UTAH AND JUVENILE INCOMPETENCY

Dannon Lee*

INTRODUCTION

Juvenile courts around the country are considering what should be done if a minor is incompetent to stand trial. The Utah legislature considered this issue last year and enacted a law addressing it that went into effect in May 2012.[1] The law gives juvenile courts a roadmap to follow when determining a minor's competency;[2] however, the law has some flaws that could create problems in the future. Some states have addressed these flaws, while others have not.[3] Incompetency has always proven to be a difficult problem for the judicial and legislative branches to solve.

This Note discusses the recent Utah law and the issues it creates, focusing on where to place minors during the attainment period and what should be done if the minor is not able to achieve competency. This Note examines whether committing the minor during attainment accords with due process as well as the real possibility that detention will be used as a placement during the attainment period. Next, it looks to what other states have done when a minor cannot achieve competency and how Utah handles similar situations with adults. Finally, this Note addresses some possible areas of improvement that the Utah legislature should consider, including outpatient treatment, the permanency of commitment, retrying incompetent minors, dealing with repeat offenders, and the possibility of a uniform statute.

I. BACKGROUND: JUVENILE COMPETENCY—UTAH CODE §§ 78A-6-1301 TO -1303

A. Competency to Proceed

Section 78A-6-1301 of the Utah Code concerns the competency of a minor to proceed and how that issue is raised during adjudication.[4] "Whenever a petition is filed alleging that a minor has committed an act that would be a crime if committed by an adult, a motion for an inquiry into the minor's competency may be filed."[5] "The motion . . . may be filed by: (a) the minor alleged not competent to proceed; (b) any person acting on the minor's behalf; (c) the prosecuting attorney;

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* © 2013 Dannon Lee. J.D. Candidate, 2014, S.J. Quinney College of Law, University of Utah.

[1] UTAH CODE ANN. § 78A-6-1301 (West 2009 & Supp. 2012).

[2] *See id.*

[3] *See, e.g.*, WYO. STAT. ANN. § 14-6-219(d) (2011) (giving courts only two options: committing the minor indefinitely or carrying through with delinquency proceedings).

[4] UTAH CODE ANN. § 78A-6-1301.

[5] *Id.* § 78A-6-1301(1).

(d) the guardian ad litem; or (e) any person having custody or supervision over the minor."[6] If competency is raised by motion, the motion must include:

> (a) a certificate that is filed in good faith and on reasonable grounds to believe the minor is not competent to proceed;
> (b) a recital of the facts, observations, and conversations with the minor that formed the basis of the motion; and
> (c) if filed by defense counsel, the motion shall contain information that can be revealed without invading the lawyer-client privilege.[7]

If the motion does not contain these items, then the motion will be denied and the court may proceed with delinquency proceedings.[8] The court may also raise the issue of a minor's competency, but "[i]f raised by the court, counsel for each party shall be permitted to address the issue of competency."[9]

B. Procedure

Section 78A-6-1302 of the Utah Code discusses the procedure followed by the juvenile court after a motion has been filed.[10] "When a motion is filed pursuant to section 78A-6-1301 raising the issue of a minor's competency to proceed, or when the court raises the issue of a minor's competency to proceed, the juvenile courts in which proceedings are pending stay all delinquency proceedings."[11] If either party opposes the motion, the court shall hold a hearing on the sufficiency of the motion.[12]

During that hearing, the court will determine if there is "a bona fide doubt as to the minor's competency to proceed."[13] If no doubt is found, the motion will be denied and the court may proceed with delinquency hearings.[14] Alternatively, if a doubt to the minor's competency is found, the motion will be granted.[15] The court will then order a competency evaluation and set a date for a competency hearing.[16]

"[T]he court may order the Department of Human Services to evaluate the minor,"[17] but the minor may not be evaluated by anyone who is involved in the

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[6] *Id.* § 78A-6-1301(3).
[7] *Id.* § 78A-6-1301(2).
[8] *See id.*
[9] *Id.* § 78A-6-1301(4).
[10] *Id.* § 78A-6-1302.
[11] *Id.* § 78A-6-1302(1).
[12] *Id.* § 78A-6-1302(2).
[13] *Id.*
[14] *See id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* § 78A-6-1302(3).

current treatment of the child.[18] Outside of these requirements, "the minor shall be evaluated by a mental health examiner with experience in juvenile forensic evaluations and juvenile brain development."[19] "If it becomes apparent that the minor may not be competent due to an intellectual disability or related condition, the examiner shall be experienced in intellectual disability or related condition evaluations of minors."[20] The petitioner is required to provide documentation to the evaluator that could be considered relevant to determining the minor's competency[21] and those related to or responsible for the minor must cooperate in providing information as well.[22]

Section 78A-6-1302(7) lists criteria that the evaluator must address and consider during the mental evaluation. The criteria include the minor's capacity to understand the charges against him or her, to understand the penalties if convicted, to explain to counsel relevant facts, and to understand the court proceedings and appropriate courtroom behavior.[23] The statute requires that the examiner's written report contain certain information, most notably the likelihood that the minor will "attain competency within a year"[24] and the reasoning behind this opinion.[25] "The examiner shall provide an initial report to the court, the prosecuting and defense attorney, and the guardian ad litem, if applicable, within 30 days of the receipt of the court's order."[26] If the examiner has good cause, the court may grant an additional thirty days to submit the initial report.[27] The report is due to the court and counsel within sixty days of the court's order, unless the examiner again shows good cause for additional time, but this must be approved by the court.[28] Once the report is received by the court, the court will set a date for the competency hearing, which must be held between five and fifteen days from the report being received unless there is good cause shown for extending time between the report and the hearing.[29] If good cause is shown, the court will set a hearing with additional time allowed as determined by the court.[30]

At the competency hearing, the minor's competency is presumed and the burden of proof is on the proponent of incompetency using the preponderance of evidence standard.[31] If the minor is found competent to proceed,[32] "the court shall proceed with the delinquency proceedings."[33]

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[18] *Id.* § 78A-6-1302(4).
[19] *Id.*
[20] *Id.*
[21] *Id.* § 78A-6-1302(5).
[22] *Id.* § 78A-6-1302(6).
[23] *Id.* § 78A-6-1302(7).
[24] *Id.* § 78A-6-1302(9).
[25] *Id.* § 78A-6-1302(8)(e).
[26] *Id.* § 78A-6-1302(9).
[27] *Id.*
[28] *Id.*
[29] *Id.* § 78A-6-1302(12).
[30] *Id.*
[31] *Id.* § 78A-6-1302(13).

Alternatively, the court may also enter a finding that the minor is "not competent to proceed without a substantial probability that the minor may attain competency in the foreseeable future."[34] If the court enters this finding, the court must terminate the competency proceeding and dismiss the charges without prejudice, meaning that the defendant could potentially be retried.[35] The minor must then be released from any custody related to the delinquency charges unless "the prosecutor informs the court that commitment proceedings . . . will be initiated" pursuant to substance abuse, mental health, or intellectual disabilities.[36] If commitment proceedings are to be initiated, they must be initiated within seven days of the court's order, unless the court allows for more time.[37] In addition, "the minor may be ordered to remain in custody until the commitment proceedings have been concluded."[38]

C. Disposition on Finding that Minor is Incompetent to Proceed

In the alternative, the court may find at the competency hearing that the minor is "not competent to proceed with a substantial probability that the minor may attain competency in the foreseeable future."[39] If the court enters this finding, "the court shall notify the Department of Human Services of the finding, and allow the department thirty days to develop a six month attainment plan for the minor."[40] The court will also schedule a competency disposition hearing.[41] An attainment plan tells the court and interested parties about the services the minor is currently receiving along with any treatments or services beyond what is already being provided that may be helpful for the minor to attain competency within six months.[42] It will discuss the ability of the current parent, custodian, or guardian to provide or access such services for the minor, as well as the likelihood that the minor will attain competency within six months.[43] In addition, the attainment plan is required to address conditions or supervision that may be required during attainment for "the safety of the minor or others."[44] The department shall "provide the attainment plan to the court, prosecutor, defense attorney, and guardian ad litem at least three days prior to the competency disposition hearing."[45]

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[32] *Id.* § 78A-6-1302(14)(a)(i).
[33] *Id.* § 78A-6-1302(14)(b).
[34] *Id.* § 78A-6-1302(14)(a)(iii).
[35] *Id.* § 78A-6-1302(14)(d).
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* § 78A-6-1302(14)(a)(ii).
[40] *Id.* § 78A-6-1303(1).
[41] *Id.* § 78A-6-1303(3).
[42] *Id.* § 78A-6-1303(2)(a)–(b).
[43] *Id.* § 78A-6-1303(2)(c)–(e).
[44] *Id.* § 78A-6-1303(2)(d).
[45] *Id.* § 78A-6-1303(3).

At the competency disposition hearing, the court and the department must determine where the minor will remain during attainment and it must be the "least restrictive appropriate setting."[46] If the court ordered the minor to be held in detention or placed outside of the home, they must make findings that (i) "the placement is the least restrictive setting," (ii) "the placement is in the best interest of the minor," (iii) "the minor will have access to the services and treatment required by the attainment plan in the placement," and (iv) "the placement is necessary for the safety of the minor or others."[47]

If the minor is being held in detention merely awaiting placement in a less restrictive setting, however, the department only has fourteen days to locate alternative placement and transfer the minor.[48] The attainment period lasts for six months, but the court must review the case every three months to evaluate if "the placement is still the least restrictive appropriate placement."[49] There are then three options during and after attainment for the court, the department, and the minor.

First, if the executive director of the Department of Human Services notifies the court at any point during the six month attainment period that the minor is now competent to proceed, the court will hold a hearing within fifteen days of such notice to determine if the minor is truly competent to participate in the delinquency proceedings.[50] If the court finds that the minor is now competent, the court may proceed with delinquency proceedings in accordance with section 78A-6-1302(14)(b). If at this hearing the court does not find that the minor is competent to proceed, the court next must decide whether there has been reasonable progress toward attainment.[51] If there has, the court may choose to extend attainment for an additional six months before again addressing competency.[52] If there has not been any progress towards competency, then the court must "terminate the competency proceeding, dismiss the delinquency charges without prejudice, and release the minor from any custody order related to the pending delinquency proceeding, unless the prosecutor informs the court that commitment proceedings . . . will be initiated."[53]

Second, at any point during attainment, the court may find that there is not a real chance that the minor will attain competency in the near future.[54] The court will then terminate the competency proceeding, dismiss the charges without

[46] *Id.*§ 78A-6-1303(4).
[47] *Id.* § 78A-6-1303(4)(b)(i)–(iv).
[48] *Id.* § 78A-6-1303(5).
[49] *Id.* § 78A-6-1303(6).
[50] *Id.* § 78A-6-1303(7).
[51] *Id.* § 78A-6-1303(13).
[52] *Id.*
[53] *Id.* § 78A-6-1302(14)(d).
[54] *Id.* § 78A-6-1303(8).

prejudice, and release the minor from any related custody order, unless the prosecutor informs the court that commitment proceedings will be initiated.[55]

Finally, if attainment ends without a decision on the minor's competency, "the department shall provide a report on the minor's progress towards competence"[56] and the court may order an updated competency evaluation.[57] Within thirty days of receiving the report, the court must hold a hearing on the minor's current competency status.[58] "At the hearing, the burden of proving the minor is competent is on the proponent of competency," in other words, the supporter or proposer of competency.[59] The court will then determine whether the minor has become competent to proceed, using a preponderance of the evidence standard.[60] If the minor is found competent to proceed, the court shall proceed with delinquency proceedings.[61] Alternatively, if the minor is not found competent to proceed, the court will again address whether there has been reasonable progress toward competency.[62] If no progress has been made, the court will be forced to terminate in the same manner as discussed above.[63] If the court finds that the minor has progressed toward attainment, "the court may extend the attainment period up to an additional six months."[64]

After the maximum one-year attainment period, the court must either find that the minor has attained competency, in which case the court shall proceed with delinquency proceedings,[65] or the court must "terminate the competency proceedings and dismiss the delinquency charges without prejudice."[66]

II. WHERE DOES THE COURT PLACE MINORS DURING ATTAINMENT?

A. Due Process

During the attainment period discussed in the statute,[67] the minor may be placed outside the home[68] as long as the requirements of section 78A-6-13-1303(5) are met. Therefore, the court is removing the minor from his home and placing him in detention or some sort of mental health facility because the minor is being accused of a crime. The minor has not been convicted of anything at this point; he

[55] *Id.*
[56] *Id.* § 78A-6-1303(10).
[57] *Id.* § 78A-6-1303(11).
[58] *Id.* § 78A-6-1303(12).
[59] *Id.*
[60] *Id.*
[61] *Id.* § 78A-6-1302(14)(b).
[62] *Id.* § 78A-6-1303(13).
[63] *Id.* § 78A-6-1303(8).
[64] *Id.* § 78A-6-1303(13).
[65] *Id.* § 78A-6-1302(14)(b).
[66] *Id.* § 78A-6-1303(14).
[67] *Id.* § 78A-6-1303.
[68] *Id.* § 78A-6-1303(4)(b).

is merely being accused and charged. Can the state legally remove a child from his home simply for being accused of a crime for which he is not competent to stand trial? After all, an incompetent minor, despite having disabilities or mental impairments, is an ordinary citizen who falls under the innocent until proven guilty umbrella and is entitled to due process.

Despite the due process argument, courts in numerous states have held that judges are allowed this power.[69] As Professor Joseph B. Sanborn, Jr. discusses, "In order to restore the youth to competency, numerous states provide for and may demand temporary civil commitment."[70] Courts "in five states ha[ve] granted judges permission to impose civil commitment for restoration of competency."[71] Accordingly, it would follow that Utah's law concerning an attainment period that allows the court to remove the minor from the home is constitutional.

Sanborn adds that, "[s]ome states have identified a time limit for this commitment, ranging from 60 days in Minnesota and New Mexico to 90 days in Texas and Virginia to 120 days in Kansas to 360 days in the District of Columbia."[72] Even though it does not appear necessary from the case law for a state to set a time limit for this commitment, setting a time limit gives the minor in question more assurance that they are receiving due process. To guarantee that the minor's due process rights are being protected, courts requiring commitment during attainment must ensure that commitment is justified by progress toward the goal of attaining competency.[73] By requiring that an attainment period may not last any longer than one year,[74] Utah courts are able to confirm that attaining competency is still the goal. Rather than giving the State an unspecified amount of time for attainment, this time period forces the State to track the progress of achieving competency. If competency hasn't been reached in that time period, the statute requires the State to take other steps concerning the minor. Due process rights are fundamental to our judicial system, and while commitment can be necessary to restore competency, courts must ensure that they are doing so within the limitations of the minor's due process rights.

It is clear that the judicial branch has the power to place a minor outside the home for as long as necessary while competence is being determined without violating due process. On the other hand, if the State sets a limit on this time, the State ensures the minor is receiving due process because there is a system in place to track the progress towards the goal of competency, and it confirms that the placement is not simply for detainment.

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[69] Joseph B. Sanborn, Jr., *Juveniles' Competency to Stand Trial: Wading Through the Rhetoric and the Evidence*, 99 J. CRIM. L. & CRIMINOLOGY 135, 145–46 (2009).

[70] *Id.* at 145.

[71] *Id.* at 145–46.

[72] *Id.* at 146.

[73] *See* Jackson v. Indiana, 406 U.S. 715, 738–41 (1972).

[74] UTAH CODE ANN. § 78A-6-1303(13) (West 2009 & Supp. 2012).

B. Detention Facilities

Ideally, if the minor cannot remain at home during the attainment period, the "least restrictive appropriate setting"[75] discussed in the law would be a mental health facility with knowledge and experience treating and working with mentally disabled minors. The mental health facility would be a setting where the child can go for the six months to a year attainment period and feel comfortable, make progress toward attainment, and receive genuine help from licensed professionals. Unfortunately, minors are more frequently sent to detention facilities.[76] "Due to the absence of community mental health services, the juvenile justice system warehouses mentally ill children in detention centers."[77] The Utah statute leaves detention as an option for placing a minor during attainment.[78] This option is available so long as it is the least restrictive setting available, still allows the minor access to treatment and services, and is in the best interest of the minor.[79] No one would argue that detention indeed fits all four of these requirements in most cases, and yet it remains the frequent choice of placement for many courts. There are no waiting lines or waiting periods delaying placement, no insurance is necessary, and there is more room available than in most mental health facilities.[80] Hicks notes that

> [i]n 2003, a congressional committee conducted a six-month study and determined that nearly fifteen thousand juveniles remained incarcerated because they could not access mental health treatment in their communities. In that same study, seventy-one facilities in thirty-three states found youth who were awaiting community mental health treatment, even though there were no pending charges against them. Even worse, children as young as seven years old were incarcerated because there were no available mental health facilities.[81]

The most obvious problem with using detention as a placement during attainment is that detention is not a mental health facility. The child could potentially have a therapist and other licensed professionals at the detention facility

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[75] *Id.* § 78A-6-1303(4).

[76] *See* Simone S. Hicks, *Behind Prison Walls: The Failing Treatment Choice for Mentally Ill Minority Youth*, 39 HOFSTRA L. REV. 979, 984–85 (2011) (discussing how many mentally ill youths end up in detention facilities because there is nowhere else to place them).

[77] *Id.* at 984 (citation omitted).

[78] UTAH CODE ANN. § 78A-6-1303(4)(b).

[79] *Id.*

[80] *See* Hicks, *supra* note 76, at 985.

[81] *Id.* at 984–85 (citation omitted).

to provide the child with any court-ordered treatment and services.[82] If the minor poses a threat to others, detention incapacitates the minor and could prevent potential harm. Additionally, preventing the minor from harming others, while still providing treatment, advances the best interest of the child. With detention being the only realistic option due to lack of available mental health facilities, [83] it has now become the least restrictive available setting as well.

Therefore, the four requirements for the child to be placed arguably are met, but detention is far from the ideal placement that a minor with disabilities or mental health issues should have during attainment. "Juvenile justice facilities across the nation, *U.S. News & World Report* found . . . , are in a dangerously advanced state of disarray, with violence an almost everyday occurrence and rehabilitation the exception rather than the rule. Abuse of juvenile inmates by staff is routine."[84] If a child with mental health issues or disabilities is left to live in such deplorable conditions for up to a year, they may not come out better than they went in.

People, and especially minors, with mental health issues and disabilities bear a higher risk of being abused, bullied, or sexually abused.[85] The abuse may come from the other minors in the detention facility, or it may come from the employees and staff.[86] The employees and staff may not be trained to work with children with disabilities and mental health disorders.[87] Not understanding how to communicate with these children may lead to lashing out, frustration, or fights and forcible resistance to the employees and staff, which will most likely require force in return.[88] After six months to a year of abuse and bullying, even with occasional treatments and services being provided, there is a good chance that the minor will revert further away from competency rather than closer.[89]

One would assume that children are more protected than adults in most judicial procedures, but concerning mental competency, juvenile court is far behind adult criminal court.

> While there are sound protections to ensure that adults are never placed in jail as a temporary holding place for more than fifteen days before

[82] *See* Rani A. Desai et al., *Mental Health Care in Juvenile Detention Facilities: A Review*, 34 J. AM. ACAD. PSYCHIATRY & L. 204, 208–12 (2006).

[83] *See* Hicks, *supra* note 76, at 984–85.

[84] Douglas E. Abrams, *Reforming Juvenile Delinquency Treatment to Enhance Rehabilitation, Personal Accountability, and Public Safety*, 84 OR. L. REV. 1001, 1002 (2005) (citation omitted) (internal quotation marks omitted).

[85] *See* Jennifer M. Keys, *When They Need Us Most: The Unaddressed Crises of Mentally Ill African American Children in the Juvenile Justice System*, 2 DEPAUL J. FOR SOC. JUST. 289, 297–99 (2009) (detailing some of the challenges and abuses that juvenile detainees with mental health issues face in detention facilities).

[86] *Id.* at 298–99.

[87] *See id.* at 299–300.

[88] *See* Abrams, *supra* note 84, at 1027, 1032.

[89] Keys, *supra* note 85, at 290.

> entering a therapeutic facility for restoration of competency treatment, children do not enjoy such a privilege. This dichotomy . . . can allow children to be placed into a secure detention facility in a penal setting for an indefinite period of time . . . .[90]

When enacting the minor competency law, the Utah legislature more than likely had better intentions for placement during attainment than detention. However, if the State and statute do not remove detention as an option for attainment placement entirely, while also providing better alternatives for use at the court's disposal, then detention will likely be the most common placement by the courts out of simple necessity and lack of better options.

> As one Oklahoma juvenile detention administrator commented: [t]o put it simply we are the dumping grounds for the juvenile system. Understand this and understand it well: when the system is unable to get youth placed in a treatment facility or a mental health facility, they will be placed in a detention facility. If a youth needs to be detained in a mental health facility it will not happen; they will be placed in a detention center.[91]

The law does provide that if the minor is being held in detention only because he or she is pending placement in a less restrictive setting, then "the department shall locate and transfer the minor to the alternative placement within 14 days."[92] However, this fourteen-day limit appears to apply only if the minor is placed in detention until a better alternative becomes available. The courts still have the option to order the placement as detention, in accordance with section 78A-6-1303(4)(b), allowing them to avoid the fourteen-day requirement entirely.[93]

There needs to be not only a better option than detention, but more available facilities that are not overcrowded for the juvenile court system to utilize. If the state hopes to help minors achieve competency during attainment, they must invest in more mental health facilities in which these children can be placed when they are removed from their homes for six months to a year.

III. WHAT DOES A COURT DO IF A MINOR IS NOT ABLE TO ACHIEVE COMPETENCY?

As the law currently stands, if a minor is unable to achieve competency, the State must dismiss the charges without prejudice and release the minor.[94]

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[90] Ashley P. Mayer, *Secure Detention: The Plight of Juveniles in Florida Who are Incompetent to Stand Trial*, 12 U.C. DAVIS J. JUV. L. & POL'Y 239, 239 (2009).

[91] Hicks, *supra* note 76, at 985 (citation omitted).

[92] UTAH CODE ANN. § 78A-6-1303(5) (West 2009 & Supp. 2012).

[93] *Id.* § 78A-6-1303(4)(b), (5).

[94] *Id.* § 78A-6-1303(8).

However, a whole host of issues could arise from a policy of dismissing the charges and releasing the minor once they are found incompetent to stand trial. If a minor is charged with a dangerous crime, the court should not dismiss all charges and let the minor back out into society. If they are being charged with rape, assault, murder, or other violent crimes, it is against society's values to simply hope for the best if they are not found competent to stand trial and are therefore released. The charges would be dismissed without prejudice in accordance with the Utah law so theoretically the prosecutor may merely re-file the charges and hope for a different result on competency. Whether or not this should be done, or how many times this can be done, however, is an issue in itself.

If the minor did indeed commit the crime, they may repeat the same crime or worse crimes if released, especially if they received no punishment for the last crime. Looking further ahead, the statute should address what should be done if the minor reoffends before turning eighteen years old and the juvenile court has already found the minor incompetent to stand trial. The law should address whether the court and its agencies should go through competency proceedings again, and if so, whether the competency review should occur automatically or only when the issue is raised by the parties. Alternatively, perhaps the courts should skip the competency process entirely and jump right to dismissing the charges—or further, not bring charges at all. Obviously this seems like an extreme result, but without guidance for following and adhering to this law along with more precise answers to problems such as these, we may indeed be heading down this type of slippery slope.

A. What Other States Have Done

Because Utah's statute was enacted recently in May 2012 it is helpful to look to what other states have done concerning juvenile competency, most notably what happens when a youth is declared incompetent. Many states have enacted juvenile competency statutes, and even though they all appear to function fairly similarly, there are slight differences amongst the states[95] that can change completely how the minor is handled when declared incompetent to stand trial.[96] States vary quite significantly on what to do with a minor who remains incompetent to stand trial.

> If restoration appears impossible, some states allow the judge to dismiss the petition with or without prejudice; some states have restricted the "with prejudice" to misdemeanors and status offenses. Three states permit the judge to convert some delinquency charges into status offenses, but another four require competency to stand trial in all cases.

[95] Sanborn, *supra* note 69, at 145–47.
[96] *See id.*

> Some jurisdictions allow the civil commitment of youths who are permanently incompetent to stand trial.[97]

1. Arizona

The Arizona law is similar to the Utah law. There are, however, some notable differences. The first difference is that Arizona includes a provision for a minor who is released after being found incompetent to proceed and then reoffends.[98] If, within the past year, the minor was found incompetent to stand trial, the court may hold a hearing to dismiss any misdemeanor charge if the juvenile continues to be incompetent.[99] However, the law contains no provision for dismissing charges other than misdemeanors. The second difference is the level of proof required by the court. Arizona requires the "clear and convincing evidence" standard,[100] a higher standard than the "preponderance of evidence" standard used in Utah.[101] Lastly, in Arizona, if a juvenile is found to be incompetent and not likely to regain competency, the court will dismiss the charges with prejudice.[102] The Utah court must dismiss the charges without prejudice.[103] Arizona also provides that if the court finds that the minor merely will not regain competency before turning eighteen (as opposed to finding that the juvenile cannot regain competency at all), then the court must differentiate between a misdemeanor and different types of felonies to determine whether to dismiss with or without prejudice.[104]

These differences could change the outcome of a competency proceeding in Utah significantly from a competency proceeding in Arizona. For instance, if a minor found incompetent repeated a misdemeanor crime in Arizona, the charges would be dismissed as long as the minor is still incompetent.[105] Yet, if the juvenile was a repeat misdemeanor offender in Utah, there is no way to know how that minor's case will be handled because the law does not specify how to handle such a situation. The charges may well be dropped, but they could also be filed and the process of determining competency may have to be repeated all over, costing the

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[97] *Id.* at 146–47 (citations omitted). Several jurisdictions allow petitions to be dismissed. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-291.08(D) (2007); COLO. REV. STAT. § 19-2-1303(3)(c) (2008); D.C. CODE § 16-2315 (2012); FLA. STAT. ANN. § 985.19(5)(c) (LexisNexis 2013); GA. CODE ANN. § 15-11-152 (West 2012); KAN. STAT. ANN. § 38-2349(c) (Supp. 2007); N.M. STAT. ANN. § 32A-2-21(G) (2008); TEX. FAM. CODE ANN. § 55.31 (West 2011); VA. CODE ANN. § 16.1-358 (West 2013); WIS. STAT. ANN. § 938.30 (West 2012); WYO. STAT. ANN. § 14-6-219(d) (West 2012).

[98] ARIZ. REV. STAT. ANN. § 8-291.05(A).

[99] *Id.*

[100] *Id.* § 8-291.10(F).

[101] UTAH CODE ANN. § 78A-6-1303(12) (West 2009 & Supp. 2012).

[102] ARIZ. REV. STAT. ANN. § 8-291.10(H) (2000).

[103] UTAH CODE ANN. § 78A-6-1303(14).

[104] ARIZ. REV. STAT. ANN. § 8-291.10(G).

[105] *Id.* § 8-291.05(A).

State and the minor undue time and money if the minor's competency status remains unchanged.

The results of a competency proceeding could also vary when considering the difference between Utah's and Arizona's outlook on dismissing charges with or without prejudice. Arizona requires charges to be dismissed with prejudice unless the incompetent minor is found likely to regain competency after they have reached the age of eighteen.[106] Thus, even though the accused is outside the reach of the juvenile court at that point, the charges could be refiled after the minor becomes a legal adult. Outside of this particular situation, Arizona does not allow the charges to be refiled.[107] On the other hand, Utah requires all charges to be dismissed without prejudice when competency cannot be achieved.[108] This leaves the door open for charges to be re-filed after a minor has been found incompetent to stand trial, but does not give any sort of guide for courts on what types of charges may be re-filed or how many times this may occur.[109] Thus a minor found incompetent in Arizona is more likely to know what steps may be taken next, whereas a minor found incompetent in Utah faces a more uncertain future. As the law stands, it is impossible to determine which types of charges a prosecutor may re-file in Utah and when they may do so. Results will likely differ depending on the individual court and prosecutor.

2. Colorado

In accordance with Colorado's statute concerning juvenile competency, a Colorado court may make a preliminary decision concerning competency without a competency hearing, which if not opposed, will stand as a final determination.[110] Utah courts will always hold a competency hearing if competency is raised and the motion convinces a court that there is a reasonable doubt as to the minor's competency.[111] Colorado's law also states that if a juvenile is found to be incompetent the charges will be dismissed, but the court may create and enforce a management plan or, at least, continue current treatments for the minor.[112] The statute specifies that charges will be dismissed but is not specific about how or when that should be done.[113] Finally, unlike Utah, after restoration, the Colorado statute does not provide situations in which a minor is found to be incompetent with no possibility of restoration.[114] A Colorado court may only contine trying to

[106] *Id.* § 8-291.10(G).
[107] *See id.*
[108] UTAH CODE ANN. § 78A-6-1303(14).
[109] *See id.*
[110] COLO. REV. STAT. § 19-2-1302(1)–(2) (West 2005).
[111] UTAH CODE ANN. § 78A-6-1302(2).
[112] COLO. REV. STAT. § 19-2-1303(3)(a).
[113] *Id.*
[114] *Id.* § 19-2-1305.

achieve restoration,[115] until the minor's twenty-first birthday, beyond which the juvenile court cannot retain jurisdiction.[116]

These are minor differences between the laws, but may have significant impact on the life of a juvenile found incompetent to stand trial. Colorado's statute gives the court system the latitude to continue to treat a minor after it is determined that competency would not be achieved.[117] Alternatively, Utah's law does not make mention of ongoing treatment after the fact, only that the prosecutor may initiate commitment proceedings.[118] Therefore, if a minor is found incompetent in Colorado they could be ordered by the court to undergo treatment until they are twenty-one years old, no matter when they are alleged to have committed the crime.[119] In Utah, the same minor would have the charges against them dropped within a year and would not receive ongoing treatment unless he or she was committed.[120]

3. Florida

The Florida law is more detailed about when a juvenile will be committed than Utah's law. A child who is found incompetent and "who has committed a delinquent act or violation of law, either of which would be a felony if committed by an adult, must be committed to the Department of Children and Family Services for treatment or training."[121] Alternatively, "a child who has committed a delinquent act or violation of law, either of which would be a misdemeanor if committed by an adult, may not be committed to the [Department] for restoration-of-competency treatment or training services."[122] There is no differentiation between the types of crime the juvenile has committed in Utah; all are treated alike, which could result in more serious handling of misdemeanor crimes committed by incompetent juveniles in Utah than in Florida.

Florida's statute also places an emphasis on why a juvenile is incompetent, differentiating between reasons for incompetency, which the Utah law does not do. If a child has been found incompetent "because of age or immaturity, or for any reason other than for mental illness or retardation or autism" they cannot be committed to the Department.[123]

If the court finds a child incompetent who has mental illness, mental retardation, or autism, the court must determine whether the child meets the criteria

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[115] *Id.*
[116] *Id.* § 19-2-1303(3)(c).
[117] *Id.* § 19-2-1303(3)(a).
[118] UTAH CODE ANN. § 78A-6-1302(14)(d) (West 2009 & Supp. 2012).
[119] COLO. REV. STAT. § 19-2-1303(3)(a)–(c).
[120] UTAH CODE ANN. § 78A-6-1302(14)(d).
[121] FLA. STAT. ANN. § 985.19(2) (West 2007).
[122] *Id.*
[123] *Id.*

for secure placement.[124] These criteria include the child's mental illness, mental retardation, or autism,

> [t]he child is manifestly incapable of surviving with the help of willing and responsible family or friends, including available alternative services, and without treatment or training the child is likely to either suffer from neglect or refuse to care for self, and such neglect or refusal poses a real and present threat of substantial harm to the child's well-being; or [t]here is a substantial likelihood that in the near future the child will inflict serious bodily harm on self or others, as evidenced by recent behavior causing, attempting, or threatening such harm; and [a]ll available less restrictive alternatives . . . are inappropriate.[125]

If a child meets these criteria, they must be committed to the Department and receive treatment in a secure facility.[126] "If a child is determined to have mental illness, mental retardation, or autism and is found to be incompetent to proceed but does not meet the criteria . . . the court shall commit the child to the Department," but require that they provide treatment in the community.[127] These variations in the two laws could mean that a juvenile in Utah who is found incompetent for a reason other than mental illness, retardation, or autism could potentially be committed, whereas in Florida this possibility does not exist.

Another difference between the two laws is the time range for restoration. Florida allows up to two years for restoration, double that of Utah. This extra time could make a significant difference in the ability to achieve competency, but also in the life of the minor. If the juvenile has been removed from the home, but placed in less than ideal conditions due to lack of mental health facilities, as discussed earlier, it could negatively impact the minor's future. On the other hand, extending the attainment period could have a positive effect on achieving competence. With a longer time for professionals to work with the minor and for the minor to mature, there may be a greater likelihood than there is in Utah of achieving competency.

4. Kansas

The main difference between Kansas and Utah law is that Kansas requires commitment in certain situations, whereas Utah's law leaves it up to the discretion of the court whether to initiate commitment proceedings.

When a juvenile is found to be incompetent in Kansas, he will be "committed for evaluation and treatment to any appropriate public or private institution for a period not to exceed 90 days."[128] During those ninety days, if the medical officer[129]

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[124] *Id.* § 985.19(3).
[125] *Id.*
[126] *Id.* § 985.19(4).
[127] *Id.* § 985.19(6)(a).
[128] KAN. STAT. ANN. § 38-2349(a) (West Supp. 2011).

believes that competency may be achieved, "the court shall order the juvenile to remain in an appropriate public or private institution until the juvenile attains competency or for a period of six months from the date of the original commitment, whichever occurs first."[130] If during that six-month period the juvenile does not attain competency, the court must order proceedings dealing with the care and treatment of the mentally ill, including commitment, to be commenced.[131] If during that six-month period the juvenile is determined to be competent, then after a competency hearing, delinquency proceedings will be resumed.[132] Alternatively, if the medical officer does not believe the juvenile has a probability of attaining competency, the court will order proceedings dealing with the care and treatment of the mentally ill, including commitment, to be commenced.[133] Kansas's law is quite clear that during restoration the juvenile will be committed and the statute divests the court of discretion to determine whether commitment is necessary.[134] If during or after restoration the court finds that the juvenile will not be restored to competency, the law requires that proceedings begin addressing the treatment of the minor, including commitment proceedings.[135]

The differences between these two state laws could impact the life of a minor found to be incompetent after committing a crime. In Kansas, said minor would be required to be committed or at least receive some sort of ongoing treatment.[136] In Utah, such a minor would have the charges against them dismissed, would not be required to undergo any ongoing treatment, and would only be committed if the prosecutor decided it was necessary and the court agreed.[137] A minor could end up in two entirely different situations if found incompetent to stand trial depending on what state the crime was committed in.

5. New Mexico

New Mexico begins its juvenile competency law very differently than many other states, including Utah. If during a delinquency proceeding,

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[129] A medical officer is a medical professional "with experience in juvenile forensic evaluations and juvenile brain development." UTAH CODE ANN. § 78A-6-1302(4) (West 2009 & Supp. 2012).

[130] *Id.* § 38-2349(b).

[131] *Id.* § 38-2349(b) (stating that the "court shall order the county or district attorney to commence proceedings pursuant to article 29 of chapter 59 of the Kansas Statues Annotated;" however, that law has been repealed).

[132] *Id.*

[133] *Id.* § 38-2349(c).

[134] *Id.* § 38-2349(b).

[135] *Id.* § 38-2349(b)–(c).

[136] *Id.*

[137] UTAH CODE ANN. § 78A-6-1302(14)(d) (West 2009 & Supp. 2012).

> evidence indicates that the child has or may have a mental disorder or developmental disability, the court may:
>
> (1) order the child detained if appropriate under the . . . provisions of the Delinquency Act; and
>
> (2) initiate proceedings for the involuntary placement of the child as a minor with a mental disorder or developmental disability.[138]

The child can then "remain in the residential treatment or habilitation facility pending the disposition of the delinquency petition."[139] Utah requires that an interested party raise the issue during delinquency and then a hearing is held to determine competency.[140] New Mexico allows the court to use its own discretion and place the child without an official hearing.[141]

Unlike Utah, New Mexico also differentiates between types of crimes. If the child is found incompetent to stand trial for a misdemeanor crime, the court will dismiss the charges with prejudice, preventing the charges from being brought again.[142] However, if the child is found incompetent to stand trial for any other type of crime, "the court shall stay the proceedings until the child is competent to stand trial; provided that a petition shall not be stayed for more than one year."[143] If the court finds that the child will not obtain competency at any time during that year, or if the child has not obtained competency by the end of the year, the court must dismiss the delinquency charges without prejudice; this process parallels Utah's law.[144] Again, this difference could result in an incompetent minor charged with a misdemeanor crime in Utah being treated very differently than a similar minor in New Mexico.

6. Wisconsin

There are significant differences between Wisconsin's law and Utah's law. To begin, Wisconsin requires a court to find probable cause that the juvenile committed the alleged offense to address the question of competency,[145] which Utah does not require. The Wisconsin statute governs not only cases in which the juvenile is not competent to stand trial, but also cases in which the juvenile is "not responsible by reason of mental disease or defect."[146] This provision is akin to the

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[138] N.M. STAT. ANN. § 32A-2-21(A) (West 2012) (discussing proceedings under the Children's Mental Health and Developmental Disabilities Act which has since been repealed by 2007 N.M. Laws 2376).

[139] *Id.* § 32A-2-21(D).

[140] UTAH CODE ANN. §§ 78A-6-1301(1), 1302(13).

[141] *See* N.M. STAT. ANN. § 32A-2-21(A).

[142] *Id.* § 32A-2-21(G).

[143] *Id.*

[144] *Id.* § 32A-2-21(G).

[145] WIS. STAT. ANN. § 938.30(5)(a) (West 2012).

[146] *Id.*

insanity plea for adults and deals with whether the guilty minor is in fact responsible for their own actions.[147]

Utah's statute, on the other hand, does not require probable cause of the minor's guilt for the delinquency charges before investigating competency.[148] However, adding a provision like this could be a life-changing requirement for innocent juveniles. If the court investigated innocence before competency, an innocent juvenile would be spared the process of determining competency and the time it requires. On the other hand, the downfall to such a provision is that the investigation into innocence may not be as thorough as an actual trial and mistakes could be made as to innocence or guilt. Utah's statute also does not include an insanity plea-type provision. This option is also not available for adults in Utah so it is not surprising that it would not be written into the statute for minors.

7. Wyoming

Wyoming's law proceeds in a different way than the Utah law. It places a great deal of consideration on commitment of the child, and it appears that the only clear way charges against an incompetent minor are dismissed is if the minor's mental disabilities are severe enough to be committed to the state hospital or a similar facility.[149]

Delving into this disparity, it is once again clear that a minor found incompetent in Wyoming may be treated completely differently in the court system than elsewhere in the country. It may be less likely that the charges against an incompetent minor in Wyoming will be dropped, considering the minor must be committed for an unspecified amount of time for this to occur.[150] Alternatively, this portion of the statute could have the undesirable effect of committing more minors than necessary. In Wyoming there are only two outcomes of a competency hearing: either the minor is committed and the charges are dropped, or delinquency proceedings are carried through to final adjudication.[151] If the minor cannot stand trial for his crimes in Wyoming, whether misdemeanors or felonies, commitment proceedings will be initiated whether or not commitment is the best treatment option for the minor.[152] This stricter requirement for commitment is vastly different from Utah, where charges may be dropped with no requirement of commitment if competency cannot be restored.[153]

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[147] *See id.* § 938.30(5)(a)(1).
[148] UTAH CODE ANN. § 78A-6-1301(1) (West 2009 & Supp. 2012).
[149] WYO. STAT. ANN. § 14-6-219(d) (2011).
[150] *Id.*
[151] *Id.*
[152] *Id.* § 14-6-219(c).
[153] UTAH CODE ANN. § 78A-6-1302(14)(d).

B. Other Options

1. How Does Utah Handle Incompetent Adults?

Utah's law for commitment of incompetent adults is similar to the law for juveniles.[154] However, the adult law addresses more concerns than the juvenile law does. Most notably, the adult competency law allows the court to extend the attainment period longer if the crime charged is "attempted murder, manslaughter, or a first degree felony" and even longer for aggravated murder and murder.[155] The fact that the court is allowed to take into account the severity of the crime charged for adults, but not for minors, is a puzzling distinction.

Adding this provision to the juvenile law could have a huge impact in keeping dangerous minors off of the streets. As the law currently stands, charges against incompetent minors are dismissed and the minors are released from custody unless involuntarily committed.[156] If the court were permitted to extend the attainment period for more severe crimes, the juvenile may have a better chance of obtaining competency given a longer time period for therapists and professionals to work with him. However, even if he never becomes competent, a longer time period would still allow the court a greater time to work with the minor, decide how best to treat him to prevent him from reoffending, and find the most appropriate long-term placement if necessary. If juveniles could be detained longer than the one-year limit currently in place, there would be less chance of indefinitely committing a child who could achieve competency and stand trial for his crimes.

Extending the attainment period just for the most severe crimes prevents incompetent minors that have been charged with minor crimes from being removed from their homes longer than necessary, while still giving the judicial system the opportunity to keep more dangerous juveniles off the streets until the best decisions concerning them can be reached. Therefore, adding a provision such as this one to the juvenile competency laws would provide a helpful alternative to simply dismissing the charges and releasing a dangerous minor—and a better alternative than involuntarily and indefinitely committing the minor.

2. Can a Court Require Outpatient Treatment?

Many of the state laws discussed above allowed the court to continue providing outpatient treatment to minors found incompetent to stand trial, either through management plans,[157] discharge plans,[158] or protective services.[159] Utah

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[154] *See id.* § 77-15-6 (West 2004).
[155] *Id.* § 77-15-6(8)–(10).
[156] *Id.* § 78A-6-1302(14)(d) (West 2009 & Supp. 2012).
[157] COLO. REV. STAT. § 19-2-1303(3)(a) (2012).
[158] FLA. STAT. ANN. § 985.19(5)(b) (West 2012).
[159] WIS. STAT. ANN. § 938.30(5)(d) (West 2009).

gives two options: release the minor or initiate involuntary commitment proceedings.[160]

Allowing the court to continue with outpatient treatment after dismissing charges due to incompetency—for example, by requiring appointments with psychologists or psychiatrists—would be a good addition to Utah's law. This would give the court and the victim peace of mind that this minor is at least receiving continued help and someone is watching over the minor to ensure the minor does not reoffend.

Continued treatment would also benefit the minor who has been declared incompetent to stand trial. Even though never convicted of a crime, the minor has been found to have mental disabilities and receiving treatment may prevent the minor from committing crimes in the future. This approach may allow the court to avoid involuntary commitment unless absolutely necessary. It gives the judicial system another option to both help the minor and ensure the safety and well-being of the community at the same time.

3. Commitment Cannot Be Permanent

To prevent dangerous minors from going back out into the public after being found incompetent to stand trial, many state statutes provide that involuntary commitment proceedings may be initiated against them, thereby committing them to a mental health facility against their will. This raises the question of how long the minor can stay committed if it has already been decided that he is incapable of attaining competency. Regarding adults, the United States Supreme Court held that "Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process."[161] If it is against an adult's guarantee of due process to be indefinitely committed, one can presume that it would be against a juvenile's rights as well.[162]

Therefore, indefinite commitment does not appear to be a viable alternative to dismissing charges and releasing the minor in Utah. Utah, or perhaps the United States Supreme Court,[163] needs to strive for a better solution than involuntary commitment. There are many potential solutions already in place in many states, including ongoing outpatient treatment and having a different process in place not involving commitment when the juvenile commits minor crimes versus more severe crimes. Because the United States Supreme Court held that indefinite involuntary commitment is against a person's due process rights, these potential solutions need to be considered more seriously by Utah as alternatives.

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[160] UTAH CODE ANN. § 78A-6-1302(14)(d).

[161] Jackson v. Indiana, 406 U.S. 715, 731 (1972).

[162] *See In re* Gault, 387 U.S. 1, 13 (1967) ("[W]hatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

[163] *See infra* Part III.B.6.

4. Should Utah Retry Incompetent Minors?

Because Utah requires that charges be dismissed without prejudice,[164] a prosecutor may bring the charges again.[165] A provision should be added to the law to treat different types of incompetency differently, similar to Florida's law.[166] Unlike adults, minors may be incompetent simply because of age or lack of maturity.[167] "Children begin to develop abstract reasoning capabilities around age twelve and may find it difficult to make rational decisions on some matters prior to that point."[168] However, a study of 136 juveniles aged 9 to 16 found that competence increased dramatically as the juveniles grew older.[169]

The law could also be improved by adding a provision that allows a prosecutor to bring charges again if certain conditions are met—for example, if the minor is found incompetent due to age. Another provision should be added to prohibit the refiling of charges if incompetency is due to a mental illness or disability that the minor is unlikely to outgrow. Otherwise, the law exposes a juvenile to potential harassment because the prosecutor has the right to continually bring charges and subject him to attainment proceedings, even if that juvenile cannot attain competency.[170]

The State should consider another provision dealing with the severity of the crime. Like New Mexico,[171] Utah should dismiss charges with prejudice when an incompetent minor is charged with a misdemeanor crime. If it is any other type of crime, charges should continue to be dismissed without prejudice. Adding this would allow only the more serious crimes to be brought again by the prosecutor.

5. Should Utah Add a Provision for Repeat Offenders?

Utah should also consider adding a provision that deals strictly with repeat offenders who have already been found incompetent to stand trial. Arizona has a provision that allows the court to immediately dismiss any misdemeanor charge if the juvenile continues to be incompetent, but then requires the court to initiate

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[164] UTAH CODE ANN. § 78A-6-1302(14)(d).

[165] *Dictionary of Legal Terms*, UTAH COURTS, http://www.utcourts.gov/resources/glossary.htm (last visited June 26, 2013).

[166] FLA. STAT. ANN. § 985.19(2) (West 2012) (applying different rules if mental incompetency results from age rather than mental disability).

[167] Lynda E. Frost & Adrienne E. Volenik, *The Ethical Perils of Representing the Juvenile Defendant Who May Be Incompetent*, 14 WASH. U. J.L. & POL'Y 327, 333 (2004).

[168] *Id.*

[169] 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, 652 (1995).

[170] State v. Rogers, 2006 UT 85, ¶ 11 (providing a list of "potentially abusive practices that bar refiling . . . including '. . . repeated filings of groundless and improvident charges for the purpose to harass'" (quoting State v. Redd, 2001 UT 113, ¶ 20)).

[171] N.M. STAT. ANN. § 32A-2-21(G) (West 2010).

commitment proceedings or appoint a guardian ad litem to investigate dependency if charges are dismissed.[172]

After Utah's law has been in place for a long enough time, it is very likely that the court will encounter the problem of incompetent minors committing more crimes. Currently, the law does not address repeat offenders, so there is a high probability of inconsistency when an incompetent minor is charged with another crime and returns to the juvenile court system. Therefore, a provision such as the Arizona one would be a helpful addition so the court has some direction when dealing with repeat offenders who are still incompetent to stand trial.[173]

6. Should There Be a Uniform Statute Regarding Juvenile Competency?

The Supreme Court has thus far remained silent on these issues.[174] Therefore, states have "filled the gap left by the Supreme Court's silence."[175] Even though the states' laws all have similarities and differences, none of the laws have reached all the issues and many of them are far from perfect answers for the problem of juvenile incompetency. Currently, depending on where an incompetent minor commits a crime, the minor may face a range of judicial action—from being released to being involuntary committed for an unspecified amount of time. It is time for the Supreme Court to give states a uniform law to enact and work with so that all minors found incompetent to stand trial are treated the same and are ensured their due process rights.

IV. CONCLUSION

No law will be perfect or address all of the potential issues that can arise in a juvenile competency matter, but Utah's law is a good first attempt to address them. However, additions need to be made to make the law more effective. There need to be provisions added that take into account the severity of the crimes and treat them differently. Generally, misdemeanors need to be dismissed with prejudice and more serious offenses dismissed without prejudice. Courts should only be able to extend restoration periods for more serious offenses. There should be provisions addressing repeat offenders and continuing outpatient treatment. Also, the law needs to address more seriously when minors can be committed and for how long. Whether Utah itself takes action, or the Supreme Court decides to look into the issue, a better answer than what is currently in place is needed to address the problem of juvenile competency.

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[172] ARIZ. REV. STAT. ANN. § 8-291.05(B) (2007).
[173] *Id.*
[174] Frost & Volenik, *supra* note 167, at 332.
[175] *Id.*