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Statutory Reform In The Georgia Juvenile Court System: Juvenile Competency Issues Finally Addressed

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STATUTORY REFORM IN THE GEORGIA JUVENILE COURT SYSTEM: JUVENILE COMPETENCY ISSUES FINALLY ADDRESSED

INTRODUCTION

The right not to be tried while incompetent is a fundamental right defendants receive in all criminal trials.[1] Society does not want to punish a person who does not understand that he or she has committed a wrongful act.[2] Certain juvenile courts also recognize that the protection for incompetent defendants extends to juvenile delinquency hearings.[3] An incompetent juvenile has a dependant status, and the court retains the right to supervise the juvenile.[4] Accordingly, juvenile court judges must be familiar with a range of personality disorders that render a juvenile incapable to stand adjudication, including severe emotional disturbance, behavior personality disorder, bipolar disorder, and antisocial behavior.[5]

Unfortunately, not all states have addressed the issue of juvenile competency, and of those that have, only a handful have codified a structure for juvenile competency hearings.[6] In 1999, a group of Georgia juvenile court judges, lawyers, and other scholars presented the Georgia General Assembly with legislation to prescribe the procedures that juvenile courts should follow when determining a juvenile's competency to

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1. *See* Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454 (1967).

2. *See* Vance L. Cowden & Geoffrey R. McKee, *Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship*, 33 U. LOUISVILLE J. FAM. L. 629, 630-31 (1995).

3. *See, e.g., In re* Causey, 363 So. 2d 472, 476 (La. 1978); *In re* S.W.T., 277 N.W.2d 507, 511 (Minn. 1979). Both courts recognized as fundamental the juvenile's right not to be tried while incompetent. *See In re* Causey, 363 So. 2d at 476; *In re* S.W.T., 277 N.W.2d at 511.

4. *See* Interview with Judge Peggy Walker, Associate Judge, Douglas County Juvenile Court, in Douglasville, Ga. (Aug. 18, 1997) [hereinafter Judge Walker Interview]. As a note to the reader, the Author served as an extern for Judge Walker and assisted her, as well as the Georgia Council of Juvenile Court Judges, in drafting proposed legislation for the Georgia General Assembly on juvenile competency.

5. *See id.*

6. Arizona, New York, Tennessee, and Texas are examples of states that have codified a structure for dealing with juvenile competency proceedings. *See* Thomas Grisso et al., *Competency to Stand Trial in Juvenile Court*, 10 INT'L J.L. & PSYCHIATRY 1, 2 n.2 (1987).

proceed in a delinquency hearing.[7] The 1999 General Assembly passed this legislation; however, legislators and juvenile court judges must keep careful watch for necessary amendments and improvements as these statutes are implemented.[8]

This Note addresses the growing urgency for legislation that will avoid a situation in which an incompetent child is adjudicated without inquiring into the child's mental abilities. Additionally, the Note discusses several elements of effective juvenile competency hearings that are indispensable to effecting change in the juvenile courts of Georgia. Part I tracks the history and formation of the juvenile court system. Part II examines the history of a defendant's right to be competent to stand trial and the standard by which a court judges his or her competency. This section also discusses the implementation of the right to competency in juvenile proceedings in many state courts. Part III examines the Georgia case that led to much of the statutory reform in the area of juvenile competency and that case's implications. Part IV evaluates the fundamental importance of the legislative changes to future Georgia cases and suggests several areas of the law and of public record that will assist Georgia and other states in drafting legislation on juvenile competency issues.

I. HISTORY OF THE JUVENILE COURT SYSTEM

A. The Formation and Mission of the First Juvenile Courts

The legal community formed the juvenile court system in the nineteenth century to protect children from the harshness of the adult court system.[9] The juvenile court system "formally recognized the numerous differences between adults and minors, particularly minors' incapacity and immaturity."[10]

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7. *See* Judge Walker Interview, *supra* note 4. A draft of the legislative proposal to determine competency of Georgia youths was originally presented to the 1997 Fall Seminar of the Georgia Council of Juvenile Court Judges in Athens, Georgia, November 10-12, 1997. *See id.*

8. *See id.* The legislation originated as HB 417 and provides for the stay of certain proceedings regarding a child who may not be competent. *See id.*; O.C.G.A. §§ 15-1-150 to -155 (Supp. 1999).

9. *See* Grisso et al., *supra* note 6, at 1.

10. Steven Friedland, *The Rhetoric of Juvenile Rights*, 6 STAN. L. & POL'Y REV. 137, 138 (1995). The early juvenile courts resembled a hospital—the judge was the "doctor"

Founders of the juvenile courts strove to rehabilitate rather than punish juveniles by redirecting delinquent offenders.[11]

The State of Illinois implemented the first juvenile court system in the United States.[12] Unlike the adult criminal system, the juvenile courts acted in the place of parents who seemingly had lost control over the child and who could no longer protect the child from harm.[13] As such, the juvenile courts based their decisions on the "paramount concern for the best interest of the minor and the public."[14]

The juvenile court founders intended to create a non-adversarial and informal environment in which the judge could counsel the child during the adjudication of the case.[15] The juvenile court "adopts" the child under the theory of *parens patriae*,[16] and, under this theory, the court, acting as a guardian of the children who come before it, works toward eliminating juvenile crime through treatment and rehabilitation.[17] The juvenile court judge consults with a team of social welfare and mental health professionals to devise a workable individualized case plan for a juvenile's treatment and rehabilitation.[18]

The juvenile court founders did not grant juveniles the same procedural due process rights guaranteed to adults in criminal trials.[19] The court did not deprive juveniles of freedom, "but rather took temporary custody of the children in their best interests."[20] Accordingly, the "adult defendant's right to be

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making a "diagnosis" of the case. The judge named the "treatment" for the juvenile delinquent and "checked" on the juvenile's rehabilitation. *See id.* at 139.

11. *See* Grisso et al., *supra* note 6, at 3.

12. *See* Friedland, *supra* note 10.

13. *See* Korine L. Larsen, Comment, *With Liberty and Juvenile Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts*, 20 WM. MITCHELL L. REV. 835, 841-42 (1994). For parents who had lost control in the home, the juvenile court assumed their role in rehabilitating the child. *See id.* at 842.

14. State v. Kempf, 282 N.W.2d 704, 710 (Iowa 1979).

15. *See* Jacqueline Cuncannan, *Only When They're Bad: The Rights and Responsibilities of Our Children*, 51 WASH. U. J. URB. & CONTEMP. L. 273, 280 (1997).

16. *See* Friedland, *supra* note 10, at 139. *Parens patriae* means "parent of the country," and describes the state's role as "sovereign and guardian of persons under a legal disability to act for themselves." *Id.*

17. *See id.* at 140.

18. *See* Grisso et al., *supra* note 6, at 1.

19. *See* Cuncannan, *supra* note 15, at 281.

20. Larsen, *supra* note 13, at 843.

competent to stand trial" did not apply to juvenile courts during their first seventy years of existence.[21]

B. The Transformation of the Juvenile Court

Supreme Court decisions of the late 1960s spurred change in the juvenile court system. The Supreme Court supported the founders' view of an informal system; however, "[a]s abuses in [the] court system mounted" and as juveniles grew unresponsive to treatment and rehabilitation, the Court sought to make some changes.[22]

In re Gault,[23] the landmark case in the juvenile court's transformation, implemented procedural due process protections for juvenile offenders in the adjudicatory phase of delinquency proceedings.[24] Justice Fortas noted, in the majority opinion, that the increasing similarities between juvenile adjudication and adult criminal proceedings weighed in favor of granting children the same constitutional protections as adult criminals.[25] The Court held that during adjudication, juveniles were entitled to certain procedural rights, namely: notice of charges, right to counsel, right to confrontation and cross-examination, privilege against self-incrimination, right to a transcript of proceedings, and right to appellate review.[26]

Juveniles acquired additional protections in later Supreme Court decisions.[27] *In re Winship*[28] held that the adjudicatory phase required proof "beyond a reasonable doubt."[29] *Breed v. Jones*,[30] a 1975 decision, extended to minors the same protections from double jeopardy as enjoyed by adults.[31]

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21. Grisso et al., *supra* note 6, at 2.
22. Friedland, *supra* note 10, at 140.
23. 387 U.S. 1 (1967).
24. *See id.* at 29-30; Dennis E. Cichon, *Developing a Mental Health Code for Minors*, 13 T.M. COOLEY L. REV. 529, 551 (1996).
25. *See In re* Gault, 387 U.S. at 29-30.
26. *See id.* at 58-59.
27. *See* Cuncannan, *supra* note 15, at 284.
28. 397 U.S. 358 (1970).
29. *Id.* at 368. The Court noted that applying this standard would not disrupt the rehabilitative model of the juvenile court. *See id.* at 366. The Court described the standard as a "constitutional safeguard." *Id.*
30. 421 U.S. 519 (1975).
31. *See id.* at 541. The Court noted that the goals of the juvenile court system were not outweighed by the need for protections against double jeopardy. Thus, the Court stated

Despite these reforms, the Supreme Court retreated somewhat in *McKeiver v. Pennsylvania*.[32] There, the Court held that the Constitution did not require trial by jury in a delinquency hearing.[33] The Court reasoned that trial by jury would disrupt the informal proceedings of the juvenile courts and introduce to them the delays, formalities, and publicity associated with the adult system.[34] One commentator noted: "The Court feared that jury trials would... call into question the need for a separate juvenile court" because of the added similarities between adult prosecution and juvenile adjudication.[35]

In the post-*Gault* era, juveniles gained certain procedural due process rights; however, all constitutional protections guaranteed to adults were not granted automatically to juveniles. Rather, the constitutional protections were scrutinized on a case-by-case basis for their effect upon the juvenile court proceedings.[36]

II. THE RIGHT TO BE COMPETENT TO STAND TRIAL

A. The Development of a Defendant's Right to be Competent to Stand Trial

One of the recognized postulates of American jurisprudence is that the "state cannot indict, try, sentence or execute any individual if he [or she is] known to be insane."[37] One scholar writes that the "chief reason for the [insanity] rule [is] that an offender who [is] not mentally competent to appreciate the nature of the proceedings could not appreciate the significance

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that there would be no disruption in the juvenile court proceedings. *See id.* at 537-38.

32. 403 U.S. 528 (1971).

33. *See id.* at 545.

34. *See id.* at 550. The Court concluded that requiring a jury trial might invoke a full adversarial proceeding and disrupt the informal protective nature of juvenile adjudication. *See id.*

35. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 696 (1991).

36. *See, e.g., In re* Causey, 363 So. 2d 472, 474 (La. 1978) (noting courts should make an "historical inquiry" into whether the right is a part of fundamental fairness and a "functional analysis" of whether granting the right asserted to the juvenile defendant would interfere with the beneficial aspects of the informal juvenile proceeding).

37. Cowden & McKee, *supra* note 2, at 630.

of conviction and therefore could not respond by repentance, or presumably, be reformed by punishment."[38]

In *Pate v. Robinson*[39] and *Drope v. Missouri*,[40] the Supreme Court expressly protected the due process rights of adult criminals not to be tried or convicted while incompetent to stand trial.[41] The test for competency, as enumerated by the Court in *Dusky v. United States*,[42] is "whether [the defendant] 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.' "[43]

The *Drope* Court added that the court system must continue to monitor the mental condition of the defendant not only at the outset of trial, but also during the adjudication phase, noting any change in behavior that may render the defendant incompetent.[44] *Pate* also suggested that a defendant's right to be competent cannot be waived.[45] In that case, the Court discussed factors that a trial court may consider in determining a defendant's competence to stand trial. For example, a trial court may consider the defendant's erratic behavior and demeanor before or at trial.[46] Additionally, a trial court may consider past psychiatric treatment evaluations separately or in the aggregate to determine whether the defendant currently needs further hearings on competence.[47]

A defendant's freedom from trial while incompetent is a fundamental right that enables the justice system to protect against unfairly subjecting a criminal defendant to liability and potential harsh consequences.[48] Moreover, putting an

38. *Id.* (quoting ARTHUR R. MATTHEWS, JR., MENTAL DISABILITY AND THE CRIMINAL LAW 18-19 (1970)).

39. 383 U.S. 375 (1966) (holding that denial of defendant's right to be competent during trial deprives defendant of due process rights).

40. 420 U.S. 162 (1975) (holding that denial of defendant's right to be competent during trial deprives defendant of due process rights).

41. *See Pate*, 383 U.S. at 385; *Drope*, 420 U.S. at 181-82.

42. 362 U.S. 402 (1960).

43. *Id.* (quoting United States Solicitor General Rankin).

44. *See Drope*, 420 U.S. at 181.

45. *See Pate*, 383 U.S. at 384.

46. *See id.* at 378, 386; *see also id.* at 389-91 (Harlan, J., dissenting) (discussing these two factors relied on by the Court).

47. *See id.* at 379-80.

48. *See* Richard Barnum & Thomas Grisso, *Competence to Stand Trial in Juvenile*

incompetent criminal defendant on trial can damage the court system because the defendant's conduct could upset the court's agenda or frustrate the trial process.[49] Case law has afforded, "as a matter of fairness and humanity," that a defendant cannot stand trial if he is "unable, because of mental or physical disability, to understand the proceedings against him or to act rationally in his own defense."[50] In order to protect against all forms of incapacity, mental incompetence "include[s] mental retardation as well as mental illness or insanity."[51] A defendant is entitled to an independent hearing before the prosecution proceeds when doubt exists as to the defendant's competency.[52]

B. The Right Not to be Tried While Incompetent Implemented in the Juvenile Justice System

As stated previously, juvenile courts used informal proceedings to devise rehabilitative treatment plans for juveniles.[53] After 1970, the post-*Gault* era, juvenile courts in several states faced questions of whether and to what extent juveniles had the right to be competent during delinquency proceedings.[54] Because a person's right to be competent at trial is a "due process-fundamental fairness right," a juvenile in an adjudicatory hearing should enjoy the same right unless the "end[s] of the juvenile justice system will be thwarted by its application."[55] The courts found that granting this right would not disrupt the informality the framers intended.[56]

Because the concept of juvenile competency is new and complex, a definite answer to the question of its legitimacy does not exist and, in fact, many states have yet to confront the issue.[57] The states' failure to provide structured programs for the

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Court in Massachusetts: Issues of Therapeutic Jurisprudence, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 321, 327 (1994).

49. *See* Note, *supra* note 1, at 457-58.

50. *Id.* at 454 (citing United States v. Chisolm, 149 F. 284 (S.D. Ala. 1906); Youtsey v. United States, 97 F. 937 (6th Cir. 1899)).

51. Cowden & McKee, *supra* note 2, at 631.

52. *See Pate*, 383 U.S. at 385; Note, *supra* note 1, at 454-55.

53. *See* Friedland, *supra* note 10, at 139.

54. *See id.* at 140-41.

55. *In re* Causey, 363 So. 2d 471, 476 (La. 1978).

56. *See, e.g., id.; In re* S.W.T., 277 N.W.2d 507, 511 (Minn. 1979).

57. *See* Grisso et al., *supra* note 6, at 2.

adequate treatment of juveniles with mental or emotional disabilities stems from a lack of funding and other resources[58] and presents a unique problem for mental health care providers, who also lack the funding to "adequately serve the package of needs presented by a mentally impaired child."[59]

This myriad of difficulties has not deterred state courts and state legislatures from debating whether the juvenile courts should require competency in delinquency proceedings.[60] Some state courts have held that a juvenile's right not to be adjudicated delinquent while incompetent is a fundamental right in the juvenile court system.[61] Unfortunately, many state legislatures have not followed through by passing laws that address the need for juvenile competency hearings or the implementation of case plans.[62]

Without suitable guidelines, the courts are unable to provide the best disposition for the child.[63] Several states, however, have drafted legislation in response to the courts' insistence on the implementation of procedures for juvenile competency hearings.[64] As discussed in the next part of this Note, the State of Georgia has recently faced this dilemma and, in response to court opinions requesting statutory reforms in the area of juvenile law, the Council of Juvenile Court Judges presented

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58. *See* Cichon, *supra* note 24, at 529-30.

59. *Id.*

60. Arizona, Colorado, the District of Columbia, Florida, Georgia, Idaho, Kansas, Minnesota, New York, Tennessee, Texas, and Wisconsin currently have specific legislation for competency hearings in juvenile delinquency proceedings. *See* Grisso et al., *supra* note 6, at 2 n.2.

61. *See, e.g., In re* S.W.T., 277 N.W.2d 507, 511 (Minn. 1979). This case has been cited by other state courts that have also held that the right to be competent in juvenile proceedings is a fundamental right. *See, e.g., In re* W.A.F., 573 A.2d 1264, 1267 (D.C. 1990).

62. *See* Cowden & McKee, *supra* note 2, at 629 (stating that "[t]he competency of juveniles to stand trial in a delinquency proceeding has received only limited attention").

63. *See* Dandoy v. Superior Court, 619 P.2d 12, 15-16 (Ariz. 1980); *In re* James H., 143 Cal. Rptr. 398 (Ct. App. 1978); *In re* Two Minor Children, 592 P.2d 166, 168-70 (Nev. 1979).

64. For example, Arizona added legislation specific to juvenile courts in the area of juvenile competency in 1996. This addition occurred after the case of *Dandoy v. Superior Court*, which held that the requirements of due process indicate that courts must be able to inquire into the competency of a juvenile before adjudication. *See* ARIZ. REV. STAT. T.8, ch.2, art. 8, References and Annotations (1996); *Dandoy*, 619 P.2d at 15.

legislation to the 1999 Georgia General Assembly regarding the codification of juvenile court competency hearings.[65]

III. *IN RE S.H.*: THE GEORGIA CASE PROMPTING THE NECESSARY STATUTORY REFORM

A. Factual Account

In *In re S.H.*,[66] a petition of delinquency was filed with the Fulton County Juvenile Court alleging that S.H., a twelve-year-old juvenile, had committed aggravated sodomy.[67] The juvenile court initially identified several examples of S.H.'s incompetency. The juvenile's mental ability at the time of the offense was equivalent to that of a six-year-old.[68] He possessed an I.Q. of forty,[69] indicative of moderate or "trainable" mental retardation.[70] S.H.'s "court-appointed guardian *ad litem* testified [at the hearing] that S.H. did not know the difference between right or wrong, and a court-ordered [psychological] evaluation of S.H. noted that he was 'not a good historian for detail.' "[71]

S.H.'s court-appointed counsel petitioned the juvenile court to find S.H. incompetent to stand trial.[72] The juvenile court found S.H. incompetent but denied the motion that claimed he was incapable of standing trial.[73] The juvenile court then adjudicated S.H. delinquent.[74] The juvenile court stated: "Georgia law does not provide a statutory framework in order to protect juveniles [sic] rights not to be tried in a delinquency proceeding while they are incompetent."[75] Therefore, the juvenile court decided that a juvenile was not guaranteed the

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65. *See* Judge Walker Interview, *supra* note 4. HB 417 was introduced and passed during the 1999 Georgia legislative session.
66. 220 Ga. App. 569, 469 S.E.2d 810 (1996).
67. *See id.*
68. *See id.* at 570, 469 S.E.2d at 810.
69. *See id.*
70. *See* ALAN STOUDEMIRE, CLINICAL PSYCHIATRY FOR MEDICAL STUDENTS 463, Table 16-6 (2d ed. 1994).
71. *In re* S.H., 220 Ga. App. at 570, 469 S.E.2d at 810.
72. *See id.*
73. *See id.*
74. *See id.*
75. *Id.* at 570, 469 S.E.2d at 810-11 (alteration in original).

right to be competent to stand trial in an adjudicatory proceeding.[76]

S.H. appealed based on two theories. He contended "that the juvenile court violated his due process rights by adjudicating him delinquent" in spite of his incompetence and by "depriving him of his liberty" at a time when he did not understand the nature of the offense and could not effectively assist in his defense.[77] The Georgia Court of Appeals held that S.H.'s due process rights were violated and relied on past United States Supreme Court decisions and state case law to establish the entitlement to be competent to stand trial in adjudicatory proceedings in juvenile court.[78]

B. Implications of In re S.H.*: Reforms in Georgia Statutory Law*

Cases such as *In re S.H.* highlight Georgia's need for provisions in the juvenile code that address competency hearings in adjudicatory proceedings.[79] The fact that competency issues only arise in a few cases each year does not negate the dire need for guidelines.[80] With the recent additions in the juvenile code, Georgia joins many other states that have drafted juvenile court rules establishing guidelines and procedures for determining competency in adjudicatory proceedings.[81]

In 1997, the Georgia Council of Juvenile Court Judges organized a coalition to submit proposed juvenile competency legislation to the Georgia General Assembly. While the Council was unable to draft a finished product in time for the 1998 legislative session,[82] it introduced legislation to the 1999 Georgia General Assembly that addressed the following: the legislation's

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76. *See id.* at 570, 469 S.E.2d at 810.

77. *Id.* at 570-71, 469 S.E.2d at 810.

78. *See id.* at 571, 469 S.E.2d at 810 (citing *In re* Gault, 387 U.S. 1 (1967); *In re* S.L.H., 205 Ga. App. 278, 279-80, 422 S.E.2d 43 (1992); *In re* S.W.T., 277 N.W.2d 507 (Minn. 1979)).

79. *See* Judge Walker Interview, *supra* note 4.

80. *See id.*

81. Arizona, Colorado, the District of Columbia, Florida, Idaho, Kansas, Minnesota, New York, Tennessee, Texas, and Wisconsin have undergone a similar transformation. Each jurisdiction began without legislation on juvenile competency; then, after case law established the need for assistance in this area, the jurisdiction proposed legislation that the respective legislative bodies eventually adopted. *See* Grisso et al., *supra* note 6, at 2.

82. *See* Judge Walker Interview, *supra* note 4.

purpose; juvenile dual diagnoses; juvenile physical and mental assessment prior to adjudication; case planning; handling of dangerous and nondangerous juveniles; victims' rights; guardian *ad litem* appointment; and juvenile haplessness.[83]

This type of legislation poses unique problems and considerations for the drafting committee.[84] One problem is that children vary in their abilities to comprehend and understand.[85] Another is that the issue of juvenile competency reaches the courts infrequently.[86] Thus, safeguards must be in place to avoid abuses.[87] States implementing or amending legislation should consider the following factors, suggested by one commentator, for effective implementation: (1) when presented with a competency evaluation petition, the court must first determine if the evidence supports holding a hearing; (2) if the evidence supports a hearing and the court grants the petition, a mental health provider must evaluate the juvenile and present that information to the court; and (3) the court must then evaluate the mental health report and extrinsic evidence to determine the juvenile's competence to continue with adjudication.[88] Regardless of the impetus to implement competency evaluations in juvenile court, the end result must be to further the ideals and purposes of the juvenile court: to rehabilitate and reform juveniles in need of the court's intervention.[89]

IV. THE FUNDAMENTAL IMPORTANCE OF LEGISLATIVE CHANGES TO FUTURE CASES

As stated above, few states have addressed the problem of incompetency in juvenile delinquency proceedings. In correcting this oversight, legislators should develop a statutory scheme directed at the needs of children.[90] Further, states like Georgia that have enacted such statutes should monitor their

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83. *See id.*

84. *See* Telephone Interview with Barbara Dooley, Director of Tennessee Juvenile Court Services (Oct. 8, 1997) [hereinafter Dooley Interview].

85. *See id.*

86. *See* Telephone Interview with Judge D. Bruce Levy, Florida Administrative Judge (Oct. 8, 1997) [hereinafter Judge Levy Interview].

87. *See* Dooley Interview, *supra* note 84.

88. *See* Grisso et al., *supra* note 6, at 8.

89. *See In re* S.H., 220 Ga. App. 569, 569-71, 469 S.E.2d 810, 811 (1996).

90. *See* Cichon, *supra* note 24, at 531.

implementation and make improvements when needed. Overall, juveniles must be addressed separately from adults because they "have many distinct treatment needs and legal concerns."[91] Mental illness in adults differs greatly from that in juveniles; juvenile court judges need proper guidelines to aid them in establishing a treatment plan for juvenile personality disorders that have not yet manifested in adulthood.[92] Three justifications for including the right to competency in juvenile delinquency proceedings include: (1) constitutional requirements under the Fourteenth Amendment; (2) protection from the "stress or duress" caused by adjudication while unable to understand the proceedings; and (3) "provision of needed treatment" at the first sign of incompetency.[93]

Therefore, two questions arise: what factors must Georgia or other state legislators consider when drafting or amending the statutory scheme, and which elements are indispensable to the effective implementation of such a scheme in future cases? The remainder of this Note will discuss key points in the creation of effective legislation for future cases in Georgia based upon other states' successes and failures in drafting juvenile competency statutes.

A. Case Analyses: The Georgia Legislation Should Consider the Concerns of States That Have Enacted Juvenile Competency Statutes

1. State ex rel. Dandoy v. Superior Court

In 1980, the Arizona Supreme Court in *Dandoy v. Superior Court*[94] recognized the authority of the juvenile court to continue the involuntary hospitalization of an incompetent minor. At the time of the decision, Arizona did not have a juvenile competency statute; however, based upon Supreme Court cases such as *In re Gault* and state cases, the court held that due process requires that juvenile courts have the authority and responsibility to inquire into a juvenile's mental

91. *Id.*
92. *See* Judge Walker Interview, *supra* note 4.
93. Grisso et al., *supra* note 6, at 4-5.
94. 619 P.2d 12, 14 (Ariz. 1980).

competence before adjudication.[95] The case turned on the fact that the minor had not been adjudicated delinquent at the time of his hospitalization.[96] The court also determined that despite the uniqueness of the juvenile court, the issue of competency was one instance when adult rules of criminal procedure must be applied to juvenile proceedings.[97]

Dandoy vested power in the juvenile court to inquire into a child's mental status before adjudication.[98] *Dandoy* and other state case law has determined that if the child has no attorney, the child's attorney fails to initiate competency proceedings, or the state has no prescribed rules on competency, then the court will inquire into the child's ability to properly assist in his or her own defense.[99] Without such safeguards, incompetent juveniles face possible detention, which may not further their rehabilitation.[100]

Currently in Georgia, when juveniles are adjudicated delinquent and require treatment or rehabilitation, they are subject to several possible dispositions: probation; probation with an out-of-home placement; a sentence to "boot camp"; placement with the Department of Juvenile Justice; an order of restitution; community service; or an order to remit reimbursement funds to the county.[101] In addition to *In re Gault*, other Supreme Court and state cases have noted that juveniles need competent representation because of their possible loss of freedom, whether in the form of probation or in a "boot camp."[102] The Supreme Court, addressing the need for assistance of counsel in light of the juvenile court's stated purpose to rehabilitate and treat, remarked:

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95. *See id.* at 15.
96. *See id.* at 16.
97. *See id.* at 15.
98. *See id.* at 14.
99. *See id.; see also In re* James H., 143 Cal. Rptr. 398, 399 (Ct. App. 1978) (stating the court must first analyze whether doubt exists as to the juvenile's competency).
100. *See* Cichon, *supra* note 24, at 529-30.
101. *See* O.C.G.A. § 15-11-35(a) (1996).
102. *See In re* Gault, 387 U.S. 1, 36 (1967); *see also* Cowden & McKee, *supra* note 2, at 634.

> There is no material difference in this respect between adult and juvenile proceedings of the sort here involved. In adult proceedings, this contention has been foreclosed by decisions of this Court. A proceeding where the issue is whether the child will be found to be "delinquent" and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it.[103]

Georgia juvenile competency legislation, therefore, should address the seriousness of delinquency proceedings to a child and incorporate counsel into all stages of the competency proceedings.[104] The American Bar Association's House of Delegates adopted Juvenile Justice Standards[105] requiring lawyers to exercise the same degree of professional responsibility in a child's case as would be exercised in an adult's case.[106] As with an adult, a juvenile needs adequate representation at all stages of the proceedings, from detention hearings to competency hearings, in order to petition the court when doubt arises as to competence.[107]

2. In re James H.

In re James H.[108] pertained to a seventeen-year-old juvenile in California charged with forcible rape. The juvenile possessed the intelligence level of a borderline mental retardate and had

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103. *In re* Gault, 387 U.S. at 36.

104. *See In re* James H., 143 Cal. Rptr. 398, 400 (Ct. App. 1978); *see, e.g., In re* Jeffrey C., 366 N.Y.S.2d 826 (N.Y. Fam. Ct. 1975).

105. *See* Howard A. Davidson, *The Child's Right to be Heard and Represented in Judicial Proceedings*, 18 PEPP. L. REV. 255, 262 (1991). The American Bar Association Juvenile Justice Standards address subjects such as a lawyer's "time of entry into a case and duration of representation," "relationship with social workers involved with the child," availability of "adequate investigative and case planning support services," "means of determining what is in the child client's interests," "ability to maintain the confidentiality of the child's communications to the attorney," "role in advising and counseling the child," and "protection of the child's right to treatment." *Id.*

106. *See id.*

107. *See id.*

108. 143 Cal. Rptr. 398, 399 (Ct. App. 1978).

a history of sniffing paint.[109] Because of the absence of a California statute on the issue of juvenile competence, the court held that the juvenile court retained the power to determine the minor's competence and ability to understand the nature of the proceedings against him and to adequately assist in his defense.[110] The court noted that it could adopt the most appropriate common law method of practice for the juvenile court.[111]

The decision in *James H.* raises the question of what factors juvenile court judges should consider in deciding a minor's competence for the purpose of adjudication.[112] An Ohio appellate court noted that while the standard for judging juvenile competence stems from the adult criminal standard, "[t]he norms . . . that apply to a juvenile in making this competency determination must necessarily differ."[113]

In order for the courts to enjoy the flexibility needed to respond to different developmental levels, the Georgia legislation should focus on the ability of juveniles to understand the actions against them and to assist counsel in their defense.[114] The legislature should recognize the inherent differences in intellectual levels between adult and juvenile offenders.[115] This reasoning reaches the core of the juvenile court's purpose: to treat and to rehabilitate the child with a disposition appropriate for the circumstances of the case.[116]

To ensure cooperation between psychiatrists, psychologists, other mental health professionals, and juvenile court judges, legislation in this area should enumerate particular items important to the determination of juvenile competence.[117] Because of the lack of guidelines, the legislation should list standard examinations and questions to assist the court and mental health professionals in drawing conclusions based on

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109. *See id.*
110. *See id.*
111. *See id.* at 401.
112. *See* James Bonta, *Factors Associated with Juvenile Court Requested Psychological Assessments*, JUV. & FAM. CT. J., Nov. 1981, at 9.
113. *In re* Michael Roger Johnson, No. 7998, 1983 WL 2516, at *5 (Ohio Ct. App. Oct 25, 1983).
114. *See* State v. Kempf, 282 N.W.2d 704, 710 (Iowa 1979).
115. *See In re* Michael Roger Johnson, 1983 WL 2516, at *5-*6.
116. *See Kempf*, 282 N.W.2d at 710.
117. *See* Bonta, *supra* note 112, at 9.

the *Dusky* standard.[118] Prior cases have identified standards for use in the competency determination but have not isolated factors that weigh in only one direction.[119] The following possible factors have been used in prior cases: (1) "Age and IQ" jointly considered to avoid the tendency of mental health professionals to rely solely on the juvenile's "mental age," which is helpful, but not dispositive;[120] (2) "School achievement" in the form of standardized tests and a comparison of the juvenile's academic grade-equivalent against the academic grade of other similarly situated juveniles;[121] and (3) "Mental illness and other disorders" prevalent in the majority of past cases, including schizophrenia, neuropsychological dysfunction, petit mal or psychomotor epilepsy, learning disability, and emotional disturbance.[122] The court must also conduct an analysis of functional abilities concerning: (1) "matters which juveniles must understand about proceedings in order to participate meaningfully in the process"; and (2) "ways in which juveniles are expected to cooperate with and assist attorneys."[123]

One scholar developed a list of specific abilities based upon the law of adult competency. Mental health professionals have used this list to determine an adult's capacity to stand trial and have correlated the adult experiences to juvenile court proceedings.[124] Thus, in analyzing a juvenile's competence,

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118. *See* Dusky v. United States, 362 U.S. 402 (1960) (stating that the test for competency is whether the defendant has the present ability to speak with his or her lawyer with a degree of understanding and whether the defendant understands the nature of the proceedings against him or her); *see also* Grisso et al., *supra* note 6, at 10.

119. *See, e.g.,* State *ex rel.* Dandoy v. Superior Court, 619 P.2d 12 (Ariz. 1980); *In re* James H., 143 Cal. Rptr. 398 (Ct. App. 1978); State v. Kempf, 282 N.W.2d 704 (Iowa 1979); *In re* Causey, 363 So. 2d 472 (La. 1978); *In re* S.W.T., 277 N.W.2d 507 (Minn. 1979); May v. State, 398 So. 2d 1331 (Miss. 1981); *In re* Two Minor Children, 592 P.2d 166 (Nev. 1979); *In re* Wharton, 290 S.E.2d 688 (N.C. 1982).

120. Grisso et al., *supra* note 6, at 9.

121. *Id.* at 10.

122. *Id.*

123. *Id.* at 10-11.

124. *See* Cowden & McKee, *supra* note 2, at 646. The factors included in this list are as follows:

Stein's Content for Interview to Assess
Juveniles' Competency to Stand Trial

Understanding of Charges

Why one has been brought to the juvenile court
What one is being accused of
One's perceptions of the degree of seriousness of the accusation,

judges may consider factors including: frequency of court involvement, application for training school, fire-setting, learning difficulties, behavioral difficulties in school, enrollment in special education classes, likelihood of placement in a training school or placement outside the home, withdrawn behavior in court, suspicion of child abuse, medical history showing severe accident or severe illness, previous psychotherapeutic treatment, violent nature of the offense, and psychiatric history.[125]

This lengthy list of possible factors illustrates the difficultly of formulating an ideal procedure for determining a juvenile offender's competence.[126] In fact, one study revealed that although courts generally follow the recommendation of a mental health professional, judges were hesitant to follow the professional's advice to place the juvenile back into the home.[127]

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and others' probable perceptions of its seriousness

Understanding of Matters Essential to Cooperation with One's Lawyer

Recognition that one has a lawyer
Knowledge of lawyer's name
The idea that the lawyer is on one's side
Appropriate appreciation of that which the lawyer will endeavor to do
What one could tell the lawyer that would be relevant to the lawyer's intentions to help

Understanding of Court Proceedings and Personnel

What generally will happen in court
Approximate locations (in courtroom) and functional labels for various key personnel
Judge's role
Jury's role (if relevant)
Definition of a witness
Definition of evidence
Definition of district attorney or prosecutor
One's role and expected behavior in the courtroom
Appropriate response to evidence that contradicts one's own information or point of view

Understanding of Consequences

Meaning of "guilt" and "innocence"
What will happen if the court concludes either
One's feelings about the various possible consequences

Id.

125. *See* Bonta, *supra* note 112, at 12.

126. *See* Judge Walker Interview, *supra* note 4.

127. *See* Cichon, *supra* note 24, at 531; *see also In re* McWhorter, No. CA94-02-047, 1994 WL 673098, at *3 (Ohio Ct. App. Dec. 5, 1994); *In re* Michael Roger Johnson, No. 7998, 1983 WL 2516, at *5 (Ohio Ct. App. Oct. 25, 1983). Professor Cichon recommends that the

Overall, juvenile courts will best serve the interests of the child by implementing a standard procedure for determining competence with basic factors and standards for each case.[128]

3. In re Patrick H.

In re Patrick H.[129] lies at the heart of the juvenile competency issue. That case addressed the placement alternatives available to the juvenile court once the court determines that the juvenile cannot assist properly in his defense.[130] When initially charged, Patrick H. was acutely deaf and was a voluntary patient at the Napa State Hospital in California.[131] Patrick escaped from the hospital, broke into a sheriff's patrol car, and took a semi-automatic rifle from the vehicle.[132] When confronted by a police sergeant and a civilian, Patrick pointed the rifle at them, and the sergeant shot Patrick twice before arresting him.[133] The defense counsel petitioned the court to determine Patrick's mental state, and the court found that he was incompetent to stand trial and ordered him to remain in the Napa State Hospital.[134]

The court, using adult standards, committed Patrick to a three-month period in the hospital over the defense's objection and recommendation that the court commit him to the hospital for a seventy-two hour evaluation of the seriousness of his disabilities.[135] After the three-month period, the hospital concluded that Patrick had not gained the competency level sufficient to stand trial and recommended continued commitment.[136] At this point, the court ordered written reports to address Patrick's placement.[137]

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legislation should recognize that children have many special needs and legal concerns; thus, legislation should encompass a "discrete and comprehensive plan for determining competency." Cichon, *supra* note 24, at 531.

128. *See* Bonta, *supra* note 112, at 16.
129. 63 Cal. Rptr. 2d 455 (Ct. App. 1997).
130. *See id.* at 456.
131. *See id.*
132. *See id.*
133. *See id.*
134. *See id.* at 456-57.
135. *See id.* at 458.
136. *See id.*
137. *See id.*

The appellate court reversed the lower court's application of adult standards.[138] Instead, the appellate court applied juvenile standards to determine that Patrick could not effectively communicate with his counsel.[139] The appellate court held that once Patrick was found incompetent, the court should have transferred the matter to his county of jurisdiction for civil commitment under the Lanterman-Petris-Short (LPS) Act[140] rather than following adult commitment procedures.[141]

As *In re Patrick H.* highlights, a statute is only as effective as its enforcement mechanism.[142] The Georgia legislation, therefore, must confront the need for effective procedures that address the placement of juveniles found incompetent in compatible programs and that, most crucially, address the problem of scarcity of resources.[143] In *In re Jeffrey C.*,[144] the New York Family Court stated:

> Jeffrey might be considered as a classic textbook example of what is wrong with the juvenile justice system. Regardless of which way one turns, attention must be drawn to the virtual paralysis of a system in which all grinds to a halt while public and private agencies cannot discharge their responsibilities because proper facilities to do so simply have not been provided. Were appropriate programs in operation, this shunting of a human being from agency to agency would not have occurred.[145]

All states with juvenile competency statutes provide that the incompetent juvenile initially will be remanded to an inpatient facility for treatment.[146] Juvenile court case plan workers contend that they need more resources to deal with children

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138. *See id.* at 462.
139. *See id.* at 462-63.
140. CAL. WELF. & INST. CODE § 5000 (1998).
141. *See In re* Patrick H., 63 Cal. Rptr. 2d at 463.
142. *See* Victor Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act)*, 25 B.C. ENVTL. AFF. L. REV. 1, 5-6 (1997). This article evinces that although the Clean Water Act in theory should rid the waters of the United States of pollution, in practice, this Act has done little to clean up these waters. *See id.*
143. *See* Telephone Interview with Judge Kent Ellis, Juvenile Court Judge, Texas (Oct. 9, 1997) [hereinafter Judge Ellis Interview].
144. 366 N.Y.S.2d 826 (N.Y. Fam. Ct. 1975).
145. *Id.* at 831.
146. *See* Grisso et al., *supra* note 6, at 16.

deemed incompetent and that these resources are vital to the success of the juvenile court.[147]

With mentally ill juvenile offenders, the court's determination whether to retain jurisdiction over the child while incompetent or to dismiss the charges comprises the first step in creating an appropriate treatment plan.[148] "The lack of appropriate facilities is a crucial problem, and one that to some degree makes more complex the decisions in the adjudicatory and dispositional process."[149] Because of the lack of placement alternatives, such as inpatient, outpatient, home-based, and community-based treatment programs, the courts are sometimes forced to commit juveniles who do not necessarily need treatment but rather pose the greatest threat to society.[150] That courts are sometimes "forced" to commit these juveniles suggests that community-based programs may better manage the problems of both the child and the family, which in turn may improve problems in the child's home and achieve long-term success for all family members.[151]

Currently, in about half of the states with juvenile competency statutes, the state retains jurisdiction over an incompetent juvenile and subsequently relinquishes jurisdiction if the juvenile cannot be restored to competency within a reasonable time period.[152] In the other half, the court dismisses the pending charges against an incompetent juvenile in need of further treatment.[153] Unfortunately, many juveniles pass through the system without the court recognizing the child's incompetence, especially when the incompetence is due to mental retardation.[154] Possible reasons for under-identification of juvenile incompetency include the traditional role of the juvenile court in treatment and rehabilitation, the ambiguities about the role of counsel in delinquency

147. *See* Dooley Interview, *supra* note 84.
148. *See* Robert Roos & Terri Ellison, *The Mentally Ill Juvenile Offender: Crisis for Law and Society*, JUV. JUST., Feb. 1976, at 25.
149. *Id.* at 29.
150. *See id.; see also* Cichon, *supra* note 24, at 530.
151. *See* Cichon, *supra* note 24, at 541.
152. *See* Grisso et al., *supra* note 6, at 16.
153. *See id.*
154. *See* Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 420 (1990).

proceedings, and the limited occasions for review by appellate courts.[155] Georgia legislation addressing competency should attempt to provide both an effective enforcement mechanism and effective treatment for mentally ill juveniles.[156]

B. Recurring Problems in the Juvenile Court System

1. The Role of Counsel

The proper role of counsel in juvenile court proceedings is often debated in legal writing. One of the first questions an attorney representing a juvenile must answer is "who does the attorney actually represent?"[157] The juvenile's right to counsel began with *In re Gault* but was confined to the adjudicatory phase[158] and remained undefined in juvenile delinquency proceedings.[159] The promise of procedural due process made by *Gault* remained unrealized as the "actual delivery of legal services lag[ged] behind the constitutional mandate."[160] For example, in the 1970s, many jurisdictions encouraged defense counsel to cooperate with the juvenile court in determining the minor's best interests rather than taking an adversarial position.[161] Today, juveniles remain underrepresented because they often waive their right to an attorney.[162] However, the court should judge the adequacy of this waiver by the "totality of the circumstances" test, which examines whether the waiver is "knowing, intelligent, and voluntary."[163]

In juvenile competency proceedings, attorneys could assume the role of a pure advocate, as in an adult criminal defense trial, or become a guardian *ad litem* and look after the best interests of the child.[164] The role assumed by the attorney makes a significant difference in the way the attorney approaches a competency hearing: an advocate would petition the court to

155. *See* Cowden & McKee, *supra* note 2, at 635-38.
156. *See* Roos & Ellison, *supra* note 148, at 31.
157. Gregory D. Smith & Sherry L.H. Thomas, *Ethical Considerations in Juvenile Court*, 2 KY. CHILDREN'S RTS. J. 24 (1992).
158. *See In re* Gault, 387 U.S. 1, 13, 36, 41 (1967).
159. *See* Cowden & McKee, *supra* note 2, at 636.
160. Feld, *supra* note 35, at 720.
161. *See* Grisso et al., *supra* note 6, at 7.
162. *See* Feld, *supra* note 35, at 721.
163. *Id.*
164. *See* Cowden & McKee, *supra* note 2, at 637.

discontinue delinquency proceedings because of the juvenile's incompetence, while a guardian *ad litem* would view the incompetence as one factor in preparing the appropriate treatment plan for the juvenile.[165] The Georgia court in *In re S.H.* stated that the cornerstone of the right to counsel is the juvenile's right to be competent to understand the pending charges.[166] Thus, the Georgia statute addressing competency must specifically address the importance of the attorney's role in adequately representing the juvenile's rights in the competency hearing.[167]

2. Safeguards Not Necessary in Adult Criminal Proceedings But Needed in the Juvenile Courts

Steven Friedland articulates the following proposal for judging the competence of the juvenile offender.[168]

> This competency determination, which must be specific and express, should then be the predicate to how the minor is treated by the legal system. Minors considered least competent should be treated quite differently from those considered to have attained a competency level equivalent to adults . . . . Instead, [the determination of competency] must establish whether it is appropriate to expect the minor to act responsibly in the circumstances. . . . [D]ifferent responsibility levels, which may be based on factors such as age, education, prior involvement in the justice system, stability of home life, etc., would produce different systemic treatments.[169]

In applying this proposal, the Georgia General Assembly must recognize the importance of the court's application of the *Dusky* standard or another codified standard to the juvenile's intellectual and practical ability to stand trial.[170] The General Assembly may consider implementing a "sliding-scale

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165. *See id.*

166. *See In re* S.H., 220 Ga. App. 569, 571, 469 S.E.2d 810, 811 (1996).

167. *See* Dandoy v. Superior Court, 619 P.2d 12, 15 (Ariz. 1980) (stating that lack of competency to understand the nature of charges renders all other substantive rights meaningless).

168. *See* Friedland, *supra* note 10, at 143-44.

169. *Id.* at 144.

170. *See* Claudia Worrell, *Pretrial Detention of Juveniles: Denial of Equal Protection Masked by the Parens Patriae Doctrine*, 95 YALE L.J. 174, 186 (1985).

standard" with varying environmental factors and maturity levels to judge competency levels in children.[171]

The new legislation should serve the rights of juveniles by implementing as many safeguards as necessary in competency proceedings to address juveniles' varying abilities to comprehend the nature of the proceedings.[172] This process includes listing relevant functions, abilities, and demographic and psychological characteristics for use in evaluating the juvenile's competency level.[173] Also, the decision of the juvenile's competence should be made by the juvenile court judge rather than the prosecutor, for fear of possible abuse.[174]

The legislation should respond to the individual needs of the juvenile during evaluation, treatment, and commitment.[175] A Washington court has interpreted that state's juvenile code as granting it the authority to dismiss charges against an incompetent juvenile offender in order to protect the best interests of the child when the dismissal does not conflict with society's need for protection.[176] That court appropriately attempted to apply the competency standard by employing "juvenile norms" rather than "adult norms."[177] A child's competence and decisionmaking ability are not equivalent to an adult's level of understanding, and science has shown that juveniles' competency levels develop at different rates as they age and mature.[178] The finding of incompetence should not automatically result in a confinement order, but rather should result in a referral for further treatment and possible commitment proceedings under the Lanterman-Petris-Short

171. *Id.* Professor Worrell noted the relation between the level of competency a juvenile possesses and the particular right the juvenile attempts to assert. *See id.*

172. *See* Dooley Interview, *supra* note 84.

173. *See* Grisso et al., *supra* note 6, at 10.

174. *See* Dooley Interview, *supra* note 84 (suggesting placement of additional safeguards in the competency proceedings).

175. *See* State v. E.C., 922 P.2d 152, 156 (Wash. Ct. App. 1996).

176. *See id.*

177. *See id.; see also In re* Michael Roger Johnson, No. 7998, 1983 WL 2516, at *5 (Ohio Ct. App. Oct. 25, 1983); *In re* McWhorter, No. CA94-02-047, 1994 WL 673098, at *3 (Ohio Ct. App. Dec. 5, 1994). In *McWhorter*, the court examined the following factors unique to juvenile proceedings: "complexity of the case, the seriousness of the charges in relation to the stress they could cause appellant during trial, any mental condition that would adversely affect appellant's ability to understand the proceedings or work with counsel, and her age and cognitive and intellectual development." *Id.*

178. *See* Cuncannan, *supra* note 15, at 294.

Act.[179] Each state court that has addressed juvenile competency issues provides the Georgia General Assembly with guidelines for drafting procedural safeguards that will ensure fairness when competency is at issue.[180]

C. *Public Reaction: Georgia Legislators May Want to Examine Public Perspective on Juveniles Incompetent to Stand Trial*

Juvenile crime exists in most cities, and communities have realized that one way to fight juvenile repeat offenders is for community members to aid the reintegration of juveniles into society.[181] Community-based programs are usually less expensive and focus treatment on the entire family.[182] For example, community-based services have been used by the Prince George's Maryland Corps Service Team to allow juveniles with developmental problems to participate in programs in which they can see the negative impact of their delinquent behavior on the community.[183]

Public reaction to juvenile offenders takes many forms. Consider a 1996 case in which a six-year-old boy was charged with brutally beating a baby until the baby's skull was cracked into two pieces.[184] This case attracted national attention because of the juvenile offender's young age.[185] The victim's father refused to ask the court to punish the six-year-old, stating that the boy "should be cured mentally."[186]

Accounts such as this are at odds with the Honorable Thomas Corbett's testimony that the "philosophy that all juvenile offenders are 'victims' must cease. Yes, many of them have had horrible childhoods of neglect, abuse and live in crime ridden

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179. *See In re* Mary T., 221 Cal. Rptr. 364, 368 (Ct. App. 1985). The Lanterman-Petris-Short Act provides that if a juvenile is in custody in a jail or juvenile detention center and may be mentally ill, the local mental health director shall examine the juvenile. *See id.*

180. *See id.; In re* S.H., 220 Ga. App. 569, 571, 469 S.E.2d 810, 812 (1996).

181. *See* Stuart O. Simms, *Communities in Crisis: Effective Juvenile Justice Programs Involve All Sectors of Community*, CORRECTIONS TODAY, June 1, 1997, at 78.

182. *See* Cichon, *supra* note 24, at 541-42.

183. *See* Simms, *supra* note 181, at 80.

184. *See* Peter Fimrite, *6-Year-Old Boy's Competence Key in Assault Case/Two New Psychiatrists Will Make Recommendation*, S.F. CHRON., June 8, 1996, at A15.

185. *See* Gary Borg, *Brain-Damaged Baby, Allegedly Beaten by 6-Year-Old, Goes Home*, CHI. TRIB., May 17, 1996, at 6.

186. *Id.*

families and neighborhoods. But once they have committed crimes . . . their victimization cannot shield them from accountability for their own conduct."[187] While this statement may be true, the public also realizes that juveniles have not been adequately represented in delinquency proceedings[188] and that while most juvenile offenders do not have a male role model, many do have a history of verbal, physical, and sexual abuse in the home.[189] Thus, the new Georgia legislation should use the community as a resource to aid in the rehabilitation of incompetent juvenile offenders and to ensure that these juveniles can re-enter society and become productive citizens.

D. Juvenile Competency Statutes in Other States: Models for Georgia Legislation

The best resources for guidance in drafting a statute on juvenile competency issues are existing statutes that effectively aid juvenile court judges in other states.[190] The Arizona juvenile competency statute defines many key terms necessary for the diagnosis of mentally incompetent juveniles.[191] The Arizona legislation explains that " '[i]ncompetent' means a juvenile who does not have sufficient present ability to consult with the juvenile's lawyer with a reasonable degree of rational understanding or who does not have a rational and factual

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187. *Juvenile Justice and Delinquency: Before the Early Childhood, Youth and Families Subcomm. of the House Economic and Educational Opportunities Committee*, *available in* 1996 WL 10163136 (Pa. 1996) (quoting statement by the Honorable Thomas Corbett, Attorney General of the Commonwealth of Pennsylvania). Corbett justified his "get tough" strategy by noting the increase in juvenile crimes of violence and the need to protect society from these juvenile offenders. *See id.* He does not, however, abandon prevention or intervention as means to deter juvenile crime. *See id.*

188. *See Juveniles Poorly Represented in Court*, OAKLAND POST, Jan. 21, 1996, at 1, *available in* 1996 WL 15810146. The article included the following observations: a significant number of youths appear in juvenile court without a lawyer; 55% of public defenders work less than 24 months as juvenile defenders; juvenile defenders, on average, carry more than 500 cases per year; appeals are rarely taken; and 87% of public defender offices do not have a budget for lawyers to attend training programs. *See id.*

189. *See* Grover Trask, Editorial, *Local View: Look Homeward for Why Kids Aren't Angels*, PRESS-ENTERPRISE (Riverside, Ca.), Feb. 2, 1997, at A23. Other indicators discussed in the article include access to drugs and firearms, low family or community attachment, and school failures. *See id.*

190. *See supra* note 60.

191. *See* ARIZ. REV. STAT. § 8-291 (1999).

understanding of the proceedings against the juvenile."[192] This definition employs the *Dusky* standard for competency[193] and gives the state flexibility to explore the juvenile's competency given his maturity level and developmental age.[194] Georgia should return to the individualized approach to determine whether juveniles understand the nature of the proceedings against them, because cognitive maturation "serves as a better indicator of [their] criminal culpability than does the severity of [their] crime[s]."[195]

Arizona legislation defines "mental health expert" as "a physician who is licensed . . . or a psychologist who is licensed . . . and who is: (a) Familiar with this state's competency standards and statutes[;] (b) Familiar with the treatment, training and restoration programs that are available in this state[; and] (c) Certified by the court as meeting court developed guidelines."[196] Employing capable mental health professionals to evaluate juveniles allows a juvenile court judge to rely upon their recommendations, and initiates active and efficient communication between the judge and the mental health provider to create an effective rehabilitation plan.[197]

The Florida statute amply addresses the procedure to initiate competency inquiries:

> If, at any time prior to or during a delinquency case involving a delinquent act or violation of law that would be a felony if committed by an adult, the court has reason to believe that the child named in the petition may be incompetent to proceed with the hearing, the court on its own motion may, or on the motion of the child's attorney or state attorney must, stay all proceedings and order an evaluation of the child's mental condition.[198]

Identifying the incompetency issue early in the adjudicatory proceeding ensures that the child will not pass through the juvenile court system unrecognized and unidentified.[199]

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192. *Id.* § 8-291(1).
193. *See* Dusky v. United States, 362 U.S. 402 (1960).
194. *See* Worrell, *supra* note 170, at 186.
195. Cuncannan, *supra* note 15, at 298.
196. ARIZ. REV. STAT. § 8-291(3) (1999).
197. *See* Bonta, *supra* note 112, at 9.
198. FLA. STAT. ch. 39.0517(1) (1990).
199. *See* Cowden & McKee, *supra* note 2, at 639. As stated earlier, under-identification

The Kansas legislation applies the dual diagnosis standard to a child adjudged incompetent by differentiating between those juveniles who will attain competency and those juveniles who will not attain competency in the foreseeable future.[200] The statute suggests that when a substantial probability of incompetency exists, the court should place the juvenile in a state, county, or private institution for a time not to exceed six months.[201] When the probability of attaining competency does not exist or when the six-month time period has expired, the court should initiate involuntary commitment proceedings.[202] Similarly, the Texas legislation instructs the court to initiate commitment proceedings to a residential care facility when the court finds sub-average general intellectual function indicative of mental retardation.[203]

Judges from the states of Florida, Kansas, and Texas have related that their statutes have worked well when called upon and, thus, provide good models for the Georgia legislation.[204] Additionally, the juvenile competency statutes from Arizona and New York provide excellent guidelines and annotations for future drafting.[205] Thus, Georgia can draw from current legislation and create a statutory framework best suited for the problems in Georgia's juvenile courts.

CONCLUSION

The framers of the juvenile court intended to protect the juvenile's best interests, and the right not to be tried while incompetent is one of those interests.[206] Therefore, the Georgia General Assembly must continue to address the issue of

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is a factor that explains the lack of attention given to juvenile competency determinations. *See id.*

200. *See* KAN. STAT. ANN. § 38-1638 (1997).

201. *See id.* § 38-1638(a).

202. *See id.* § 38-1638(a)-(b).

203. *See* TEX. FAM. CODE ANN. § 55.03 (West 1997).

204. *See* Telephone Interview with Judge John Barker, Kansas (Oct. 8, 1997); Judge Levy Interview, *supra* note 86; Judge Ellis Interview, *supra* note 143.

205. *See* ARIZ. REV. STAT. §§ 8-291 to -291.04 (1999); N.Y. FAM. CT. ACT § 322.2 (McKinney 1997). In assisting Judge Peggy Walker with a draft of her version of the Georgia legislation, the Author used the statutes from Arizona, Florida, Kansas, New York, and Texas as guides.

206. *See In re* Gault, 387 U.S. 1 (1967); *In re* Causey, 363 So. 2d 472, 476 (La. 1978).

juvenile competency in the context of adjudicatory hearings. The Georgia legislation must apply equally to all juveniles and should adopt a "totality of the circumstances" test to gauge the differing abilities among children.[207] Most important to the effective implementation of such legislation, Georgia must acquire adequate facilities to treat and rehabilitate juveniles adjudicated incompetent.[208]

The following statement by a New York court skillfully states the ever-present need for states to adopt effective juvenile competency legislation:

> It is inconceivable that the Legislature intended that a juvenile charged with a serious crime, ascertained to be a threat to himself and to society, and found incompetent to proceed, should be returned to his community without some procedure established for his care and treatment. It is hoped that this oversight will soon be corrected by legislative action.[209]

Georgia and other states with untested or non-existent juvenile competency statutes will best serve their future adults by providing a statutory framework for the protection and treatment of incompetent juvenile offenders.

Christine A. Sullivan

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207. *See* Dooley Interview, *supra* note 84.

208. *See* Roos & Ellison, *supra* note 148, at 29; *see also In re* Patrick H., 63 Cal. Rptr. 2d 455 (Ct. App. 1997).

209. *In re* Two Minor Children, 592 P.2d 166, 170 (Nev. 1979) (citing People *ex rel* Thorpe v. Clark, 62 A.D.2d 216, 229 (N.Y. App. Div. 1978)).