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House Judiciary Committee
 Colorado General Assembly
 200 East Colfax Avenue
 Denver, CO 80203

RE: Written testimony on Colorado House Bill 1025 "A BILL FOR AN ACT CONCERNING COMPETENCY TO PROCEED FOR JUVENILES INVOLVED IN THE JUVENILE JUSTICE SYSTEM"

Dear Members of the Judiciary Committee:

I am an academic researcher who is a member of a technical assistance team at the University of Massachusetts Medical School (the National Youth Screening and Assessment Project), which is funded by the John D. and Catherine T. MacArthur Foundation to assist states in their efforts to form juvenile justice law and policy on a number of matters pertaining to youths' welfare, including juveniles' competence to stand trial (JCST). In that role, I developed a guide for policymakers who are in the process of developing JCST legislation.¹ Utilizing that guide, I provide assistance to states related to JCST legislation, policy and procedure and provide education upon states' request. It is our hope that the information provided below will assist you in your legislative efforts.

I. Background: Competence to Stand Trial for Youth

Over the past ten years, juvenile competence to stand trial (JCST) has become an issue on the legislative agendas of states around the country. H.B. 1025 would amend current JCST legislation, including Colorado in the growing trend ensuring state legislation addresses the unique developmental needs of juvenile justice involved youth.

Legal History and Standards:

Competence to stand trial (CST) is critical to help ensure the fundamental fairness of proceedings by promoting meaningful participation by defendants in court processes and increasing the accuracy of the fact-finding process.

In *Dusky v. United States* (1960), the Supreme Court held that CST requires that a defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding –and whether he has a rational and factual understanding of the proceedings against him."² In other words, a defendant must be able to understand factual information about the trial (what the judge does, jury does, etc.), be able to apply that information to his or her case to make reasoned decisions (e.g., whether to go to trial or accept a plea bargain), and be able to assist counsel in his or her defense (e.g., communicate effectively regarding alleged events). As early as 1967, the Supreme Court held that, similar to their adult counterparts, juveniles in delinquency proceedings are entitled to due process protections.³ However, it was not until after the 1990s wave of "get tough" legislation around the country, which put youth at risk of more punitive sanctions, that CST began to be raised with any frequency in juvenile proceedings. When CST began to be raised with juveniles, initially, adult

¹ See K. LARSON & T. GRISSO, DEVELOPING STATUTES FOR COMPETENCE TO STAND TRIAL IN JUVENILE DELINQUENCY PROCEEDINGS: A GUIDE FOR LAWMAKERS (2011), available at: http://works.bepress.com/kimberly_larson/5/.

² 362 U.S. 402 (1960).

³ *In re Gault*, 387 U.S. 1 (1967).

criminal CST procedures were often applied. However, it quickly became apparent that the unique developmental needs of youth caused adult procedures to be a poor fit.

Psychological Research:

During the past decade, psychological research on juveniles' development has also underscored states' need to establish juvenile-specific CST laws and policies. The most comprehensive study to date has been the MacArthur Foundation Juvenile Competence Study, which examined 927 youth (age 12-17) and 486 young adults (age 18-24). The study found that, on average, juveniles under age 15 performed worse on a standardized measure of competence-related abilities when compared to young adults.⁴ These difficulties were exacerbated in youth with mental illness or intellectual disabilities, putting them at higher risk of having deficits in abilities usually considered necessary for CST. Additional research has underscored that youth often lack competence-related abilities for different reasons than adults. For adults, serious mental illness (e.g., Schizophrenia) is the most common cause of incompetence. In contrast, juveniles are more likely to be incompetent due to intellectual disability, learning disabilities, developmental factors, and/or different types of mental illness (because symptoms like psychosis usually do not develop until one's 20s).⁵ In response to this research, psychologists developed special evaluation procedures and services to address developmental differences in youths' competence-related abilities.⁶

National Legislative Picture:

While courts around the country have been applying CST in juvenile proceedings, and psychological research and evaluation procedures have shed light on the critical developmental differences in this context, legislation lagged behind until about the last decade. Since that time, states around the country have been working to create developmentally appropriate CST laws to help protect youth. In the past six years, states as diverse as California, Connecticut, Michigan, Maine, Ohio, and Illinois have passed JCST legislation. In total, nationally, at least 20 states have created juvenile-specific JCST policies and procedures, with more in process, to ensure that their laws are in line with the current body of knowledge and the unique needs of juveniles are addressed.

II. House Bill 1025

Colorado has a juvenile-specific statute for competence to stand trial (CST), and Colorado Supreme Court case law specifically addressing the importance of recognizing the differences between juveniles and adults.⁷ However, H.B. 1025 modifies existing law to bring Colorado law further in line with the extant body of knowledge regarding the impact of developmental factors upon youths' functioning in CST contexts. The current bill addresses the specific needs of juveniles identified in the psychological research and allows for increased consistency across the state by clarifying these issues. Importantly, the bill emphasizes the civil nature and rehabilitative purposes of juvenile proceedings, and the importance of recognizing differences between juveniles and adults. It also provides guidance for judges and forensic evaluators by developing and/or clarifying several key concepts including: 1) underlying reasons or "predicates" for a finding of incompetence; 2) functional abilities to be examined; 3) least restrictive setting; and 4) competency restoration (described in more detail below). The proposed amendments would provide guidance for courts considering JCST-related issues that existing law does not comprehensively address.

- 1) *Underlying Reasons or "predicates" for a Finding of Incompetence*—H.B. 1025 addresses this by including "developmental disability," "intellectual disability," and "mental disability." Defining the underlying reasons

⁴ T. Grisso, et al., *Juveniles Competence to Stand Trial: A Comparison of Adolescents and Adults Capacities as Trial Defendants*, 27 L. & HUM. BEHAV. 333 (2003).

⁵ See e.g., Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 Va.J. Soc. Pol'y & L. 353 (2001); McGaha et al., *Juveniles adjudicated incompetent to proceed: A descriptive study of Florida's competence restoration program*, 29 J. Am. Academy of Psychiatry & L. 427 (2001); Warren et al., *Developing a Forensic Service Delivery System for Juveniles Adjudicated Incompetent to Stand Trial.*, 8 Internat'l J. of Forensic Mental Health 245 (2009).

⁶ T. GRISSO, *EVALUATING JUVENILES' ADJUDICATIVE COMPETENCE: A GUIDE FOR CLINICAL PRACTICE* (2005).

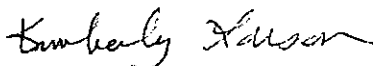
⁷ *In Re: The People of the State of Colorado, In the Interest of: W.P., an Adult*, 295 P.3d 514 (2013).

for a finding of incompetence is consistent with the psychological literature showing that youth are often incompetent for different reasons than adults. While adults are most commonly incompetent due to mental illness or intellectual disability, youth's CST-related abilities may also be impaired due to their still-developing abilities. However, regardless of the underlying reason, these youth are still similarly as disadvantaged as those who are unable to meet the *Dusky* standard for other reasons. It is important to note that this is not the same as stating a youth is automatically incompetent to stand trial. We must still examine the youth's functional abilities—what he or she can or cannot do—with regard to what is required under the *Dusky* standard. H.B. 1025 addresses this effectively by clearly specifying that age alone cannot be the basis for an incompetence finding.⁸

- 2) *Functional Abilities to be Examined*: By defining “incompetence to proceed” and “mental capacity” H.B. 1025 defines the standard for incompetence and the abilities that should be examined. This increases clarity for both forensic evaluators and courts. Forensic evaluators are much more likely to conduct consistent, comprehensive evaluations. Similarly, judges will benefit from the increased clarity regarding the expectations for the elements in reports they receive.
- 3) *Least restrictive setting*-- Evaluations should occur in the least restrictive setting possible. H.B. 1025 adds to this existing requirement by specifying “home” or “community placement” as options. This provision is in line with psychological research showing that decreasing system involvement can increase positive youth outcomes among lower-risk youth. Relatedly, this requirement of H.B.1025 helps guard against use of a limited resource in an inefficient way. Specifically, under adult models for competence to stand trial, individuals are commonly psychiatrically hospitalized because most adults are incompetent due to severe mental illness that requires hospital level care. However, as outlined above, youth are often incompetent for different reasons than adults, and thus their placement for JCST evaluation and services should differ accordingly. For example, youth are far less likely to have mental illness requiring inpatient psychiatric care. Psychiatric facilities are designed to treat the needs of those with mental health diagnoses. It would be inappropriate to psychiatrically hospitalize youth who are developmentally immature as inpatient facilities were not designed for, and thus are not equipped to provide, services for these youth. H.B. 1025 would protect youth by keeping them in the community when possible (i.e., safety does not require secure detention), allowing for better outcomes and avoiding potential inefficient use of a limited resource.
- 4) *Competency restoration*: The literature discusses that competence restoration also differs between youth and adults. With adults we are restoring them to a former level of functioning, while with youth, due to their ongoing developmental processes, we may be creating abilities rather than restoring abilities that previously existed. The inclusion of words/phrases in H.B. 1025 such as “achieve” or “have achieved or been restored” when discussing competence restoration recognizes this distinction between adults and youth, bringing Colorado law further in line with extant knowledge about youth.

If I can be of further assistance in Colorado's legislative process regarding juvenile's competence to stand trial, please feel free to contact me.

Submitted by:



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⁸ See 19-2-1300.2 (e) (stating age is not determinative and court must find youth lacks relevant capacities for competence).