legal situation⁵⁰.
- i. In completing the evaluation, the evaluator should determine which assessment tools or instruments, if any, and what other evaluative methodology (interviews, record review etc.) should be utilized.⁵¹
- j. An evaluation should include an assessment of possible malingering if there is a clinical suspicion of malingering or assessment of minimization of symptoms if that is suspected.⁵²

10. Content of Report

- a. The report of the results of the initial competency evaluation should be submitted to the court and counsel at least three calendar days prior to any hearing.
- b. The report should include:
 - i. A description of the evaluation, including instruments or other methodology used and nature of the evaluator's contacts with the defendant and counsel and information relied upon in reaching the opinion⁵³;
 - ii. That the defendant was informed about the purpose of the evaluation limits of confidentiality, including that the results of the evaluation would be shared with the court, defense attorney and prosecutor⁵⁴;
 - iii. Results of the mental status examination including diagnosis and results of assessment of malingering, if applicable⁵⁵;
 - iv. An opinion as to the defendant's capacity to understand the nature and object of the criminal proceedings against him and to assist in his defense or that further examination is needed to make that determination, with reasoning in support of opinion. And, when so requested, an opinion as to

⁴⁹ This would include an assessment of the defendant's trust of his counsel (mere cynicism is not sufficient), thoughts about working with his counsel and sharing information, willingness to discuss legal issues with his counsel, attention and concentration sufficient to attend legal proceedings, impact of any mood or thought disorder on his ability to discuss case rationally with the defense attorney. Virginia Manual, Appendix D. See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n.5, at IX.B.

⁵⁰ This would include his ability to name charges and if he knows charge is misdemeanor or felony, his factual understanding of the role of the participants (judge, jury, defense counsel, prosecutor and witness), types of pleas and what they mean, defenses available to the defendant, plea bargaining and his rights as a defendant. Virginia Manual, Appendix D. See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 5, at IX.B.

⁵¹ NJC at II.C. See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n.5, VI.B-I. (evaluation should consider review of documents/collateral information, results of interview, mental status examination, psychological testing, in any or other evaluative instruments).

⁵² NJC. at III.A. 9.

⁵³ *Id.* at III.A 1-4; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n.5, at X.C and X.D.

⁵⁴ NJC at III.A 1; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 5, at X.E and X.G.

⁵⁵ NJC at III.A 1; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n.5, at X.E and X.G.

- whether he had the capacity to have a particular state of mind, where such state of mind is a required element of the criminal charge.⁵⁶
- v. In the event the evaluator opines that the defendant is incompetent, the report should include an opinion as to the defendant's restorability to competence and where the defendant should be restored, or that the evaluator is unable to reach an opinion as to the defendant's capacity to regain competence.⁵⁷ In the event the evaluator's opinion is that the defendant is restorable, the evaluator should provide a clear explanation of what types of treatment are necessary to restore competency.⁵⁸
 - vi. In the event the evaluator opines that the further examination is needed to determine defendant's competence, the report should include an opinion as to where the further evaluation should be held.⁵⁹
- c. The report should also include the following:
- i. Examples of the defendant's factual understanding of court proceedings (calibrated to the charge[s]) and/or examples of impairments in factual understanding, including knowledge of charges, roles of courtroom participants, pleas and their consequences and plea bargaining, at a minimum⁶⁰;
 - ii. Examples of the defendant's rational understanding of court proceedings and/or examples of impairments in rational understanding, including discussions reflecting defendant's understanding of the allegations, potential evidence/ witnesses, understanding of the potential for being found guilty or accepting plea bargain, and presence of absence of delusional beliefs that significantly impact legal decision-making⁶¹;
 - iii. Examples or explanation of the defendant's capacity to work with his or her attorney in his/her own defense, including for example, noting if the defendant understands he/she has an attorney who is representing him/her, has the ability to work with counsel, (distinguishing capacity to work with counsel from willingness to work with counsel), and includes the evaluator's comments about the defendant's capacity to attend and participate in court process to assist counsel⁶²;

⁵⁶ 50 P.S. § 7402 (e) (4) (For sections i. – iv.); NJC at III.A.6; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n.5, at X.H; Virginia Forensic Oversight Manual Appendix B.

⁵⁷ NJC at III.A.7 and 8; ABA Standards at 7-4.6. See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 5, at X.H See also Procedure 2 titled Competency Reevaluation, Treatment and Restoration at section 9.

⁵⁸ NJC at III.A.7; ABA Standards at 7-4.6 (c). See also Virginia Forensic Oversight Manual at Appendix B (This could include medications and other medical interventions, or psychological interventions such as psychoeducational or therapies to help the defendant manage emotions or symptoms).

⁵⁹ NJC at III.A.8. This could include outpatient evaluation or in the jail in the event the defendant is detained.

⁶⁰ Virginia Manual at Appendix B 2; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 5, at X.F (“the heart of a competence report is a description of the defendant's abilities and deficits concerning the tasks that the defendant must perform during a criminal trial.”)

⁶¹ Virginia Manual at Appendix B 3; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n.5, at X.F.

⁶² Virginia Manual. at Appendix B 4; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n.5, at X.F.

- iv. In providing an opinion as to the defendant's competence, the report should include the reasoning for the opinion on competence⁶³.

11. Court Hearing on Initial Competency Evaluation, Finding on Competence and Further Orders:

- a. Upon receipt of the evaluator's report, the court should conduct a hearing on the issue of defendant's competence unless all parties stipulate that no hearing is necessary and the court concurs.⁶⁴ The court shall make every effort to ensure the hearing on the evaluator's report is held promptly but in no event later than 20 days after receipt of the report, including advancing the hearing date regarding the report if all parties are available.⁶⁵
- b. Except for a competency examination ordered by the court on its own motion, the party who sought the competency examination bears the burden to prove incompetence by a preponderance of evidence.⁶⁶
- c. Any psychiatrist or licensed psychologist who participated in the evaluation should be available to testify upon the request of either party or the court.⁶⁷
- d. Based upon the report submitted by the evaluator and any other evidence, the court shall make a finding as to the defendant's competence or that further evaluation is required in instances of defendant non-cooperation or non-receipt of documents necessary for the evaluation.⁶⁸ The determination of competency of a defendant who is detained must be rendered by the court within 20 days after the receipt of the report of the examination unless the hearing was continued at the defendant's request.⁶⁹
- e. In the event the court finds the defendant competent, the criminal case shall resume, and trial should commence within 90 days, unless the court determines that by reason of passage of time and its effect upon the criminal proceedings it would be unjust to resume the prosecution, the court may dismiss the charges and order the person discharged.⁷⁰
- f. In the event the court finds the defendant incompetent, the court should determine if the defendant is substantially likely to become competent in the foreseeable future (restorable).⁷¹ If the court finds that the defendant is substantially likely to become competent in the foreseeable future, the court should order further evaluation and treatment, which may include involuntary treatment, for the defendant for the purpose of restoring his competency for a period not to exceed 60 days.⁷² Such additional evaluation and treatment should occur on an outpatient basis (and may include an order for the defendant to attend an outpatient or jail-based competency restoration program if the defendant so qualifies⁷³) unless the

⁶³ Virginia Manual at Appendix B 5; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n.5, at X.F.

⁶⁴ ABA Standards at 7-4.8 (a); 50 P.S. 7402 (d); NJC V.B.

⁶⁵ 50 P.S. § 7402 (g); NJC at V.A (hearing should be held within 10 days of receipt of report regardless of original schedule date).

⁶⁶ 50 P.S. § 7403 (a); 50 P.S. § 7402 (d).

⁶⁷ ABA Standards at 7-4.9 (b).

⁶⁸ 50 P.S. § 7402 (d).

⁶⁹ 50 P.S. § 7402 (g).

⁷⁰ 50 P.S. § 7403 (e).

⁷¹ *Jackson v. Indiana*, *supra* note 9.

⁷² 50 P.S. § 7402(b).

⁷³ See OCRP and Jail based restoration procedures.

court determines that public safety and treatment needs require that the further evaluation and treatment occur in a hospital setting, that the hospital setting is the least restrictive or that the defendant is unlikely to comply with an order for outpatient treatment.⁷⁴

- g. If the court finds the defendant incompetent to stand trial and restorable under section f. above, the proceedings shall be stayed only for so long as the defendant remains restorable.⁷⁵ A stay may not exceed the period during which the defendant is determined to be restorable or the maximum sentence of confinement that may be imposed for the crime(s) for which the defendant is charged or ten years, whichever is less, except in cases of first and second-degree murder, when there is no maximum period of time so long as the defendant remains restorable.⁷⁶
- h. In the event the court finds the defendant incompetent and the defendant is not substantially likely to become competent in the foreseeable future (non-restorable), the court shall discharge the person from the detention pursuant to the criminal case and release the defendant, unless involuntary civil commitment is authorized.⁷⁷
- i. In the event the court is unable to make a competence finding and concludes that further evaluation of the defendant's competency is needed, the court should order additional evaluation in an outpatient setting, unless it determines that public safety and treatment needs support evaluation in a hospital setting or that the defendant is unlikely to comply with an order for outpatient examination/treatment.⁷⁸
- j. A defendant who has been discharged after a finding of incompetent and not restorable may be ordered, upon motion of the Commonwealth, defense or on the court's own motion, to submit to a psychiatric examination every 12 months after discharge to determine if he has become competent to proceed. If the examination reveals that the defendant has regained competency to proceed, the court shall schedule a hearing. If the defendant is adjudicated competent to proceed, the trial shall begin with 90 days.⁷⁹

⁷⁴ NJC at V.E; ABA Standards at 7-4.10 (a) and (b).

⁷⁵ 50 P.S. § 7403(b); 50 P.S. 7402(b).

⁷⁶ 50 P.S. section 7403 (f); *Jackson v. Indiana*, 46 U.S. 715, 738 (1972) (“a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.”)

See also Procedure 2 Competency Treatment, Restoration and Re-evaluation at section 9 and 11.

⁷⁷ 50 P.S. section 7403(d)

⁷⁸ NJC III. A. 8.

⁷⁹ 50 P.S. 7403 (g)

APPENDIX A
CHECKLIST FOR EVALUATORS
COMPETENCY TO STAND TRIAL

- Defendant's name and date of birth
- Court of jurisdiction and case number
- Type of evaluation with statute noted
- Limits of confidentiality
- Background information
 - Educational history
 - Relevant medical history
 - Psychiatric history

- ___ Explanation of request for competency to stand trial (if provided)
- ___ Explanation of reason for finding of incompetency, restoration treatment provided (if evaluation is post-restoration)

- ___ Mental status examination

- ___ Competency to stand trial examination
 - ___ Factual information (not all-inclusive)
 - ___ Name of charges and if misdemeanor or felony
 - ___ Misdemeanor v. felony
 - ___ Roles of judge, jury (if felony), defense attorney, prosecutor, witness
 - ___ Guilty and not guilty plea and their consequences
 - ___ Not guilty by reason of insanity defense and its consequences
 - ___ Plea bargaining
 - ___ Rights of defendant

 - ___ Rational information (not all-inclusive)
 - ___ Explanation of allegations, whether understanding is rational or irrational
 - ___ Understanding of potential sentences/consequences if convicted
 - ___ Intended plea and reasoning for it
 - ___ Understanding potential witnesses and evidence in the case; ideas for attorney to present on his/her behalf
 - ___ Thoughts about plea bargaining
 - ___ Thoughts about ngri defense

 - ___ Capacity to assist counsel (not all-inclusive)
 - ___ Trust issues regarding attorney (mere cynicism okay)
 - ___ Thoughts about working with attorney and sharing information
 - ___ Willingness to discuss legal decisions with counsel
 - ___ Attention and concentration sufficient to attend legal proceedings
 - ___ Impact of mood or thought disorder on defendant's ability to discuss case rationally with defense attorney

- ___ Conclusion
 - ___ Brief summary of primary issues related to defendant's competency to stand trial such as past psychiatric/medical/educational history, reason for evaluation, treatment summary if post restoration
 - ___ Brief summary of understanding of factual and rational aspects of his/her legal proceedings
 - ___ Brief summary of defendant's capacity to assist counsel
 - ___ Opinion linking your assessment to psycho-legal criteria
 - ___ Other (may or may not be relevant)
 - ___ Any recommendations to court regarding accommodations a competent

defendant may need to remain competent, or recommendation to attorney on how to relate/interact with the defendant to improve collaboration

_____ If incompetent, but restorable, recommendation regarding inpatient, partial hospitalization, or outpatient restoration

_____ If non-restorable, recommend civil commitment, discharge or other

**PROCEDURE 2 - COMPETENCY TREATMENT, RESTORATION AND
RE-EVALUATION OF DEFENDANTS ADJUDICATED
INCOMPETENT TO STAND TRIAL/PROCEED¹**

1. **Purpose:** This procedure establishes standards for treatment and competence restoration of a defendant adjudicated incompetent to stand trial/proceed, continued evaluation of a criminal defendant's competence to stand trial, reporting to the court the results of ongoing competence evaluation(s) and court orders relating to competency evaluations and restoration.

2. **References:**

Pennsylvania statutes 50 P.S §§ 7402, 7403

National Judicial College, *Mental Competency Best Practices Model* (hereafter NJC) (2012)

American Bar Association *Criminal Justice Standards on Mental Health*, adopted 8.8.16 (hereafter ABA Standards) (2016 ed.)

American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*

Dusky v. United States, 362 U.S. 402 (1960) (per curiam)

Jackson v. Indiana, 406 U.S. 715, 738 (1972)

Clinical literature related to competence and competency restoration

3. **Scope:** This operating procedure applies to all individuals found incompetent to stand trial/proceed pursuant to 50 P.S. §§ 7402 and 7403. The sections of this procedure include:

Section 1: Purpose

Section 2: References

Section 3: Scope

Section 4: Definitions

Section 5: Roles of Participants

Section 6: Qualifications of the Evaluator

Section 7: Treatment for Competency Restoration

Section 8: Assessing Defendant's Competency

Section 9: Factors to Consider in Determining Restorability

Section 10: Content of Reports

Section 11: Periodic Redetermination of Competence by the Court, and Further Court Orders

Section 12: Maintaining Competence

¹ This procedure addresses Policy Research Associates ("PRA") recommendation number 3. See Reducing the Pennsylvania Incompetency to State Trial Restoration Waitlist: More than Just Beds, December 2017.

4. Definitions:

- a. Commonwealth: the Commonwealth of Pennsylvania.
- b. Competence/competent: a person charged with a crime who has a rational and factual understanding of the proceedings against him/her and the sufficient present ability to consult with his/her lawyer with a reasonable degree of rational understanding.²
- c. Competency evaluation: the clinical process of a thorough and impartial assessment of an individual's ability to participate in his/her defense and assist his/her legal counsel, and to understand relevant legal procedures.³
- d. Court: magisterial courts, municipal courts, mental health courts and courts of common pleas.
- e. Defendant: the defendant in a criminal case.
- f. Department: the Pennsylvania Department of Human Services.
- g. Evaluator: a psychiatrist or licensed psychologist qualified by certification, training or experience who conducts the evaluation as to the defendant's competence to stand trial/proceed.⁴ The evaluator may be an employee of the county or state or a contractor under contract with the state or county but should not be a member of the treatment team.⁵
- h. Incompetent: Lacking sufficient ability at the pertinent time to consult with counsel with a reasonable degree of rational understanding or to have a rational as well as a factual understanding of the proceedings.⁶
- i. Jail-Based Competency Restoration: a program in the jail in which a defendant is provided mental health treatment and psycho-legal education services that are designed to restore a defendant's competence to stand trial.⁷
- j. Licensed psychologist: an individual licensed under the Professional Psychologists Practice Act.⁸
- k. Non-Restorable: there is not a substantial probability that defendant will become competent in the foreseeable future.⁹
- l. Outpatient competency restoration program: a program operated in a community setting other than the jail in which psychiatric and other related services necessary to restore a defendant's competence to stand trial are provided.¹⁰

² *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam). See also 50 P.S. § 7402 (a) (paraphrased).

³ American Bar Association *Criminal Justice Standards on Mental Health*, adopted 8.8.16 (hereafter ABA Standards) (2016 ed.) § 7-1.3 (b).

⁴ ABA Standards at 7-1.3(b). See also National Judicial College *Mental Competency Best Practices Model* (2012) (hereafter NJC) at II.A (best practice is for the evaluator to be a licensed psychiatrist or psychologist with forensic training and/or certification).

⁵ NJC at II.B ("It is best practice, if not an ethical requirement, that the mental health professional who directly treats the defendant not also be the mental health professional who performs the competency evaluation."); See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial* (hereafter "AAPL"), Journal of American Academy of Psychiatry and the Law Online, Mossman et al, December 2007, 35 (Supplement 4)(http://jaapl.org/content/35/Supplement_4/S3) at IV.B ("In general, treating psychiatrists should try to avoid conducting forensic evaluations on their own patients; ideally, independent non-treating psychiatrists should perform such evaluations").

⁶ *Com. v. Appel*, 689 A.2d 891, 899 (Pa. 1997), citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), *Com. v. Hughes*, 555 A.2d 1264, 1270 (Pa. 1989), 50 P.S. § 7402(a).

⁷ See Procedure 5 - Jail-Based Competency Restoration.

⁸ 50 P.S. § 7402 (h).

⁹ *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

¹⁰ See Procedure 6 – Outpatient Competency Restoration Programs.

- m. Outpatient examination/evaluation: an examination conducted in a community setting, the jail or any setting other than a state psychiatric hospital.
- n. Psychiatrist: a licensed medical practitioner specializing in the diagnosis and treatment of mental illness.
- o. Restorable: a defendant for whom, with treatment and psycho-legal education, there is a substantial probability that he/she will become competent in the foreseeable future.¹¹
- p. Treatment: individualized services or supports provided to a defendant, including services or supports that are offered to a defendant to assist a defendant in becoming competent, to restore competence or to ensure the person will remain competent¹² and may include the appropriate use of psychotropic medications, habilitation services, psycho-educational services, group and individual therapies.¹³
- q. Treatment team: mental health professionals providing diagnostic, treatment and rehabilitative services to a defendant and should be independent from the evaluator.¹⁴

5. Roles of participants:

- a. Evaluator: The evaluator completes a thorough and impartial assessment of the defendant's condition, symptoms, capacity, functioning and behavior based upon sound evaluative methods to reach an objective opinion as to the defendant's competence.¹⁵ The evaluator should not disclose statements by the defendant during the course of the evaluation unless it relates solely to the defendant's present competence and disclosure is in accordance with law.¹⁶ The evaluator should explain to the defendant the purpose and nature of the evaluation, the limits of confidentiality, the potential uses of statements made during the evaluation, and who will have access to the results of the evaluation.¹⁷ The evaluator may not be the defendant's treatment provider.¹⁸
- b. Defense counsel: Attorneys who represent defendants with mental disorders should be prepared to raise the defendant's competence throughout the legal proceedings in appropriate cases where counsel has a good faith doubt about the defendant's competence.¹⁹
- c. Court: The court has a continuing obligation, separate and apart from that of counsel for each of the parties, to raise the issue of competence to proceed at any

¹¹ *Id.*

¹² D.C. ST. § 24-531.01.

¹³ ABA Standards at 7-1.1(d). See also *Standardizing Protocols for Treatment to Restore Competency to Stand Trial: Interventions and Clinically Appropriate Time Periods*, Washington State Institute for Public Policy, January 2013, http://www.wsipp.wa.gov/ReportFile/1121/Wsipp_Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods_Full-Report.pdf, pages 5-16.

¹⁴ See note 5 *supra*.

¹⁵ ABA Standards at 7-1.3 (b); NJC at II.C (evaluator should determine which clinical assessment tools are appropriate to be given in a competency evaluation.)

¹⁶ ABA Standards at 7-3.2 (a).

¹⁷ ABA Standards at 7-3.5 (b).

¹⁸ See note 5 *supra*.

¹⁹ ABA Standards at 7-1.4; 7-4.3(c). See also *Pate v. Robinson* 383 U.S. 375 (1966) ("bona fide" doubt).

time the court has a good faith doubt about the defendant's competence, and may raise the issue at any stage of the proceedings on its own motion.²⁰

- d. Prosecutor: The prosecutor should move for an evaluation of the defendant's competence whenever the prosecutor has a good faith doubt as the defendant's competence.²¹
- e. Treatment team: The mental health professionals who are responsible for providing treatment for the defendant, including treatment that may restore the defendant's competence, should exercise sound clinical judgment in developing a treatment plan for the defendant.
- f. The party initiating the evaluation should obtain and provide to the evaluator all records and other information that the attorneys believe may be of assistance in facilitating a thorough evaluation of the defendant's competence.²² The attorneys should also take appropriate measures to obtain and provide to the evaluator information that the evaluator regards as necessary for conducting the evaluation.²³
- g. If the evaluation is initiated by the court, both the defense attorney and prosecutor should obtain and provide the information to which they have access.²⁴
- h. Information that should be provided to the evaluator includes relevant medical records, psychosocial history, police and law enforcement reports, statements made by the defendant and transcripts of hearings.²⁵
- i. The court should stay apprised of the defendant's progress or lack thereof in the restoration of his competence and in cases where the defendant is not making progress toward restoration, the court should encourage the defendant to follow any treatment regimen and/or otherwise order the defendant to participate in his/her treatment plan.²⁶

6. Qualifications of the evaluator

- a. An evaluator completing competency evaluations in criminal cases should be a licensed psychologist or psychiatrist with forensic training, experience or certification in performing competency evaluations.²⁷ Certification in forensic psychology by the American Board of Professional Psychology or certification in forensic psychiatry by the American Academy of Psychiatry and the Law is highly recommended.
- b. An evaluator completing competency evaluations in criminal cases should complete ten hours of continuing education in forensic evaluations every two years.²⁸
- c. The evaluator completing the competency evaluation should not be a member of the defendant's treatment team.²⁹

²⁰ ABA Standards at 7-4.3 (a). NJC at I.A (either party or court has reasonable basis to believe competence is at issue); 50 P.S. § 7402 (d) (prima facie question of incompetence).

²¹ ABA Standards at 7-4.3 (b). NJC at I.A (either party or court has reasonable basis to believe competence is at issue).

²² ABA Standards at 7-3.4 (b). See also 7-3.5(a).

²³ ABA Standards at 7-3.4 (b).

²⁴ *Id.*

²⁵ *Id.*

²⁶ NJC at V.G.; ABA Standards at 7-4.12(a). See also 50 P.S. § 7402; *Sell v. United States*, 539 U.S. 166 (2003).

²⁷ NJC at II.A; ABA Standards at 7-3.9 (a) and 7-3.10.

²⁸ NJC at II.A.

²⁹ NJC at II.B.

7. Treatment for competency restoration

- a. A defendant found incompetent to stand trial should receive prompt and adequate treatment to restore competence.³⁰ The treatment must be in the least restrictive environment consistent with the defendant's detention status.³¹
- b. The treatment provider should develop a treatment plan to address the defendant's incompetence within five calendar days of admission to the hospital or outpatient or jail-based competency restoration program based upon the results of the treatment provider's mental health assessment. The treatment plan should be based upon the results of the most recent competency evaluation, address the particular deficits relating to defendant's competence and include specific interventions addressing these in order to aid in the restoration of the defendant's competency.³² The treatment plan should be modified as needed based upon defendant's condition and progress toward achieving competency.³³ It may include use of medication in accordance with applicable law (including *Sell v. United States*, 539 U.S. 166 (2003)) and policy.
- c. The treatment plan should include at a minimum:
 - i. Any diagnosis as defined by Diagnostic and Statistical Manual of Mental Disorders 5 (DSM-5);
 - ii. Objectives and interventions designed to address the specific symptoms/issues/deficits found by the evaluator related to defendant's incompetence;
 - iii. Medications prescribed if any;
 - iv. Psychoeducational, social or psychological therapies, activities and interventions designed to restore the individual to competence;
 - v. Crisis plan to be implemented in the event the defendant experiences a crisis during treatment;
 - vi. Anticipated length of time of treatment;
 - vii. A provision for periodic review of the plan's efficacy in accordance with section 7e below and in conjunction with the periodic evaluations completed under section 8a;
 - viii. Community support plan for discharge.³⁴
- d. In developing the treatment plan, the treatment provider(s) should review all reports of any evaluator addressing the defendant's competence and, if necessary, consult with the evaluator to ensure all deficits are addressed in the treatment plan.³⁵

³⁰ ABA Standards at 7-4.11(a).

³¹ *Id.* at § 7-4.11(c); NJC at VI. See Jail-Based Competency Restoration and Outpatient Competency Restoration procedures.

³² NJC at IV; ABA Standards at §7-4.11(b) (i)-(v).

³³ See generally ABA Standards at 7-4.11; NJC at IV; *Forensic Services: Incompetent, but Not Restorable and Incompetent But Restorable: challenges and opportunities*, Pinals, Debra, Power Point Presentation, Presentation to the NASMHPD Legal Division, 11/11/13, <https://www.nasmhpd.org/content/forensic-services-incompetent-not-restorable-incompetent-not-committable-challenges-and>.

³⁴ NJC at IV and VI.B.; ABA Standards at 7-4.11 (b) (i)-(4)

³⁵ *Cf* ABA Standards at 7-4.11(b)(i); NJC at VI.B ("it is best practice to rely on the opinion of the evaluating mental health professional as to what competency restoration interventions should be initially provided to the defendants")

- e. The treatment plan should be reviewed and updated every 30 days or after each competency evaluation, whichever is shorter, and reflect changes in the defendant's condition that relate to the findings of the competency evaluation.³⁶
- f. In developing the treatment plan to restore competence, the treatment providers should consider the appropriateness of such interventions as medication, education, therapies to reduce anxiety or anger, dialectical behavior therapy, positive behavioral support and cognitive remediation strategies, and implement them if appropriate. The teams should also consider the appropriateness of a variety of modalities (e.g. guest lectures, videos, and mock trials) in creating the treatment plan.³⁷
- g. A defendant determined to be incompetent to stand trial and committed for treatment has the right to refuse treatment with psychotropic medication, and may be treated over his objection only if ordered by a court and if:
 - i. The government's interests in prosecuting the defendant are important;
 - ii. The medication prescribed is substantially likely to restore defendant's competence and substantially unlikely to have side effects that will substantially interfere significantly with the defendant's ability to assist counsel;
 - iii. The medication is necessary to restore competence, and any less intrusive treatments are unlikely to achieve the same result; and
 - iv. The medication is in the defendant's best interests in light of the defendant's medical condition.³⁸
- h. A defendant who has been found incompetent for trial and is not severely mentally disabled may be ordered by the court to be treated over his objection only in accordance with subsection g above and only for a period not to exceed 60 days.³⁹

8. Assessing Defendant's Competence

- a. The evaluator should review the defendant's competence at regular intervals, including 30 days after admission and every 60 days thereafter, to determine the defendant's progress toward competence.⁴⁰ The evaluator should inform the treatment team of particular issues that are interfering with the defendant's competence as they are identified, and the team, as appropriate, should modify the treatment plan and interventions to address the continued incompetence.

³⁶ *Id.* at 7-4.11(b)(v).

³⁷ *Forensic Services: Incompetent, but Not Restorable and Incompetent But Restorable: challenges and opportunities*, at Slides 25,30-36 Pinals, Debra, Power Point Presentation, Presentation to the NASMHPD Legal Division, 11/11/13, <https://www.nasmhpd.org/content/forensic-services-incompetent-not-restorable-incompetent-not-committable-challenges-and-Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods>, Washington State Institute for Public Policy, January 2013, <http://www.wsipp.wa.gov/ReportFile/1121/Wsipp-Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods-Full-Report.pdf>. See also NJC at VI.B.

³⁸ *Sell v. United States*, 539 U.S. 166 (2003); ABA Standards at 7-4.11(d).

³⁹ 50 P.S. § 7402(b).

⁴⁰ ABA Standards at 7.4-12.

- b. The evaluator should submit a report to the court and counsel on the defendant's competency at regular intervals prior to any court hearing or as ordered by the court.⁴¹
- c. In assessing the defendant's competence, the evaluator should consider measuring defendant's comprehension against the following specific *factual* understanding criteria to determine the specific areas of deficiency, if any, which are contributing to the defendant's continued incompetence:
 - i. Name(s) of charge(s) and if felony or misdemeanor;
 - ii. Knowledge of possible pleas, consequences and penalties;
 - iii. Knowledge of court procedures;
 - iv. Understanding of plea bargaining;
 - v. Understanding of roles of court participants (judge, prosecutor, defense counsel, jury etc.);
 - vi. Understanding of defenses.⁴²
- d. In assessing the defendant's competence, the evaluator should consider measuring the defendant's status against each of the following specific *rational* understanding criteria to determine which areas of deficiency which are contributing to the defendant's incompetence:
 - i. Ability to explain the charges and whether his/her understanding is rational;
 - ii. Understanding of potential sentences/consequences if convicted;
 - iii. Intended plea and reasoning for it;
 - iv. Understanding potential witnesses and evidence in the case;
 - v. Thoughts about plea options, plea bargaining;
 - vi. Thoughts about defenses.⁴³
- e. In assessing the defendant's competence, the evaluator should consider measuring the defendant's status against each of the following specific criteria relating to the *ability to assist* counsel to determine which areas of deficiency which are contributing to the defendant's incompetence:
 - i. Ability to testify relevantly;
 - ii. Ability to challenge witnesses;
 - iii. Ability to disclose pertinent information;
 - iv. Ability to relate to counsel and discuss matters rationally;
 - v. Ability to manage behavior
 - vi. Ability to concentrate.⁴⁴

9. Factors to Consider in Determining Restorability of Competence

⁴¹ 50 P.S. § 7403(c) (not *less* than every 90 days). ABA Standards 7-4.12 (a) (30 days, 90 days, 180 days and every 180 days thereafter).

⁴² Morris and DeYoung, Psycholegal abilities and restoration of competence to stand trial. *Behav Sci Law* 30:710-28 2012, <https://pdfs.semanticscholar.org/3f29/705b0176ed22852294f1a2e54a18f3647f64.pdf>, (at page 725) ("These findings support a conceptual framework for evaluating competency restoration by viewing competency to stand trial as a hierarchy of demands progressing from the appropriateness of basic behavior and outlook, through factual understanding of legal procedures and participants, and ultimately requiring rational decision-making and ability to work productively with one's attorney. Although this study concerned competency restoration, the proposed conceptual framework should generalize to all stages of assessing competency to stand trial.") See also Virginia Manual Appendix D.

⁴³ Virginia Manual Appendix D.

⁴⁴ *Id.*

- a. In opining whether there is a substantial probability that a defendant's competence is restorable in the foreseeable future, the evaluator should consider the following factors⁴⁵:
 - i. Defendant's diagnoses (i.e. psychotic disorders, intellectual disorders, personality disorders, substance use disorders);
 - ii. Defendant's prior history of incompetency findings in previous cases;
 - iii. Whether the defendant has a history of chronic psychosis with long periods of hospitalizations;
 - iv. Defendant's age at onset of illness;
 - v. Number of prior hospitalizations;
 - vi. Seriousness of current charges and prior criminal history;
 - vii. Degree of factual understanding after three months of treatment;
 - viii. Defendant's response to current treatment;
 - ix. Defendant's current age.
- b. In considering the defendant's competence restorability, the evaluator should also consider the length of time the defendant's incompetency has persisted and whether any treatment options are available that would be appropriate but have not yet tried.⁴⁶
- c. Based upon the results of the assessments conducted pursuant to Section 7 and the factors set forth in Section 9.a and b, the evaluator should render an opinion as to whether the defendant's competence is restorable in the foreseeable future.
- d. The evaluator should inform the treatment team of particular issues that are interfering with the defendant's competence as they are identified, and the team as appropriate should within five days modify the treatment plan and interventions to address the continued incompetence.

10. Content of reports relating to results of ongoing competency evaluations:

- a. The report should include:

⁴⁵ Morris and DeYoung, Long Term Competence Restoration, *J of Amer Academy of Psychiatry and the Law*, 42:81-90, March 2014, <http://jaapl.org/content/42/1/81> (Recent research suggests that older individuals with chronic, treatment refractory severe mental illness or mental retardation are less restorable; younger individuals with criminal histories and personality and non-psychotic disorders are more likely to be restored. Average length of stay to restoration was 1.58 years and after 3.5 years restoration was very rare (less than 3%). Those with more serious charges were more likely to be restored to competence and those with some understanding of factual understanding, as opposed to rational assistance abilities, were more likely to be restored.) See also Colwell and Gianessini, Demographic, Criminogenic, and Psychiatric Factors that Predict Competency Restoration, *J. Amer Academy of Psychiatry and the Law*, 39:297-306, Nov 2011, <http://jaapl.org/content/39/3/297.long> (those deemed incompetent and non-restorable had more prior hospitalizations, more prior incarcerations, more prior episodes of being found incompetent to stand trial, lower IQs, were prescribed more medications, and were more likely to have diagnoses of borderline intellectual functioning, psychosis or other cognitive deficiency. Those restored to competency were more likely to have personality disorders.); Mossman, Predicting Restorability of Incompetent Criminal Defendants, *J of Amer Academy of Psychiatry and the Law*, 35:34-43, March 2007, <http://jaapl.org/content/35/1/34> ("if a defendant is incompetent because of a longstanding psychotic disorder that has resulted in lengthy periods of psychiatric hospitalizations, this history supports an opinion that the defendant has a well-below-average probability of becoming competent with psychiatric treatment. Second, if a defendant has an irremediable cognitive disorder (e.g. [intellectual disability]) and can grasp little information that the examiner attempts to convey during an evaluation, this finding would support a conclusion that restoration efforts have well-below-average chances of success.")

⁴⁶ See *Standardizing Protocols for Treatment to Restore Competency to Stand Trial*, Washington State Institute for Public Policy, January 2013, http://www.wsipp.wa.gov/ReportFile/1121/Wsipp_Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods_Full-Report.pdf (review of ten studies evaluating time frames for competency restoration show that average time to restore is 153 days).

- i. A description of the evaluation, including instruments or other methodology used and nature of the evaluator's contacts with the defendant and counsel and other sources or information relied upon in reaching the opinion⁴⁷;
 - ii. That the defendant was informed about the purpose of the evaluation limits of confidentiality, including that the results of the evaluation would be shared with the court, defense attorney and prosecutor;⁴⁸
 - iii. Results of the mental status examination and diagnosis;⁴⁹
 - iv. The nature of the treatment provided and his or her response thereto⁵⁰;
 - v. An opinion as to the defendant's capacity to understand the nature and object of the criminal proceedings against him and to assist in his defense.⁵¹ In the event the evaluator opines that the defendant remains incompetent, the report should include an opinion as to the substantial probability of defendant's restorability to competence and the basis therefore.⁵²
- b. The report should also include the following:
- i. Examples of the defendant's factual understanding of court proceedings (calibrated to the charge[s]) and/or examples of impairments in factual understanding, including knowledge of charges, roles of courtroom participants, pleas and their consequences and plea bargaining, at a minimum;⁵³
 - ii. Examples of the defendant's rational understanding of court proceedings and/or examples of impairments in rational understanding, including discussions reflecting defendant's understanding of allegations, potential evidence/witnesses, understanding of the potential for being found guilty or accepting plea bargain, and presence or absence of delusional beliefs that significantly impact legal decision-making⁵⁴;
 - iii. Examples or explanation of the defendant's capacity to work with his or her attorney in his/her own defense, including for example, noting if the defendant understands he/she has an attorney who is representing him/her, has the ability to work with counsel, distinguishes capacity to work with counsel from willingness to work with counsel, and includes the evaluator's comments about the defendant's capacity to attend and participate in court process to assist counsel⁵⁵;
 - iv. Whether the defendant was assessed for malingering and if so the results of the assessment;⁵⁶
 - v. Nature of the evaluator's contacts with the defendant and counsel;⁵⁷

⁴⁷ NJC III.A 1-4. See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 5, at X.C and X.D.

⁴⁸ NJC at III.A 1; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 5, at X.E and X.G.

⁴⁹ NJC at III.A 1; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 5, at X.E and X.G.

⁵⁰ ABA Standard 7-4.12 (b) (ii)-(iii).

⁵¹ 50 P.S. 7402(e)(4) (For sections i. – iii.). See also ABA Standards 7-4.12 (b).

⁵² NJC at III.A(7) and (8); ABA Standards at 7-4.6 and 7-4.8 (b).

⁵³ Virginia Manual, Appendix B.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ NJC at III.A.9.

⁵⁷ NJC at III.A 3.

- vi. Information relied upon in reaching the opinion;⁵⁸
- vii. The reasoning for the opinion on competence⁵⁹;
- viii. If the evaluator has concluded that the defendant is competent, whether continued treatment is needed to maintain competence.⁶⁰
- c. If the opinion of the evaluator is that the defendant continues to have some impairments but is competent, the report should include information as to any accommodations which might be necessary to aid the defendant.⁶¹
- d. If the opinion of the evaluator is that the defendant is not competent but restorable, the report should also include a statement as to the setting in which restoration should occur (outpatient, jail or hospital) and a clear explanation of what types of specific treatment are necessary to restore competency.⁶² This could include medications and other medical interventions, or psychological interventions such as psychoeducational or therapies to help the defendant manage emotions or symptoms.
- e. If the opinion is that the defendant is not competent and not restorable, the report should specify what deficits remain, why treatment will not result in any further improvement and clear evidence of what types of treatment were attempted, or if multiple types were not attempted, an explanation as to why not.⁶³

11. Periodic redetermination of competence by the court, and further court orders

- a. The court should review the determination of incompetency at regular intervals, such as 60 calendar days from the initial finding of incompetency and in 90 day increments thereafter.⁶⁴
- b. The court should hold a prompt hearing⁶⁵ and make new findings related to defendant's competence when
 - i. Any period of ordered treatment is completed; or
 - ii. The evaluator reports to the court that reasonable grounds exist that the defendant has regained competence; or
 - iii. The evaluator reports to the court that there is no longer a substantial probability that the defendant will regain competence in the foreseeable future; or
 - iv. The current location ordered for competency evaluation or restoration is no longer appropriate as reported by the evaluator or treatment provider.⁶⁶
- c. Either party has the right to contest the report or any issues addressed in the report and the right to demand a prompt hearing on the issues, present evidence and examine and cross examine witnesses.⁶⁷

⁵⁸ NJC. at III.A. 4.

⁵⁹ Virginia Manual, Appendix B; American Academy of Psychiatry and the Law, *AAPL Practice Guidelines for Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* note 5 at X.F.

⁶⁰ NJC VII.

⁶¹ Virginia Manual, Appendix B.

⁶² *Id.* See also NJC III.A.7 and A.8.

⁶³ See generally American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 5 at X.H.

⁶⁴ 50 P.S. § 7403(c) (90 days). ABA Standards 7-4.12 (a) (30 days, 90 days, 180 days and every 180 days thereafter)

⁶⁵ 50 P.S. § 7402(g) (20 days within receipt of report).

⁶⁶ ABA Standards at 7-4.12 (a).

⁶⁷ ABA Standards at 7-4.12 (c).

- d. The defendant bears the burden to prove incompetence by a preponderance of evidence.⁶⁸
- e. The court should make every effort to ensure the hearing on the evaluator's report is held promptly after receiving the report, including advancing the hearing date on the report so that the hearing is held no later than 10 calendar days after receipt of the report, unless the parties stipulate that no hearing is necessary.⁶⁹
- f. Any psychiatrist or psychologist who participated in the evaluation should be available to testify upon the request of either party or the court.⁷⁰
- g. Based upon the report submitted by the evaluator and any other evidence, the court shall make a finding as to the defendant's competence. The determination of competence of a defendant who is detained must be rendered by the court within 20 days after the receipt of the report of the examination unless the hearing was continued at the defendant's request.⁷¹
- h. In the event the court finds the defendant competent, the criminal case shall resume and trial should commence within 90 days, unless the court determines that by reason of passage of time and its effect upon the criminal proceedings it would be unjust to resume the prosecution, the court may dismiss the charges and order the person discharged.⁷²
- i. In the event the court finds the defendant incompetent, the court should determine if the defendant is substantially likely to become competent in the foreseeable future. If the court finds that the defendant is substantially likely to become competent in the foreseeable future, the court should order further evaluation and may order involuntary treatment for the defendant for the purpose of restoring his competency for a period not to exceed 60 days, subject to the defendant's constitutional right to refuse treatment. Such additional evaluation and treatment should occur on an outpatient basis and may include an order for outpatient or jail-based competency restoration unless the court determines that public safety and treatment needs require that the further evaluation and treatment occur in a hospital setting, that the hospital setting is the least restrictive or that the defendant is unlikely to comply with an order for outpatient treatment.⁷³
- j. If the court finds the defendant incompetent to stand trial and restorable, the proceedings shall be stayed only for so long as the defendant remains restorable.⁷⁴ A stay may not exceed the period during which the defendant is determined to be restorable, or for a period not to exceed the maximum sentence of confinement that may be imposed for the crime(s) for which the defendant is charged or ten years, whichever is less, except in cases of first-degree and second-degree murder, when there is no maximum period of time so long as the defendant remains restorable.⁷⁵

⁶⁸ 50 P.S. § 7403 (a).

⁶⁹ NJC at V.A (hearing should be held within 10 days of receipt of report regardless of original schedule date) and V.B.

⁷⁰ ABA Standards at 7-3.8.

⁷¹ 50 P.S. § 7402(g).

⁷² 50 P.S. § 7403(e).

⁷³ NJC at III. A. 8; ABA Standards at 7-4.10 (a)(iii).

⁷⁴ 50 P.S. § 7403(b); 50 P.S. § 7402(b).

⁷⁵ 50 P.S. § 7403(f). But see ABA Standards at 7-4.14 (b) ("the court should hold a hearing to determine whether the defendant is unrestorable whenever the issue has been raised by the report of the professional providing treatment, at the expiration of the maximum sentence for the crime charged or [twelve/eighteen] months from the date of the adjudication of incompetence to proceed, whichever occurs first.") See also NJC at VI.C; See *Standardizing Protocols for Treatment to Restore Competency to Stand Trial*, Washington State Institute for Public Policy, January 2013,

- k. In the event the court finds that the defendant is incompetent and that the defendant is not substantially likely to become competent in the foreseeable future (non-restorable), the court shall discharge the person from detention pursuant to the criminal case and release the defendant, unless involuntary commitment is authorized.⁷⁶
- l. A defendant who has been discharged after a finding of incompetent and non-restorable may be ordered, upon motion of the Commonwealth, defense or on the court's own motion, to submit to a psychiatric examination every 12 months after discharge to determine if he has become competent to proceed. If the examination reveals that the defendant has regained competency to proceed, the court shall schedule a hearing. If the defendant is adjudicated competent to proceed, the trial shall begin with 90 days.⁷⁷

12. Maintaining competency and preventing decompensation

- a. Once a defendant is found competent, treatment to maintain competence should be continued regardless of the setting (i.e., outpatient, jail or hospital) where the defendant will be placed.⁷⁸ A copy of the current treatment plan shall be provided to the next treatment provider.
- b. In the event the defendant is to be detained in the jail, the defendant should be provided appropriate mental health treatment so that competence may be maintained.⁷⁹

http://www.wsipp.wa.gov/ReportFile/1121/Wsipp_Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods_Full-Report.pdf (review of ten studies evaluating time frames for competency restoration show that average time to restore is 153 days and citing NJC standards).

⁷⁶ 50 P.S. § 7403(d); See Procedure document titled "Incompetent to Stand Trial and Non-Restorable" for additional information.

⁷⁷ 50 P.S. § 7403(g).

⁷⁸ NJC at § VIII.A.

⁷⁹ *Id.*

PROCEDURE 3 - INCOMPETENT TO STAND TRIAL AND NON-RESTORABLE¹

1. Purpose: This procedure establishes standards for defendants who are to be reported non-restorable and subsequently have been found incompetent for trial and non-restorable by the court.

2. References:

Pennsylvania statutes 50 P.S §§ 7402 and 7403

National Judicial College, *Mental Competency Best Practices Model* (hereafter NJC) (2012)

American Bar Association *Criminal Justice Standards on Mental Health*, adopted 8.8.16 (hereafter ABA Standards) (2016 ed.)

American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*

Dusky v. United States, 362 U.S. 402 (1960) (per curiam)

Jackson v. Indiana, 406 U.S. 715, 738 (1972)

Clinical literature related to competence and competency restoration

3. Scope: This operating procedure applies to all individuals found incompetent to stand trial and not restorable pursuant to 50 P.S. §7402 and §7403. Sections include:

Section 1: Purpose

Section 2: Scope

Section 3: References

Section 4: Definitions

Section 5: Qualifications of the evaluator

Section 6: Prehearing actions for defendants evaluated as incompetent and non-restorable

Section 7: Reporting to the Court

Section 8: Hearings on Competency and Restorability

Section 9: Reasonable time for competency restoration

4. Definitions:

a. Commonwealth: the Commonwealth of Pennsylvania.

b. Competence/competent: a person charged with a crime who has a rational and factual understanding of the proceedings against him/her and the sufficient

¹ This addresses Policy Research Associates (“PRA”) recommendation number 3. See Reducing the Pennsylvania Incompetency to State Trial Restoration Waitlist: More than Just Beds, December 2017.

- present ability to consult with his/her lawyer with a reasonable degree of rational understanding.²
- c. Competency evaluation: the clinical process of a thorough and impartial assessment of an individual's ability to participate in his/her defense and assist his/her legal counsel, and to understand relevant legal procedures.³
 - d. Court: magisterial courts, municipal courts, mental health courts and courts of common pleas.
 - e. Defendant: the defendant in a criminal case.
 - f. Department: the Pennsylvania Department of Human Services.
 - g. Evaluator: a psychiatrist or licensed psychologist qualified by certification, training or experience who conducts the evaluation as to the defendant's competence to stand trial/proceed.⁴ The evaluator may be an employee of the county or state or a contractor under contract with the state or county but should not be a member of the treatment team.⁵
 - h. Incompetent: Lacking sufficient ability at the pertinent time to consult with counsel with a reasonable degree of rational understanding or to have a rational as well as a factual understanding of the proceedings.⁶
 - i. Initial competency evaluation: the first evaluation of the defendant's competence.
 - j. Jail-Based Competency Restoration: a program in the jail in which a defendant is provided mental health treatment and psycho-legal education services that are designed to restore a defendant's competence to stand trial.⁷
 - k. Licensed psychologist: an individual licensed under the Professional Psychologists Practice Act.⁸
 - l. Non-Restorable: there is not a substantial probability that defendant will become competent in the foreseeable future.⁹
 - m. Outpatient competency restoration program: a program operated in a community setting other than the jail in which psychiatric and other related services necessary to restore a defendant's competence to stand trial are provided.¹⁰
 - n. Outpatient examination/evaluation: an examination conducted in a community setting, the jail or any setting other than a state psychiatric hospital.
 - o. Psychiatrist: a licensed medical practitioner specializing in the diagnosis and treatment of mental illness.

² *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam). See also 50 P.S. § 7402 (a) (paraphrased).

³ American Bar Association *Criminal Justice Standards on Mental Health*, adopted 8.8.16 (hereafter ABA Standards) (2016 ed.) § 7-1.3 (b).

⁴ ABA Standards at 7-1.3(b). See also National Judicial College *Mental Competency Best Practices Model* (2012) (hereafter NJC) at II.A (best practice is for the evaluator to be a licensed psychiatrist or psychologist with forensic training and/or certification)

⁵ NJC at II.B ("It is best practice, if not an ethical requirement, that the mental health professional who directly treats the defendant not also be the mental health professional who performs the competency evaluation."); See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial* (hereafter "AAPL"), Journal of American Academy of Psychiatry and the Law Online, Mossman et al, December 2007, 35 (Supplement 4)(http://jaapl.org/content/35/Supplement_4/S3 at IV.B ("In general, treating psychiatrists should try to avoid conducting forensic evaluations on their own patients; ideally, independent non-treating psychiatrists should perform such evaluations").

⁶ *Com. v. Appel*, 689 A.2d 891, 899 (Pa. 1997), citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), *Com. v. Hughes*, 555 A.2d 1264, 1270 (Pa. 1989), 50 P.S. § 7402(a).

⁷ See Procedure 5 - Jail-Based Competency Restoration

⁸ 50 P.S. § 7402 (h).

⁹ *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

¹⁰ See Procedure 6 – Outpatient Competency Restoration Programs.

- p. Restorable: a defendant for whom, with treatment and psycho-legal education, there is a substantial probability that he/she will become competent in the foreseeable future.¹¹
- q. Treatment: individualized services or supports provided to a defendant, including services or supports that are offered to a defendant to assist a defendant in becoming competent, to restore competence or to ensure the person will remain competent¹² and may include the appropriate use of psychotropic medications, habilitation services, psycho-educational services, group and individual therapies.¹³
- r. Treatment team: mental health professionals providing diagnostic, treatment and rehabilitative services to a defendant and should be independent from the evaluator.¹⁴

5. Roles of participants:

- a. Evaluator: The evaluator completes a thorough and impartial assessment of the defendant's condition, symptoms, capacity, functioning and behavior based upon sound evaluative methods to reach an objective opinion as to the defendant's competence.¹⁵ The evaluator should not disclose statements by the defendant during the course of the evaluation unless it relates solely to the defendant's present competence and is disclosure is in accordance with law.¹⁶ The evaluator should explain to the defendant the purpose and nature of the evaluation, the limits of confidentiality, the potential uses of statements made during the evaluation, and who will have access to the results of the evaluation.¹⁷ The evaluator may not be the defendant's treatment provider.¹⁸
- b. Defense counsel: Attorneys who represent defendants with mental disorders should be prepared to raise the defendant's competence throughout the legal proceedings in appropriate cases where counsel has a good faith doubt about the defendant's competence.¹⁹
- c. Court: The court has a continuing obligation, separate and apart from that of counsel for each of the parties, to raise the issue of competence to proceed at any time the court has a good faith doubt about the defendant's competence, and may raise the issue at any stage of the proceedings on its own motion.²⁰

¹¹ *Id.*

¹² D.C. ST. § 24-531.01.

¹³ ABA Standards at 7-1.1(d). See also *Standardizing Protocols for Treatment to Restore Competency to Stand Trial: Interventions and Clinically Appropriate Time Periods*, Washington State Institute for Public Policy, January 2013, http://www.wsipp.wa.gov/ReportFile/1121/Wsipp_Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods_Full-Report.pdf, pages 5-16.

¹⁴ See note 5 *supra*.

¹⁵ ABA Standards at 7-1.3 (b); NJC at I.C (evaluator should determine which clinical assessment tools are appropriate to be given in a competency evaluation).

¹⁶ ABA Standards at 7-3.2 (a).

¹⁷ ABA Standards at 7-3.5 (b).

¹⁸ See note 5 *supra*.

¹⁹ ABA Standards at 7-1.4; 7-4.3(c). See also *Pate v. Robinson* 383 U.S. 375 (1966) ("bona fide" doubt).

²⁰ ABA Standards at 7-4.3 (a). NJC at I.A (either party or court has reasonable basis to believe competence is at issue); 50 P.S. § 7402 (d) (prima facie question of incompetence).

- d. Prosecutor: The prosecutor should move for an evaluation of the defendant's competence whenever the prosecutor has a good faith doubt as the defendant's competence.²¹
- e. Treatment team: The mental health professionals who are responsible for providing treatment for the defendant, including treatment that may restore the defendant's competence, should exercise sound clinical judgment in developing a treatment plan for the defendant.
- f. The party initiating the evaluation should obtain and provide to the evaluator all records and other information that the attorneys believe may be of assistance in facilitating a thorough evaluation of the defendant's competence.²² The attorneys should also take appropriate measures to obtain and provide to the evaluator information that the evaluator regards as necessary for conducting the evaluation.²³
- g. If the evaluation is initiated by the court, both the defense attorney and prosecutor should obtain and provide the information to which they have access.²⁴
- h. Information that should be provided to the evaluator includes relevant medical records, psychosocial history, police and law enforcement reports, statements made by the defendant and transcripts of hearings.²⁵
- i. The court should stay apprised of the defendant's progress or lack thereof in the restoration of his competence and in cases where the defendant is not making progress toward restoration, the court should encourage the defendant to follow any treatment regimen and/or otherwise order the defendant to participate in his/her treatment plan.²⁶

6. Qualifications of the evaluator

- a. An evaluator completing competency evaluations in criminal cases should be a licensed psychologist or psychiatrist with forensic training, experience or certification in performing competency evaluations.²⁷ Certification in forensic psychology by the American Board of Professional Psychology or certification in forensic psychiatry by the American Academy of Psychiatry and the Law is highly recommended.
- b. An evaluator completing competency evaluations in criminal cases should complete ten hours of continuing education in forensic evaluations every two years.²⁸
- c. The evaluator completing the competency evaluation should not be a member of the defendant's treatment team.²⁹

7. Pre-hearing actions for defendants evaluated as incompetent and non-restorable

²¹ ABA Standards at 7-4.3 (b). NJC at I.A (either party or court has reasonable basis to believe competence is at issue).

²² ABA Standards at 7-3.4 (b). See also 7-3.5(a).

²³ ABA Standards at 7-3.4 (b).

²⁴ *Id.*

²⁵ *Id.*

²⁶ NJC at V.G.; ABA Standards at 7-4.12(a). See also 50 P.S. § 7402; *Sell v. United States*, 539 U.S. 166 (2003).

²⁷ NJC at II.A; ABA Standards at 7-3.9 (a) and 7-3.10.

²⁸ NJC at II.A.

²⁹ NJC at II.B.

- a. As soon as an evaluator determines that the defendant is incompetent and that there is not a substantial probability that the defendant will be restored to competency in the foreseeable future, the evaluator should immediately notify the defendant's treatment team of this opinion so that the team may continue discharge planning for the defendant.
- b. Upon notification from the evaluator that he or she is of the opinion that the defendant is not restorable, the treating psychiatrist or clinical psychologist should complete an evaluation and determine whether the defendant should be considered for involuntary civil commitment. In the event the team does not believe that the defendant meets the requirements for civil commitment, it should develop an aftercare plan for the defendant, and should inform the evaluator of the discharge plan (community service plan).
- c. The team should provide the evaluator with recommendations for disposition of the defendant, which may include discharge without services or conditions, civil commitment under 50 P.S. §§ 7301-7306, or voluntary services on an inpatient or outpatient basis. These recommendations should be included in the evaluator's report to the court. Discharge planning with the treatment team and applicable county should begin immediately in cases where the team concludes ongoing aftercare services are recommended, and the county should fully cooperate with developing and implementing the community support plan of care for discharge.

8. Content of report

- a. Upon concluding that the defendant is incompetent and non-restorable, the evaluator should promptly notify the court within seven calendar days of this conclusion.³⁰ The report should include:
 - i. A description of the evaluation, including instruments or other methodology used and nature of the evaluator's contacts with the defendant and counsel and other sources or information relied upon in reaching the opinion³¹;
 - ii. That the defendant was informed about the purpose of the evaluation limits of confidentiality, including that the results of the evaluation would be shared with the court, defense attorney and prosecutor;³²
 - iii. Diagnosis of the person's mental condition, results of mental status examination and description of symptoms and behavior;
 - iv. The nature of the treatment provided and his or her response thereto;
 - v. An opinion as to the defendant's capacity to understand the nature and object of the criminal proceedings against him and to assist in his defense with supporting rationale;
 - vi. An opinion as to whether the defendant is restorable to competency, with rationale to support the opinion that the defendant is not restorable;

³⁰ ABA standards 7.4-12 (a)(i).

³¹ NJC III.A 1-4. See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n.5, at X.C and X.D.

³² NJC at III.A 1; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 5, at X.E and X.G.

- vii. A summary of the treatment team’s recommendations regarding the defendant’s need for further services, and/or eligibility for involuntary commitment.³³
- b. The report should also include the following:
 - i. Examples of the defendant’s factual understanding of court proceedings (calibrated to the charge[s]) and/or examples of impairments in factual understanding, including knowledge of charges, roles of courtroom participants, pleas and their consequences and plea bargaining, at a minimum³⁴;
 - ii. Examples of the defendant’s rational understanding of court proceedings and/or examples of impairments in rational understanding, including discussions reflecting defendant’s understanding of the allegations, potential evidence/ witnesses, understanding of the potential for being found guilty or accepting plea bargain, and presence or absence of delusional beliefs that significantly impact legal decision-making³⁵;
 - iii. Examples or explanation of the defendant’s capacity to work with his or her attorney in his/her own defense, including for example, noting if the defendant understands he/she has an attorney who is representing him/her, has the ability to work with counsel, distinguishes capacity to work with counsel from willingness to work with counsel, and includes the evaluator’s comments about the defendant’s capacity to attend and participate in court process to assist counsel³⁶;
 - iv. Nature of the evaluator’s contacts with the defendant and counsel;³⁷
 - v. Information relied upon in reaching the opinion;³⁸
 - vi. The reasoning for the opinion on competence and non-restorability³⁹;
- c. Because the opinion of the evaluator is that the defendant is not competent and non-restorable, the report should specify what deficits remain, why treatment will not result in any further improvement and clear evidence of what types of treatment were attempted to address the remaining deficits, or if multiple types were not attempted, an explanation as to why not.⁴⁰ The evaluator also should indicate whether he is of the opinion that the defendant meets the criteria for civil commitment.⁴¹

9. Hearings on competency and non-restorability

- a. Court hearings on competency restoration and the results of additional evaluations should be held at regular intervals set by the court, such as 60 calendar days for initial competency restoration and in 90 calendar day increments thereafter.⁴²

³³ 50 P.S. § 7402(e)(4); ABA Standards 7-4.12 (b) and 7.4-14 (c)

³⁴ Virginia Manual, Appendix B

³⁵ *Id.*

³⁶ *Id.*

³⁷ NJC at III.A.3.

³⁸ *Id.* at III.A.4

³⁹ Virginia Manual, Appendix B

⁴⁰ ABA Standards at 7-4.12 (a) and (b); NJC at VII. 50 P.S. § 7403(c) (90 days).

⁴¹ Cf. ABA Standards at 7-4.14 (c)

⁴² 50 P.S. § 7403(c) (90 days) ; NCJ V.F (120 then every 60 days),

- b. The court should hold a prompt hearing⁴³ and make new findings related to defendant's competence when
 - i. Any period of ordered treatment is completed; or
 - ii. The evaluator reports to the court that reasonable grounds exist that the defendant has regained competence; or
 - iii. The evaluator reports to the court that the defendant remains incompetent and there is no longer a substantial probability that the defendant will regain competence; or
 - iv. The current location ordered for competency evaluation or restoration is no longer the least restrictive environment.⁴⁴
- c. The evaluator shall submit a report meeting the criteria in Section 8 to the court and to all parties.⁴⁵ The evaluator should submit the report at least seven calendar days prior to the hearing.
- d. Where a defendant or his counsel were the party requesting the competency evaluation the defendant bears the burden to prove incompetence by a preponderance of the evidence.⁴⁶
- e. Either party has the right to contest the report or any issues addressed in the report and the right to demand a prompt hearing on the issues, present evidence and examine and cross examine witnesses.⁴⁷
- f. At the conclusion of the hearing, applying the preponderance of evidence standard, the court should make specific findings as to the defendant's competence and if the court finds the defendant incompetent, whether
 - i. There is a substantial probability that the defendant will regain competence in the foreseeable future; or
 - ii. There is no substantial probability that the defendant will regain competence in the foreseeable future.⁴⁸
- g. If the court finds the defendant competent, the court shall order the criminal case to resume and trial should be held within 90 days.⁴⁹
- h. If the court finds the defendant incompetent and restorable, the court should order additional treatment which may be on an involuntary basis, as appropriate and consistent with the defendant's constitutional right to refuse treatment, in the least restrictive setting, for up to 60 days.⁵⁰
- i. If the court finds the defendant incompetent and not restorable, the defendant should be released from any detention or commitment that was ordered in the criminal case.⁵¹ If the defendant meets the criteria for civil commitment, the defendant may receive voluntary treatment or be civilly committed consistent with 50 P.S. 7301-7306.

10. Reasonable time for competency restoration.

⁴³ 50 P.S. § 7402(g) (20 days within receipt of report)

⁴⁴ 50 P.S. § 7403(d). See also 50 P.S. § 7402(e)(1)

⁴⁵ 50 P.S. § 7402(e)(4)

⁴⁶ 50 P.S. § 7403(a)

⁴⁷ ABA Standards at 7-4.12 (c)

⁴⁸ ABA Standards at 7-4.14; Cf. 50 P.S. § 7403(d)

⁴⁹ 50 P.S. §§ 7402(d) and 7403(e)

⁵⁰ NJC at VI and XI; ABA Standards at 7-4.10 (a); 50 P.S. § 7402 (b). See also *Sell v. United States*, 539 U.S. 166 (2003).

⁵¹ 50 P.S. § 7403(d); NJC at XI.

- a. A defendant should not be detained on a criminal charge longer than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain competence in the foreseeable future.⁵²
- b. The following time periods should be considered by the evaluator, counsel and the courts as far as a reasonable time for allowance of competency restoration⁵³:
 - i. For a defendant charged with a felony (or misdemeanor involving a crime of violence), a reasonable period for achieving competency restoration should be no longer than the maximum time of sentence for the crime charged or eighteen months from the date of adjudication of incompetence, whichever occurs first.⁵⁴
 - ii. For a defendant charged with a non-violent misdemeanor, the reasonable period for achieving competency restoration should be no longer than the maximum time of sentence for the crime charged or twelve months from the date of adjudication of incompetence, whichever occurs first.⁵⁵
- c. Unless a petition for civil commitment has been filed and the court has ordered the defendant detained pursuant to the petition for civil commitment, a defendant found incompetent to stand trial and not restorable should not be detained for purposes of linking them to services in the community.⁵⁶

11. Discharge or commitment of defendant found incompetent and non-restorable

- a. When the court finds that a defendant remains incompetent and non-restorable, the director of the hospital or facility should take steps to either arrange for the defendant's discharge, voluntary civil commitment or involuntary civil commitment consistent with the court's orders and the defendant's condition.
- b. In cases in which the defendant is to be discharged to the community, the hospital shall ensure that the county administrator's office is aware of the potential

⁵² *Jackson v. Indiana*, 406 U.S. 715 (1972)

⁵³ ABA standard 7-4.14 (b) NJC standard is 120 for misdemeanors and 120+245 for felonies. See also *Standardizing Protocols for Treatment to Restore Competency to Stand Trial: Interventions and Clinically Appropriate Time Periods*, Washington State Institute for Public Policy, January 2013, http://www.wsipp.wa.gov/ReportFile/1121/Wsipp_Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods_Full-Report.pdf (summarizes studies related to average length of time to restoration; time ranged from a low of 64 days to a high of 219 days); Morris and DeYoung, Long Term Competence Restoration, *J of Amer Academy of Psychiatry and the Law*, 42:81-90, March 2014, <http://jaapl.org/content/42/1/81> (Recent research suggests that older individuals with chronic, treatment refractory severe mental illness or mental retardation are less restorable; younger individuals with criminal histories and personality and non psychotic disorders are more likely to be restored. Average length of stay to restoration was 1.58 years and after 3.5 years restoration was very rare (less than 3%). Those with more serious charges were more likely to be restored to competence and those with some understanding of factual understanding, as opposed to rational assistance abilities, were more likely to be restored.) See also Colwell and Gianessini, Demographic, Criminogenic, and Psychiatric Factors that Predict Competency Restoration, *J. Amer Academy of Psychiatry and the Law*, 39:297-306, Nov 2011, <http://jaapl.org/content/39/3/297.long> (those deemed incompetent and non-restorable had more prior hospitalizations, more prior incarcerations, more prior episodes of being found incompetent to stand trial, lower IQs, were prescribed more medications, and were more likely to have diagnoses of borderline intellectual functioning, psychosis or other cognitive deficiency. Those restored to competency were more likely to have personality disorders.); Mossman, Predicting Restorability of Incompetent Criminal Defendants, *J of Amer Academy of Psychiatry and the Law*, 35:34-43, March 2007 <http://jaapl.org/content/35/1/34> ("if a defendant is incompetent because of a longstanding psychotic disorder that has resulted in lengthy periods of psychiatric hospitalizations, this history supports an opinion that the defendant has a well-below-average probability of becoming competent with psychiatric treatment. Second, if a defendant has an irremediable cognitive disorder (e.g. mental retardation) and can grasp little information that the examiner attempts to convey during an evaluation, this finding would support a conclusion that restoration efforts have well-below-average chances of success.)

⁵⁴ ABA Standards at 7-4.14 (b).

⁵⁵ ABA Standards at 7-4.14 (b).

⁵⁶ ABA Standards 7-4.14 (c)

discharge and is involved in pre-discharge planning.⁵⁷ The county shall fully cooperate in the discharge planning of any defendant who is to be released.

- c. The county administrator receiving the referral should take the necessary steps to arrange for and begin providing available mental health treatment services and supports (i.e. housing, ACT services) within seven calendar days of the defendant's release from custody. Services and supports should not be limited solely based upon the defendant's involvement in the criminal justice system.
- d. A district attorney, defense counsel, county administrator or other interested party may petition for civil commitment of a defendant found incompetent for trial and non-restorable if the defendant suffers from a mental illness and presents a clear and present danger if adequate treatment is not provided on an emergency or subsequent basis.⁵⁸ The standard of clear and present danger may be met when a person has made a threat of harm to self or others, has made a threat to commit suicide; or has made a threat to commit an act of mutilation and has committed acts in furtherance of any such threats. The examiner should consider the probability of that the defendant would be unable without care, supervision and the continued assistance of others to satisfy his need for nourishment, personal or medical care, shelter or self-protection and safety in accordance with section 7301 (b).
- e. A defendant who consents to voluntary commitment or upon an order for civil commitment should be transferred from the Regional Forensic Psychiatric Unit to the least restrictive environment, such as a civil unit or to an outpatient setting, if clinically appropriate within fourteen (14) days of the commitment.
- f. If the charge has not been dismissed, a defendant who has been discharged after a finding of incompetent and not restorable may be ordered, upon motion of the Commonwealth, defense or on the court's own motion, to submit to a psychiatric examination every 12 months after discharge to determine if he has become competent to proceed. If the examination reveals that the defendant has regained competency to proceed, the court shall schedule a hearing. If the defendant is adjudicated competent to proceed, the trial shall begin with 90 days.⁵⁹

⁵⁷ 55 Pa. Code. § 5100.61(b)

⁵⁸ 50 P.S. § 7301(a) and (b)

⁵⁹ 50 P.S. § 7403(g)

**PROCEDURE 4 - COLLABORATION OF JUDICIAL, LEGAL,
STATEWIDE AND REGIONAL PARTNERS¹**

1. Purpose: This operating procedure establishes standards for the collaboration of the judiciary, prosecutors and defense counsel, state and local mental health providers and corrections, probation and parole staff regarding the handling of mental health competency cases and competency related programs in state hospitals, community mental health centers/providers, and jails.

2. References:

National Judicial College, *Mental Competency Best Practices Model* (hereafter NJC standards) (2012)

American Bar Association *Criminal Justice Standards on Mental Health*, adopted 8.8.16 (hereafter ABA Standards) (2016 ed.)

3. Scope: This procedure operates statewide.

Section 4: Statewide collaboration

Section 5: Local level collaboration

Section 6: Tracking and publicizing key data elements

4. Statewide Collaboration:

a. Stakeholders at the state level should meet regularly to collaborate on the best practices in the state for handling all facets of managing mental competency issues. These meetings should be used to identify issues that are affecting pre-trial mentally ill defendants in the criminal justice system and identify solutions and best practices that would serve all stakeholders and the mentally ill who cycle through the criminal justice system.²

b. Invited stakeholders should include directors of pertinent state agencies, state forensic hospital directors, county behavioral health directors, representatives of evaluators and advocates, state attorneys and public defenders, law enforcement and correction officials.

c. The topics for consideration through this collaboration should be flexible and may include identification of best practices that would serve each stakeholder including the mentally ill defendant, education and training on issues related to competency to stand trial and establishment of statewide standards for competency evaluations, reports, restoration curriculum and qualifications for evaluators.³

¹ This procedure addresses Policy Research Associates (“PRA”) recommendation number 3. See Reducing the Pennsylvania Incompetency to State Trial Restoration Waitlist: More than Just Beds, December 2017.

² NJC at XIV.

³ *Id.*

5. Regional Collaboration

- a. The key parties, including representatives from the Commonwealth's Department of Human Services, forensic directors, psychiatric hospitals, presiding Judges of the county courts' Criminal Divisions, mental health judges (if any), defense counsel, District Attorneys' Office, corrections and jail officials, probation and parole staff, mental health advocacy groups and county behavioral health services should meet in their respective jurisdictions at least quarterly to identify, discuss and problem solve systemic issues that may be affecting the timely and efficient processing of defendants with mental or behavioral health issues.⁴ A purpose of this collaboration would be to identify, and implement as appropriate, best practices that would best serve court-involved mentally ill persons.⁵
- b. The topics for consideration through this collaboration should be flexible and may include addressing issues related to repeat mentally ill defendants, providing information on programs and services including housing available to or needed by mentally ill defendants, reviewing data related to moving mentally ill defendants through the criminal justice system in an efficient and humane process, and to provide cross discipline education to all stakeholders.⁶
- c. Agendas should be developed in advance of these meetings and shared with all participants so each party can add items to the agenda and come to the meetings prepared to address the agenda item. It shall be the responsibility of the state hospital to prepare and circulate the agenda for the initial meeting, during which this responsibility should be discussed and assigned. The relevant parties should be prepared to present key data to the group at each meeting.
- d. Minutes of these meetings should be maintained.

6. Tracking and publicizing key data elements

- a. Key data elements relating to competency evaluations should be identified at both the state and county levels, and data collected and shared with the participants on at least a quarterly basis. This data should be reviewed at both the state and county levels. Data elements to be tracked may include:
 - i. Number of new orders for evaluations by type (competency, criminal responsibility, aid in sentencing);
 - ii. Number of orders for competency evaluations by location of evaluation (outpatient, jail or hospital);
 - iii. Number of competency evaluations completed during the period by location (outpatient, jail or hospital);
 - iv. Number of persons reported by the evaluator to be competent and number of persons reported incompetent during the reporting period;
 - v. Number of persons found by the court to be competent and number of persons found incompetent during the reporting period;

⁴ National Judicial College, *Mental Competency Best Practices Model* (hereafter NJC standards) (2012), hereafter NJC at XIV.

⁵ See American Bar Association *Criminal Justice Standards on Mental Health*, adopted 8.8.16 (hereafter ABA Standards) (2016 ed.) at 7-1.2 (a) and (b)

⁶ *Id.*

- vi. Number of persons reported restorable and number of persons reported non-restorable during the reporting period;
 - vii. Number of persons found by the court to be restorable and number of persons found non-restorable during the reporting period;
 - viii. Average and median length of stay for those admitted for competency evaluations during the period (admission cohort);
 - ix. Average and medial length of stay for those admitted for competency restoration during the period (admission cohort);
 - x. Average and median length of stay for those admitted for competency evaluation who were discharged in the reporting period (discharge cohort);
 - xi. Average and median length of stay for those found restorable during the period;
 - xii. Average and median length of stay for those found non-restorable during the period;
 - xiii. Percentage of cases in which the court agreed with the competency related opinions submitted by evaluator;
 - xiv. Percentage of cases in which the court agreed with the restorability related opinions submitted by the evaluator;
 - xv. The disposition of cases involving incompetent, non-restorable defendants;
 - xvi. Number of defendants for whom civil commitment proceedings were initiated
 - xvii. Type of placements defendants were discharged to by housing type
- b. Data should be presented in multiple formats and include data by county. Key trends should be identified and discussed.

PROCEDURE 5 - JAIL-BASED COMPETENCY RESTORATION¹

1. Purpose: This procedure establishes standards for jail-based competency restoration programs that reflect best practices so that courts may order competency restoration in non-hospital environments, including the community or jail.² Smaller regions/counties may elect to collaborate and combine services in implementing a jail-based competency restoration program

2. References:

National Judicial College, *Mental Competency Best Practices Model* (hereafter NJC) (2012)

American Bar Association *Criminal Justice Standards on Mental Health*, adopted 8.8.16 (hereafter ABA Standards) (2016 ed.)

3. Scope: This procedure applies to jail-based competency restoration programs operating in Pennsylvania.

Section 4: Definitions

Section 5: Qualifications of the evaluator

Section 6: Program requirements

Section 7: Eligibility criteria

Section 8: Screening

Section 9: Order for jail-based competency restoration

Section 10: Program removal

Section 11: Assessing defendant's competence

Section 12: Factors to consider in determining restorability

Section 13: Content of reports

4. Definitions:

- a. Commonwealth: the Commonwealth of Pennsylvania.
- b. Competence/competent: a person charged with a crime who has a rational and factual understanding of the proceedings against him/her and the sufficient present ability to consult with his/her lawyer with a reasonable degree of rational understanding.³

¹ This procedure addresses Policy Research Associates ("PRA") recommendation number 4. See Reducing the Pennsylvania Incompetency to State Trial Restoration Waitlist: More than Just Beds, December 2017.

² ABA Criminal Justice Standards on Mental Health, adopted 8.8.16 (hereafter ABA Standards) (2016) at § 7-4.11(c). See also National Judicial College *Mental Competency Best Practices Model* (2012) (hereafter NJC) at VI.A and VI.A.3.

³ *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam). See also 50 P.S. §7402 (a) (paraphrased).

- c. Competency evaluation: the clinical process of a thorough and impartial assessment of an individual's ability to participate in his/her defense and assist his/her legal counsel, and to understand relevant legal procedures.⁴
- d. Court: magisterial courts, municipal courts, mental health courts and courts of common pleas.
- e. Defendant: the defendant in a criminal case.
- f. Department: the Pennsylvania Department of Human Services.
- g. Evaluator: a psychiatrist or licensed psychologist qualified by certification, training or experience who conducts the evaluation as to the defendant's competence to stand trial/proceed.⁵ The evaluator may be an employee of the county or state or a contractor under contract with the state or county but should not be a member of the treatment team.⁶
- h. Incompetent: Lacking sufficient ability at the pertinent time to consult with counsel with a reasonable degree of rational understanding or to have a rational as well as a factual understanding of the proceedings.⁷
- i. Initial competency evaluation: the first evaluation of the defendant's competence.
- j. Jail-Based Competency Restoration: a program in the jail in which a defendant is provided mental health treatment and psycho-legal education services that are designed to restore a defendant's competence to stand trial.
- k. Licensed psychologist: an individual licensed under the Professional Psychologists Practice Act.⁸
- l. Non-Restorable: there is not a substantial probability that defendant will become competent in the foreseeable future.⁹
- m. Outpatient competency restoration program: a program operated in a community setting other than the jail in which psychiatric and other related services necessary to restore a defendant's competence to stand trial are provided.¹⁰
- n. Outpatient examination/evaluation: an examination conducted in a community setting, the jail or any setting other than a state psychiatric hospital.
- o. Psychiatrist: a licensed medical practitioner specializing in the diagnosis and treatment of mental illness.
- p. Restorable: a defendant for whom, with treatment and psycho-legal education, there is a substantial probability that he/she will become competent in the foreseeable future.¹¹

⁴ American Bar Association *Criminal Justice Standards on Mental Health*, adopted 8.8.16 (hereafter ABA Standards) (2016 ed.) § 7-1.3 (b).

⁵ ABA Standards at 7-1.3(b). See also National Judicial College *Mental Competency Best Practices Model* (2012) (hereafter NJC) at II.A (best practice is for the evaluator to be a licensed psychiatrist or psychologist with forensic training and/or certification)

⁶ NJC at II.B ("It is best practice, if not an ethical requirement, that the mental health professional who directly treats the defendant not also be the mental health professional who performs the competency evaluation."); See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial* (hereafter "AAPL"), *Journal of American Academy of Psychiatry and the Law Online*, Mossman et al, December 2007, 35 (Supplement 4)(http://jaapl.org/content/35/Supplement_4/S3 at IV.B ("In general, treating psychiatrists should try to avoid conducting forensic evaluations on their own patients; ideally, independent non-treating psychiatrists should perform such evaluations").

⁷ *Com. v. Appel*, 689 A.2d 891, 899 (Pa. 1997), citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), *Com. v. Hughes*, 555 A.2d 1264, 1270 (Pa. 1989), 50 P.S. § 7402(a).

⁸ 50 P.S. § 7402 (h).

⁹ *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

¹⁰ See Procedure 6 – Outpatient Competency Restoration Programs.

¹¹ *Id.*

- q. Treatment: individualized services or supports provided to a defendant, including services or supports that are offered to a defendant to assist a defendant in becoming competent, to restore competence or to ensure the person will remain competent¹² and may include the appropriate use of psychotropic medications, habilitation services, psycho-educational services, group and individual therapies.¹³
- r. Treatment team: mental health professionals providing diagnostic, treatment and rehabilitative services to a defendant and should be independent from the evaluator.¹⁴

5. Qualifications of the evaluator

- a. An evaluator completing competency evaluations in criminal cases should be a licensed psychologist or psychiatrist with forensic training, experience or certification in performing competency evaluations. Certification in forensic psychology by the American Board of Professional Psychology or certification in forensic psychiatry by the American Academy of Psychiatry and the Law is highly recommended.
- b. An evaluator completing competency evaluations in criminal cases should complete ten hours in continuing education in forensic evaluations every two years.
- c. The evaluator completing the competency evaluation should not be a member of the defendant's treatment team.¹⁵

6. Program requirements: The following are minimum program requirements for jail-based competency restoration programs:

- a. The jail-based competency restoration program operates within the jail in a dedicated location;
- b. The program provides treatment for mental illness and provision of individualized competency training twice per week to address the defendant's deficits related to competency. Such treatment should include rehabilitative skills training, counseling and other services indicated for restoration of competence including education about the legal process (including differences between misdemeanors and felonies, plea options/bargaining, roles of courtroom personnel, evidence and witnesses);
- c. The program must have the capacity to provide competency restoration training, psychiatric and emotional symptom management, and medication management using varied modalities (i.e. lectures, videos, mock trials);
- d. Evaluations should be completed by someone other than the treatment provider, but should include consideration of all information provided by the treatment provider;

¹² D.C. ST. § 24-531.01.

¹³ ABA Standards at 7-1.1(d). See also *Standardizing Protocols for Treatment to Restore Competency to Stand Trial: Interventions and Clinically Appropriate Time Periods*, Washington State Institute for Public Policy, January 2013, http://www.wsipp.wa.gov/ReportFile/1121/Wsipp_Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods_Full-Report.pdf, pages 5-16.

¹⁴ See note 4 *supra*.

¹⁵ NJC at II.B.

- e. Treatment related to competency restoration should be provided under the supervision of licensed clinicians with experience or training in providing competency related treatment and education;
 - f. The defendant should have a written treatment plan within 10 days of admission to a jail-based competency restoration program that includes specific interventions to address the specific deficits in competency.
7. Eligibility criteria: Individuals who meet the following criteria¹⁶ are eligible for jail-based competency restoration:
- a. Defendant is detained at the jail and is not eligible for outpatient competency restoration as a result of his or her detention status;
 - b. Defendant has been determined by a court to be incompetent to stand trial but restorable;
 - c. The defendant suffers from a major mental illness, and may also suffer from intellectual disability, or neurocognitive disorder;
 - d. The defendant has been screened and deemed appropriate for the program;
 - e. A defendant who is on a waiting list for hospital competency restoration services may participate in a jail-based restoration program if he otherwise meets the eligibility requirements for the jail-based program and the court authorizes participation.
 - f. The court should terminate the order for commitment to a hospital for a defendant who is ordered to participate in jail-based competency restoration and is accepted into such program.
8. Screening: The jail-based competency restoration program should have the opportunity to screen a defendant prior to an order for jail-based competency restoration to determine if defendant is a candidate for the jail-based competency restoration program. Screening should occur within five calendar days of the program being notified of the defendant's referral to the program. In screening candidates, the Program should complete a clinical interview and may consider results of prior competency evaluation, any psychological assessment or testing to include the defendant's current functioning, likelihood of malingering and the likelihood of competency restoration. The program should notify the court within five days in the event the defendant is deemed not to be a candidate for jail-based competency restoration, with specific rationale.
9. Order for jail-based competency restoration: The order for jail-based competency restoration should include, at a minimum the following:
- a. Order for care and treatment to the jail-based competency restoration up to 60 days to restore competency;
 - b. Statement requiring the defendant to meet conditions of the order and all treatment recommendations made by the provider, including mental health and substance use treatment, taking all prescribed medication on a voluntary basis and attending all other programming;
 - c. Statement as to the type and frequency of follow-up reports;
 - d. Statement that if the treatment providers determine that the defendant is no longer appropriate for the program, is not complying with the program, is no longer incompetent or is not likely to be restored to competence, the treatment

¹⁶ NJC at VI.A. (3).

provider should notify the court and counsel in writing of the changed circumstance.

- e. Statement that defendant has consented to allowing the treatment provider to access clinical information pertinent to determining and addressing defendant's competency while defendant is in the program.

10. Program removal: A defendant may be recommended for removal from the program prior to completion of the program in the event of:

- a. Noncompliance with the program (i.e. refusing to attend competency restoration training after attempts have been made to engage the patient, non-compliance with medication); or
- b. Decompensation in mental status requiring inpatient treatment.

Except where the defendant has become dangerous to self or the jail community or his/her mental status has deteriorated to a level requiring inpatient treatment, prior to removal from the program, the program staff should notify the defense attorney, and should make reasonable efforts to address the issues before recommending to the Court that the defendant be terminated from the program.

11. Assessing Defendant's Competence

- a. The evaluator should review the defendant's competence at regular intervals, including 30 days after admission and after 60 days to determine the defendant's progress toward competence.¹⁷ The evaluator should inform the treatment provider of particular issues that are interfering with the defendant's competence as they are identified, and the provider, as appropriate, should modify the treatment plan and interventions to address the continued incompetence.
- b. The evaluator should submit a report to the court and counsel on the defendant's competency at regular intervals prior to any court hearing or as ordered by the court.¹⁸
- c. In assessing the defendant's competence, the evaluator should consider measuring defendant's comprehension against the following specific *factual* understanding criteria to determine the specific areas of deficiency, if any, which are contributing to the defendant's continued incompetence:
 - i. Name of charges and if felony or misdemeanor;
 - ii. Knowledge of possible pleas, consequences and penalties;
 - iii. Knowledge of court procedures;
 - iv. Understanding of plea bargaining;
 - v. Understanding of roles of court participants (judge, prosecutor, defense counsel, jury etc.);
 - vi. Understanding of defenses.¹⁹

¹⁷ ABA Standards at 7.4-12.

¹⁸ 50 P.S. § 7403(c) (not *less* than every 90 days). ABA Standards at 7.4.12 (a) (30 days, 90 days, 180 days and every 180 days thereafter).

¹⁹ Morris and DeYoung, Psycholegal abilities and restoration of competence to stand trial. *Behav Sci Law* 30:710-28 2012, <https://pdfs.semanticscholar.org/3f29/705b0176ed22852294f1a2e54a18f3647f64.pdf>, (at page 725) ("These findings support a conceptual framework for evaluating competency restoration by viewing competency to stand trial as a hierarchy of demands progressing from the appropriateness of basic behavior and outlook, through factual understanding of legal procedures and participants, and ultimately requiring rational decision-making and ability to work productively with one's attorney. Although

- d. In assessing the defendant's competence, the evaluator should consider measuring the defendant's status against each of the following specific *rational* understanding criteria to determine which areas of deficiency which are contributing to the defendant's incompetence:
 - i. Ability to explain the charges and whether his/her understanding is rational;
 - ii. Understanding of potential sentences/consequences if convicted;
 - iii. Intended plea and reasoning for it;
 - iv. Understanding potential witnesses and evidence in the case;
 - v. Thoughts about plea options, plea bargaining;
 - vi. Thoughts about defenses.²⁰
- e. In assessing the defendant's competence, the evaluator should consider measuring the defendant's status against each of the following specific criteria relating to the *ability to assist* counsel to determine which areas of deficiency which are contributing to the defendant's incompetence:
 - i. Ability to testify relevantly;
 - ii. Ability to challenge witnesses;
 - iii. Ability to disclose pertinent information
 - iv. Ability to relate to and trust counsel and discuss matters rationally;
 - v. Ability to manage behavior
 - vi. Ability to concentrate.²¹

12. Factors to Consider in Determining Restorability of Competence

- a. In opining whether there is a substantial probability that a defendant's competence is restorable in the foreseeable future, the evaluator should consider the following factors²²:
 - i. Defendant's diagnoses (i.e. psychotic disorders, intellectual disorders, personality disorders, substance use disorders);
 - ii. Defendant's prior history of incompetency findings in previous cases;

this study concerned competency restoration, the proposed conceptual framework should generalize to all stages of assessing competency to stand trial.") See also Virginia Manual Appendix D.

²⁰ Virginia Manual Appendix D.

²¹ *Id.*

²² Morris and DeYoung, *Long Term Competence Restoration*, *J of Amer Academy of Psychiatry and the Law*, 42:81-90, March 2014, <http://jaapl.org/content/42/1/81> (Recent research suggests that older individuals with chronic, treatment refractory severe mental illness or mental retardation are less restorable; younger individuals with criminal histories and personality and non-psychotic disorders are more likely to be restored. Average length of stay to restoration was 1.58 years and after 3.5 years restoration was very rare (less than 3%). Those with more serious charges were more likely to be restored to competence and those with some understanding of factual understanding, as opposed to rational assistance abilities, were more likely to be restored.) See also Colwell and Gianessini, *Demographic, Criminogenic, and Psychiatric Factors that Predict Competency Restoration*, *J. Amer Academy of Psychiatry and the Law*, 39:297-306, Nov 2011, <http://jaapl.org/content/39/3/297.long> (those deemed incompetent and non-restorable had more prior hospitalizations, more prior incarcerations, more prior episodes of being found incompetent to stand trial, lower IQs, were prescribed more medications, and were more likely to have diagnoses of borderline intellectual functioning, psychosis or other cognitive deficiency. Those restored to competency were more likely to have personality disorders.); Mossman, *Predicting Restorability of Incompetent Criminal Defendants*, *J of Amer Academy of Psychiatry and the Law*, 35:34-43, March 2007, <http://jaapl.org/content/35/1/34> ("if a defendant is incompetent because of a longstanding psychotic disorder that has resulted in lengthy periods of psychiatric hospitalizations, this history supports an opinion that the defendant has a well-below-average probability of becoming competent with psychiatric treatment. Second, if a defendant has an irremediable cognitive disorder (e.g. mental retardation) and can grasp little information that the examiner attempts to convey during an evaluation, this finding would support a conclusion that restoration efforts have well-below-average chances of success.)

- iii. Whether the defendant has a history of chronic psychosis with long periods of hospitalizations;
 - iv. Defendant's age at onset of illness;
 - v. Number of prior hospitalizations of defendant;
 - vi. Seriousness of current charges and prior criminal history;
 - vii. Degree of factual understanding after three months of treatment;
 - viii. Defendant's response to current treatment;
 - ix. Defendant's current age.
- b. In considering the defendant's competence restorability, the evaluator should also consider the length of time the defendant's incompetency has persisted and whether any treatment options are available, including treatment in a setting other than the jail, that would be appropriate but not yet tried.²³
- c. Based upon the results of the assessments conducted pursuant to Section 11 and the factors set forth in Section 12, the evaluator should render an opinion as to whether the defendant's competence is restorable in the foreseeable future.

13. Content of reports relating to results of competency evaluations:

- a. The report should include:
- i. A description of the evaluation, including instruments or other methodology used and nature of the evaluator's contacts with the defendant and counsel and other sources or information relied upon in reaching the opinion;²⁴
 - ii. Results of the mental status examination and diagnosis;²⁵
 - iii. The nature of the treatment provided and his or her response thereto²⁶;
 - iv. An opinion as to the defendant's capacity to understand the nature and object of the criminal proceedings against him and to assist in his defense.²⁷ In the event the evaluator opines that the defendant remains incompetent, the report should include an opinion as to the substantial probability of defendant's restorability to competence and the basis therefore.²⁸
- b. The report should also include the following:
- i. Examples of the defendant's factual understanding of court proceedings (calibrated to the charge[s]) and/or examples of impairments in factual understanding, including knowledge of charges, roles of courtroom participants, pleas and their consequences and plea bargaining, at a minimum²⁹;
 - ii. Examples of the defendant's rational understanding of court proceedings and/or examples of impairments in rational understanding, including

²³ See *Standardizing Protocols for Treatment to Restore Competency to Stand Trial*, Washington State Institute for Public Policy, January 2013, http://www.wsipp.wa.gov/ReportFile/1121/Wsipp_Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods_Full-Report.pdf (review of ten studies evaluating time frames for competency restoration show that average time to restore is 153 days).

²⁴ NJC III.A 1-4. See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 4, at X.C and X.D.

²⁵ NJC at III.A 1; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 4, at X.E and X.G.

²⁶ ABA Standards at 7-4.12 (b) (ii)-(iii).

²⁷ 50 P.S. 7402 (e) (4) (For sections i. – iii.). See also ABA Standards at 7-4.12 (b).

²⁸ NJC at III.A(7) and (8); ABA Standards at 7-4.6 and 7-4.8 (b).

²⁹ Virginia Manual, Appendix B.

- discussions reflecting defendant's understanding allegations, potential evidence/ witnesses, understanding of the potential for being found guilty or accepting plea bargain, and presence or absence of delusional beliefs that significantly impact legal decision-making³⁰;
- iii. Examples or explanation of the defendant's capacity to work with his or her attorney in his/her own defense, including for example, noting if the defendant understands he/she has an attorney who is representing him/her, has the ability to work with counsel, distinguishes capacity to work with counsel from willingness to work with counsel, and includes the evaluator's comments about the defendant's capacity to attend and participate in court process to assist counsel³¹;
 - iv. Whether the defendant was assessed for malingering and if so the results of the assessment;³²
 - v. Nature of the evaluator's contacts with the defendant and counsel;³³
 - vi. Information relied upon in reaching the opinion;³⁴
 - vii. The reasoning for the opinion on competence;³⁵
 - viii. If the evaluator has concluded that the defendant is competent, whether continued treatment is needed to maintain competence.³⁶
- c. If the opinion of the evaluator is that the defendant is competent, he/she should report this opinion to the court. If the opinion of the evaluator is that the defendant continues to have some impairments but is competent, the report should include information as to any accommodations which might be necessary to aid the defendant.³⁷
 - d. If the opinion of the evaluator is that the defendant is not competent but restorable, the report should also include a statement as to the setting in which restoration should occur (jail, outpatient or hospital) and a clear explanation of what types of specific treatment are necessary to restore competency.³⁸ This could include medications and other medical interventions, or psychological interventions such as psychoeducational or therapies to help the defendant manage emotions or symptoms.
 - e. If the opinion is that the defendant is not competent and not restorable, the report should specify what deficits remain, why treatment will not result in any further improvement and clear evidence of what types of treatment were attempted, or if multiple types were not attempted, an explanation as to why not.³⁹

³⁰ *Id.*

³¹ *Id.*

³² NJC at III.A.9.

³³ NJC at III.A.3.

³⁴ NJC. at III.A. 4.

³⁵ Virginia Manual, Appendix B.

³⁶ NJC VII.

³⁷ Virginia Manual, Appendix B.

³⁸ *Id.* See also NJC III.A.7 and A.8.

³⁹ See generally American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 4 at X.H.

PROCEDURE 6 - OUTPATIENT COMPETENCY RESTORATION PROGRAMS¹

1. Purpose: This procedure establishes standards for courts to order competency restoration in the least restrictive environment appropriate for the individual given his mental condition and immediate risk to himself or the community, including jails or outpatient settings consistent with best practices.² Smaller regions may elect to collaborate and combine services in implementing an outpatient-based competency restoration program.

2. References:

National Judicial College, *Mental Competency Best Practices Model* (hereafter NJC) (2012)

American Bar Association *Criminal Justice Standards on Mental Health*, adopted 8.8.16 (hereafter ABA Standards) (2016 ed.)

3. Scope: This procedure applies to outpatient competency restoration programs operating in Pennsylvania.

Section 4: Definitions

Section 5: Qualifications of the evaluator

Section 6: Program requirements

Section 7: Eligibility criteria

Section 8: Screening

Section 9: Order for outpatient competency restoration

Section 10: Program removal

Section 11: Assessing defendant's competence

Section 12: Factors to consider in assessing the restorability

Section 13: Content of reports

4. Definitions:

- a. Commonwealth: the Commonwealth of Pennsylvania.

- b. Competence/competent: a person charged with a crime who has a rational and factual understanding of the proceedings against him/her and the sufficient present ability to consult with his/her lawyer with a reasonable degree of rational understanding.³

- c. Competency evaluation: the clinical process of a thorough and impartial assessment of an individual's ability to participate in his/her defense and assist his/her legal counsel, and to understand relevant legal procedures.⁴

¹ This procedure addresses Policy Research Associates ("PRA") recommendation number 5. See Reducing the Pennsylvania Incompetency to State Trial Restoration Waitlist: More than Just Beds, December 2017.

² NJC at VI.A and VI.A.3.; ABA Standards at 7-4.11(c).

³ *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam). See also 50 P.S. §7402 (a) (paraphrased).

⁴ American Bar Association *Criminal Justice Standards on Mental Health*, adopted 8.8.16 (hereafter ABA Standards) (2016 ed.) § 7-1.3 (b).

- d. Court: magisterial courts, municipal courts, mental health courts and courts of common pleas.
- e. Defendant: the defendant in a criminal case.
- f. Department: the Pennsylvania Department of Human Services.
- g. Evaluator: a psychiatrist or licensed psychologist qualified by certification, training or experience who conducts the evaluation as to the defendant's competence to stand trial/proceed.⁵ The evaluator may be an employee of the county or state or a contractor under contract with the state or county but should not be a member of the treatment team.⁶
- h. Incompetent: Lacking sufficient ability at the pertinent time to consult with counsel with a reasonable degree of rational understanding or to have a rational as well as a factual understanding of the proceedings.⁷
- i. Initial competency evaluation: the first evaluation of the defendant's competence.
- j. Jail-Based Competency Restoration: a program in the jail in which a defendant is provided mental health treatment and psycho-legal education services that are designed to restore a defendant's competence to stand trial.⁸
- k. Licensed psychologist: an individual licensed under the Professional Psychologists Practice Act.⁹
- l. Non-Restorable: there is not a substantial probability that defendant will become competent in the foreseeable future.¹⁰
- m. Outpatient competency restoration program: a program operated in a community setting other than the jail in which psychiatric and other related services necessary to restore a defendant's competence to stand trial are provided.
- n. Outpatient examination/evaluation: an examination conducted in a community setting, the jail or any setting other than a state psychiatric hospital.
- o. Psychiatrist: a licensed medical practitioner specializing in the diagnosis and treatment of mental illness.
- p. Restorable: a defendant for whom, with treatment and psycho-legal education, there is a substantial probability that he/she will become competent in the foreseeable future.¹¹
- q. Treatment: individualized services or supports provided to a defendant, including services or supports that are offered to a defendant to assist a defendant in becoming competent, to restore competence or to ensure the person will remain competent¹² and may include the appropriate use of psychotropic medications,

⁵ ABA Standards at 7-1.3(b). See also National Judicial College *Mental Competency Best Practices Model* (2012) (hereafter NJC) at II.A (best practice is for the evaluator to be a licensed psychiatrist or psychologist with forensic training and/or certification)

⁶ NJC at II.B ("It is best practice, if not an ethical requirement, that the mental health professional who directly treats the defendant not also be the mental health professional who performs the competency evaluation."); See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial* (hereafter "AAPL"), Journal of American Academy of Psychiatry and the Law Online, Mossman et al, December 2007, 35 (Supplement 4)(http://jaapl.org/content/35/Supplement_4/S3 at IV.B ("In general, treating psychiatrists should try to avoid conducting forensic evaluations on their own patients; ideally, independent non-treating psychiatrists should perform such evaluations").

⁷ *Com. v. Appel*, 689 A.2d 891, 899 (Pa. 1997), citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam), *Com. v. Hughes*, 555 A.2d 1264, 1270 (Pa. 1989), 50 P.S. § 7402(a).

⁸ See Procedure 5 - Jail-Based Competency Restoration.

⁹ 50 P.S. § 7402 (h).

¹⁰ *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

¹¹ *Id.*

¹² D.C. ST § 24-531.01.

habilitation services, psycho-educational services, group and individual therapies.¹³

- r. Treatment team: mental health professionals providing diagnostic, treatment and rehabilitative services to a defendant and should be independent from the evaluator.¹⁴

5. Qualifications of the evaluator

- a. An evaluator completing competency evaluations in criminal cases should be a licensed psychologist or psychiatrist with forensic training, experience or certification in performing competency evaluations.¹⁵ Certification in forensic psychology by the American Board of Professional Psychology or certification in forensic psychiatry by the American Academy of Psychiatry and the Law is highly recommended.
- b. An evaluator completing competency evaluations in criminal cases should complete ten hours in continuing education in forensic evaluations every two years.¹⁶
- c. The evaluator completing the competency evaluation should not be a member of the defendant's treatment team.¹⁷

6. Program standards: The following are minimum program standards for outpatient competency restoration programs, which may be provided through a separate program or through a combination of outpatient treatment and education groups provided elsewhere:
- a. The program provides intensive, individualized competency training tailored to the demands of the case and the defendant's competency deficits and intellectual functioning that includes presenting material in multiple formats such as lectures, discussions, videos and mock trials;
 - b. Program must have capacity to provide education about the legal process (including differences between misdemeanor and felonies, plea options/bargaining, roles of courtroom personnel, evidence and witnesses) and psychiatric and emotional symptom management, including medication management;
 - c. Program should have both treatment providers and access to at least one qualified evaluator;
 - d. Evaluations should be completed by someone other than the treatment provider, but should include consideration of all information provided by the treatment provider;
 - e. Competency restoration training should be provided under the supervision of or by licensed clinicians with experience or training in providing competency-related treatment and education;

¹³ ABA Standards at 7-1.1(d). See also *Standardizing Protocols for Treatment to Restore Competency to Stand Trial: Interventions and Clinically Appropriate Time Periods*, Washington State Institute for Public Policy, January 2013, http://www.wsipp.wa.gov/ReportFile/1121/Wsipp_Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods_Full-Report.pdf, pages 5-16.

¹⁴ See note 4 *supra*.

¹⁵ NJC at II.A; ABA Standards at Sections 7-3.9 (a) and 7-3.10.

¹⁶ NJC at II.A.

¹⁷ NJC at II.B.

- f. The program should include access to case managers who can assist the defendant with community-based needs, that may arise independent of the competency restoration;
 - g. The program and its participants should have full access to housing, services and supports (e.g., transportation costs to and from competency restoration site) provided by the county to other mentally ill persons in the community, and participants should not be denied access to services and supports simply because of participation in the outpatient competency restoration program;
 - h. Competency restoration training for defendants should include, at a minimum, two sessions per week for at least one hour;
 - i. The defendant should have a written treatment plan that is completed by a licensed clinician that includes interventions to address the specific deficits in competency previously identified.
7. Eligibility criteria: Individuals who meet the following criteria¹⁸ are eligible for outpatient competency restoration:
- a. Defendant is eligible for pretrial release either on personal recognizance or bail¹⁹;
 - b. Defendant has been determined by a court to be incompetent to stand trial but restorable;
 - j. The defendant suffers from a major mental illness, intellectual disability, or neurocognitive disorder;
 - k. The defendant does not present an immediate danger to community or self;
 - l. The community has a program to restore competency that is suitable for the treatment needs of the defendant;
 - m. The defendant has housing identified and supports in the community that can assist with compliance with appointments and treatment, or the community is able to arrange for such;
 - n. The defendant consents to accept treatment and attend the program;
 - o. The defendant is not currently abusing alcohol or other substances.
8. Screening: Outpatient competency restoration programs should have the opportunity to screen a defendant prior to an order for outpatient competency restoration to determine if defendant is a candidate for the outpatient competency restoration program. In screening candidates, the Program may consider prior criminal history, current mental status and substance use, and, as well as results of any formal screening assessments completed and the results of an interview. Screening should occur within five calendar days of the program being notified of the defendant's referral to the program. The program should notify the court within five days if the event the defendant is deemed not to be a candidate for outpatient competency restoration, with specific rationale.
9. Order for outpatient competency restoration: The order for outpatient competency restoration should include, at a minimum the following:
- a. Order for care and treatment up to 60 days to restore competency;

¹⁸ NJC at VI.A. (3)

¹⁹The pretrial release decision should be made independent of fitness and restoration considerations.

- b. Statement that defendant accepts all conditions to participate in outpatient competency restoration;
- c. Statement requiring the defendant to meet conditions of the order and all treatment recommendations made by the provider, including mental health and substance use treatment, taking all prescribed medication, urine testing for substance use, and attending all other programming;
- d. Statement as to the type and frequency of follow up reports;
- e. Statement that if the treatment providers determine that the defendant is no longer appropriate for the program, is not complying with the program, is no longer incompetent or is not likely to be restored to competence, the treatment provider should notify the court and counsel in writing of the changed circumstance within three days of making this determination.
- f. Statement that defendant has consented to allowing the treatment provider to access clinical information pertinent to determining and addressing defendant's competency while defendant is in the community.

10. Program removal: A defendant may be recommended for removal from the program prior to completion of the program under the following circumstances:

- a. Noncompliance with the program (i.e. missing appointments, non-compliance with medication);
- b. New charges or arrest;
- c. Active substance use;
- d. Becoming a danger to self or community;
- e. Decline in clinical stability;
- f. Poor motivation or cooperation.

Except where the defendant has become dangerous to self or the community or has been arrested, prior to removal from the program, the program staff should notify the defense attorney of the issue and make reasonable efforts to address the issues before recommending to the Court that the defendant be terminated from the program. A person who has been removed from the program may be considered for jail-based competency restoration.

11. Assessing Defendant's Competence

- a. The evaluator should review the defendant's competence every 60 days, to determine the defendant's progress toward competence.²⁰ The evaluator should inform the treatment provider of particular issues that are interfering with the defendant's competence as they are identified, and the provider, as appropriate, modify the treatment plan and interventions to address the continued incompetence.

²⁰ ABA Standards at 7.4-12.

- b. The evaluator should submit a report to the court and counsel on the defendant's competency at regular intervals prior to any court hearing or as ordered by the court.²¹
- c. In assessing the defendant's competence, the evaluator should consider measuring defendant's comprehension against the following specific *factual* understanding criteria to determine the specific areas of deficiency, if any, which are contributing to the defendant's continued incompetence:
 - i. Name of charges and if felony or misdemeanor;
 - ii. Knowledge of possible pleas, consequences and penalties;
 - iii. Knowledge of court procedures;
 - iv. Understanding of plea bargaining;
 - v. Understanding of roles of court participants (judge, prosecutor, defense counsel, jury etc.);
 - vi. Understanding of defenses.²²
- d. In assessing the defendant's competence, the evaluator should consider measuring the defendant's status against each of the following specific *rational* understanding criteria to determine which areas of deficiency which are contributing to the defendant's incompetence:
 - i. Ability to explain the charges and whether his/her understanding is rational;
 - ii. Understanding of potential sentences/consequences if convicted;
 - iii. Intended plea and reasoning for it;
 - iv. Understanding potential witnesses and evidence in the case;
 - v. Thoughts about plea options, plea bargaining;
 - vi. Thoughts about defenses.²³
- e. In assessing the defendant's competence, the evaluator should consider measuring the defendant's status against each of the following specific criteria relating to the *ability to assist* counsel to determine which areas of deficiency which are contributing to the defendant's incompetence:
 - i. Ability to testify relevantly;
 - ii. Ability to challenge witnesses;
 - iii. Ability to disclose pertinent information
 - iv. Ability to relate to counsel and discuss matters rationally;
 - v. Ability to manage behavior
 - vi. Ability to concentrate.²⁴

12. Factors to Consider in Determining Restorability of Competence

²¹ 50 P.S § 7403(c) (not *less* that ever 90 days). ABA Standards 7-4.12 (a) (30 days, 90 days, 180 days and every 180 days thereafter).

²² Morris and DeYoung, Psycholegal abilities and restoration of competence to stand trial. *Behav Sci Law* 30:710-28 2012, <https://pdfs.semanticscholar.org/3f29/705b0176ed22852294f1a2e54a18f3647f64.pdf>, (at page 725) (“These findings support a conceptual framework for evaluating competency restoration by viewing competency to stand trial as a hierarchy of demands progressing from the appropriateness of basic behavior and outlook, through factual understanding of legal procedures and participants, and ultimately requiring rational decision-making and ability to work productively with one’s attorney. Although this study concerned competency restoration, the proposed conceptual framework should generalize to all stages of assessing competency to stand trial.”) See also Virginia Manual Appendix D.

²³ Virginia Manual Appendix D.

²⁴ *Id.*

- a. In opining whether there is a substantial probability that a defendant's competence is restorable in the foreseeable future, the evaluator should consider the following factors²⁵:
 - i. Defendant's diagnoses (i.e. psychotic disorders, intellectual disorders, personality disorders, substance use disorders);
 - ii. Defendant's prior history of incompetency findings in previous cases;
 - iii. Whether the defendant has a history of chronic psychosis with long periods of hospitalizations;
 - iv. Defendant's age at onset of illness;
 - v. Number of prior hospitalizations of defendant;
 - vi. Seriousness of current charges and prior criminal history;
 - vii. Degree of factual understanding after three months of treatment;
 - viii. Defendant's response to current treatment;
 - ix. Defendant's current age.
- b. In considering the defendant's competence restorability, the evaluator should also consider the length of time the defendant's incompetency has persisted and whether any treatment options are available, including treatment in a setting other than in a community outpatient setting, that would be appropriate but not yet tried.²⁶
- c. Based upon the results of the assessments conducted pursuant to Section 11 and the factors set forth under this section, the evaluator should render an opinion as to whether the defendant's competence is restorable in the foreseeable future.

13. Content of reports relating to results of competency evaluations:

- a. The report should include:
 - i. A description of the evaluation, including instruments or other methodology used and nature of the evaluator's contacts with the

²⁵ Morris and DeYoung, *Long Term Competence Restoration*, *J of Amer Academy of Psychiatry and the Law*, 42:81-90, March 2014, <http://jaapl.org/content/42/1/81> (Recent research suggests that older individuals with chronic, treatment refractory severe mental illness or mental retardation are less restorable; younger individuals with criminal histories and personality and non-psychotic disorders are more likely to be restored. Average length of stay to restoration was 1.58 years and after 3.5 years restoration was very rare (less than 3%). Those with more serious charges were more likely to be restored to competence and those with some understanding of factual understanding, as opposed to rational assistance abilities, were more likely to be restored.) See also Colwell and Gianessini, Demographic, Criminogenic, and Psychiatric Factors that Predict Competency Restoration, *J. Amer Academy of Psychiatry and the Law*, 39:297-306, Nov 2011, <http://jaapl.org/content/39/3/297.long> (those deemed incompetent and non-restorable had more prior hospitalizations, more prior incarcerations, more prior episodes of being found incompetent to stand trial, lower IQs, were prescribed more medications, and were more likely to have diagnoses of borderline intellectual functioning, psychosis or other cognitive deficiency. Those restored to competency were more likely to have personality disorders.); Mossman, Predicting Restorability of Incompetent Criminal Defendants, *J of Amer Academy of Psychiatry and the Law*, 35:34-43, March 2007, <http://jaapl.org/content/35/1/34> ("if a defendant is incompetent because of a longstanding psychotic disorder that has resulted in lengthy periods of psychiatric hospitalizations, this history supports an opinion that the defendant has a well-below-average probability of becoming competent with psychiatric treatment. Second, if a defendant has an irremediable cognitive disorder (e.g. mental retardation) and can grasp little information that the examiner attempts to convey during an evaluation, this finding would support a conclusion that restoration efforts have well-below-average chances of success.)

²⁶ See *Standardizing Protocols for Treatment to Restore Competency to Stand Trial*, Washington State Institute for Public Policy, January 2013, http://www.wsipp.wa.gov/ReportFile/1121/Wsipp_Standardizing-Protocols-for-Treatment-to-Restore-Competency-to-Stand-Trial-Interventions-and-Clinically-Appropriate-Time-Periods_Full-Report.pdf (review of ten studies evaluating time frames for competency restoration show that average time to restore is 153 days).

defendant and counsel and other sources or information relied upon in reaching the opinion²⁷;

- ii. Results of the mental status examination and diagnosis;²⁸
 - iii. The nature of the treatment provided and his or her response thereto²⁹;
 - iv. An opinion as to the defendant's capacity to understand the nature and object of the criminal proceedings against him and to assist in his defense.³⁰ In the event the evaluator opines that the defendant remains incompetent, the report should include an opinion as to the substantial probability of defendant's restorability to competence and the basis therefore.³¹
- b. The report should also include the following:
- i. Examples of the defendant's factual understanding of court proceedings (calibrated to the charge[s]) and/or examples of impairments in factual understanding, including knowledge of charges, roles of courtroom participants, pleas and their consequences and plea bargaining, at a minimum³²;
 - ii. Examples of the defendant's rational understanding of court proceedings and/or examples of impairments in rational understanding, including discussions reflecting defendant's understanding allegations, potential evidence/ witnesses, understanding of the potential for being found guilty or accepting plea bargain, and presence or absence of delusional beliefs that significantly impact legal decision-making³³;
 - iii. Examples or explanation of the defendant's capacity to work with his or her attorney in his/her own defense, including for example, noting if the defendant understands he/she has an attorney who is representing him/her, has the ability to work with counsel, distinguishes capacity to work with counsel from willingness to work with counsel, and includes the evaluator's comments about the defendant's capacity to attend and participate in court process to assist counsel³⁴;
 - iv. Whether the defendant was assessed for malingering and if so the results of the assessment;³⁵
 - v. Nature of the evaluator's contacts with the defendant and counsel;³⁶
 - vi. Information relied upon in reaching the opinion;³⁷
 - vii. The reasoning for the opinion on competence³⁸;
 - viii. If the evaluator has concluded that the defendant is competent, whether continued treatment is needed to maintain competence.³⁹

²⁷ NJC III.A 1-4. See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 4, at X.C and X.D.

²⁸ NJC at III.A 1; See also American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 4, at X.E and X.G.

²⁹ ABA Standards at 7-4.12 (b) (ii)-(iii).

³⁰ 50 P.S. § 7402(e)(4) (For sections i. – iii.). See also ABA Standards at 7-4.12 (b).

³¹ NJC at III.A(7) and (8); ABA Standards at 7-4.6 and 7-4.8 (b).

³² Virginia Manual, Appendix B.

³³ *Id.*

³⁴ *Id.*

³⁵ NJC at III.A.9.

³⁶ NJC at III.A 3.

³⁷ NJC. at III.A. 4.

³⁸ Virginia Manual, Appendix B.

³⁹ NJC VII.

- c. If the opinion of the evaluator is that the defendant is competent, he/she should report this opinion to the court. If the opinion of the evaluator is that the defendant continues to have some impairments but is competent, the report should include information as to any accommodations which might be necessary to aid the defendant.⁴⁰
- d. If the opinion of the evaluator is that the defendant is not competent but restorable, the report should also include a statement as to the setting in which restoration should occur (continued outpatient, the jail or hospital) and a clear explanation of what types of specific treatment are necessary to restore competency.⁴¹ This could include medications and other medical interventions, or psychological interventions such as psychoeducational or therapies to help the defendant manage emotions or symptoms.
- e. If the opinion is that the defendant is not competent and not restorable, the report should specify what deficits remain, why treatment will not result in any further improvement and clear evidence of what types of treatment were attempted, or if multiple types were not attempted, an explanation as to why not.⁴²

⁴⁰ Virginia Manual, Appendix B.

⁴¹ *Id.* See also NJC III.A.7 and A.8.

⁴² See generally American Academy of Psychiatry and the Law, *AAPL Practice Guideline for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, *supra* n. 4 at X.H.