

CALIFORNIA JUDGES BENCHGUIDES

Benchguide 117

**JUVENILE DELINQUENCY
FITNESS HEARING**

[REVISED 2011]



ADMINISTRATIVE OFFICE
OF THE COURTS

EDUCATION DIVISION/CENTER FOR
JUDICIAL EDUCATION AND RESEARCH

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I. [§117.1] SCOPE OF BENCHGUIDE

This benchguide covers fitness hearings in juvenile court held generally under [Welf & I C §707](#) and [Cal Rules of Ct 5.766–5.772](#). It does not cover juveniles who are subject to direct filing in criminal court under [Welf & I C §§602\(b\) and 707\(d\)](#). This benchguide includes a procedural checklist, a brief summary of the applicable law, and Judicial Council form JV-710.

II. [§117.2] PROCEDURAL CHECKLIST

(1) *Attorneys serving as temporary judges should obtain a stipulation from the parties under [Cal Rules of Ct 2.816](#). If desired, referees should also obtain a written stipulation from the parties to serve as temporary judges. See discussion in [§117.13](#).*

(2) *Review the file to ensure that the delinquency petition, probation report, and other documents have been timely filed and are in order.*

(3) *Ask the bailiff, court clerk, or probation officer to call the case.*

(4) *Determine who is present and their interest in the case before the court.* [Welf & I C §§676, 676.5, 679](#); [Cal Rules of Ct 5.530\(b\)](#). The judge may be asked to rule on the presence of the following in the courtroom (see [§117.19](#)):

- Interpreters for parent and/or child,
- Crime victims and their family members,
- Support persons for prosecuting witnesses,
- Child's family members,
- Media,
- Public, and
- Court-appointed special advocate (CASA). There may also be agency workers from the county welfare department if the child is also a dependent child.

(5) *If competency or substance abuse appears to be an issue, make an inquiry and, if necessary, suspend proceedings and make a referral under [Pen C §4011.6](#) or [Welf & I C §5343](#). See [In re Mary T. \(1985\) 176 CA3d 38, 44, 221 CR 364](#); [Welf & I C §708](#), and discussion in [§§117.16](#) and [117.20](#).*

(6) *Consider the evidence contained in the petition and probation report and from other sources if necessary.* See [§§117.22–117.26](#)

(7) *If requested by the child, determine whether the prosecution has made a prima facie case that the alleged offense is a felony (if brought under [Welf & I C §707\(a\)\(2\)](#)) or a [Welf & I C §707\(b\)](#) offense felony (if brought under [Welf & I C §707\(c\)](#)). See [§117.27](#). The judge may hear additional evidence on this subject.*

(8) *Based on the evidence, make a finding of amenability to juvenile court care, treatment, and training programs on each of the criteria on which fitness is based, and state the reasons on the record. The criteria are ([Welf & I C §707\(a\), \(c\)](#)):*

- The degree of criminal sophistication
- Whether the child can be rehabilitated during the period of juvenile court jurisdiction
- Previous delinquent history
- Success of previous juvenile court attempts at rehabilitation

- Circumstances and gravity of the offense

See discussion in §§117.31–117.36 and discussion of burden of proof in §117.6.

(9)(a) *In a case brought under Welf & I C §707(a)(1), if the child is fit, state that the child has been found fit by a preponderance of the evidence. Cal Rules of Ct 5.770(a), (c)(1).*

(b) *In a case brought under Welf & I C §707(a)(1), if the child is unfit, find that:*

- The child is not amenable to treatment under one or more of the criteria listed above, and
- The child was at least 16 years old at the time of the offense.

See discussion in §117.32.

(10)(a) *If the case has been brought under Welf & I C §707(a)(2), in order to find the child unfit, find all these factors:*

- The child was at least 16 years old at the time of the offense,
- The offense is a felony,
- The child has been declared a ward on two or more prior occasions for having committed felony offenses when 14 years old or older,
- The child is not amenable to treatment under *any* of the criteria listed above.

(b) *If the case has been brought under Welf & I C §707(a)(2), in order to find the child fit, find that the child is amenable to treatment under all the criteria listed above or that any of the first four factors listed in (10)(a) are not true. See discussion in §117.33.*

(11)(a) *If the case has been brought under Welf & I C §707(c), in order to find the child unfit, find all of these factors:*

- The child was at least 14 years old at the time of the offense and
- The offense is listed in Welf & I C §707(b), and
- The child is not amenable to treatment on *any* of the criteria listed above.

(b) *If the case has been brought under Welf & I C §707(c), in order to find the child fit, find that the child is amenable to treatment under all the criteria listed above, was under 14 years old at the time of the offense, or the offense is not a Welf & I C §707(b) offense. See discussion in §117.33.*

(12) *If the child is found fit for juvenile court, schedule the jurisdiction hearing, and order the parties to return on that date. See discussion on timing in §117.14.*

(13) *If the child is found unfit, make the following orders:*

- If the child is in custody, set bail if appropriate, or
- Detain the child in juvenile hall or the county jail, or
- Release the child on his or her own recognizance or to the custody of an adult if the child should not remain in custody, and
 - Dismiss the petition;
 - Refer the case to the District Attorney for prosecution in adult criminal court; and
 - Order parties to appear at the hearing in criminal court when notified of the place, date, and time.

(14) *With counsel's consent, ask the child if he or she has anything to add or wishes to address the court.*

III. APPLICABLE LAW

A. Background—When Juvenile Can Be Tried as Adult

1. Direct Filing in Criminal Court

a. [§117.3] By Statute

When a juvenile who is 14 years old or older has personally committed murder with special circumstances or certain sex offenses, he or she must be tried directly in adult criminal court. [Welf & I C §602\(b\)](#). A prosecution under [Welf & I C §602\(b\)](#) may be initiated by grand jury indictment. *Guillory v Superior Court* (2003) 31 C4th 168, 172, 1 CR3d 879.

b. [§117.4] At Prosecutor's Discretion

The prosecutor may elect to file an accusatory pleading directly in adult criminal court when a juvenile who is 16 years old or older is accused of committing any of the felonies listed in [Welf & I C §707\(b\)](#), as well as one that may be punishable by death or life imprisonment or one in which the juvenile personally used a firearm. [Welf & I C §707\(d\)](#). Filing charges directly against a juvenile in criminal court under [Welf & I C §707\(d\)](#) as authorized by [Proposition 21](#) is well within the prosecutor's charging authority. *Manduley v Superior Court* (2002) 27 C4th 537, 556, 33 CR2d 10. Such a filing, however, is not necessarily an indication of a finding of unfitness. See *People v Superior Court (Marcelina M.)* (2005) 133 CA4th 651, 656-657, 34 CR3d 940 ([Welf & I C §707\(b\)](#) offenses were later dismissed as part of a plea negotiation).

In addition, under [Welf & I C §707\(d\)\(2\)](#), the prosecutor may file directly in criminal court against a juvenile who is 14 years old or older when:

- The juvenile is alleged to have committed an offense that would be punishable by death or life imprisonment if it had been committed by an adult, or
- The juvenile personally used a firearm in committing or attempting to commit a felony (see [Pen C §12022.5](#)), or
- The juvenile had previously been found to have committed an offense listed in [Welf & I C §602\(b\)](#), or
- The juvenile committed the offense in association with a street gang, or
- The offense was a hate crime, or
- The victim was disabled or elderly.

c. After Fitness Hearing

(1) [§117.5] In General

The traditional way for a juvenile to be tried as an adult is after a judicial determination that the child is unfit to be dealt with under juvenile court law. See [Welf & I C §707\(a\), \(c\)](#); [Cal Rules of Ct 5.766\(a\)](#). This procedure is the subject of this benchguide. The prosecutor initiates this procedure, by filing a motion in juvenile court, alleging that the juvenile is a person described by [Welf & I C §602\(a\)](#) and that he or she would not be amenable to juvenile court care, treatment, and training, based on the following factors ([Welf & I C §707\(a\), \(c\)](#)):

- The degree of criminal sophistication
- Whether the child can be rehabilitated during the period of juvenile court jurisdiction
- Previous delinquent history
- Success of previous juvenile court attempts at rehabilitation
- Circumstances and gravity of the offense

(2) [§117.6] Presumptions and Burden of Proof

If the juvenile is alleged to have committed an offense other than one of those listed in [Welf & I C §707\(b\)](#) and is 16 years old or older, the prosecutor has the burden of proof of unfitness, and the court may base its determination of unfitness on a finding on any one or a combination of the factors listed in [§117.5](#). See [Welf & I C §707\(a\)\(1\)](#).

If the child is alleged to have committed an offense listed in [Welf & I C §707\(b\)](#) and is 14 years old or older, there is a presumption of unfitness

unless the child can show that he or she is amenable to juvenile court care, treatment, and training, based on each of the factors listed above. [Welf & I C §707\(c\)](#). There is also a presumption of unfitness when the child is 16 years old or older and has been declared a ward on at least two prior occasions for having committed two or more felony offenses when 14 years old or older unless the child can show that he or she is amenable on each of the factors. [Welf & I C §707\(a\)\(2\)](#). The burden of rebutting the presumption is on the child by a preponderance of the evidence. See [Welf & I C §707\(a\)\(2\), \(c\)](#); [Cal Rules of Ct 5.772\(a\)](#).

These presumptions depend on the child's age at the time of the commission of the alleged offense. Under former [CC §26](#) (now [Fam C §6500](#)), a person attains a certain age on the first minute of his or her birthday. [In re Harris \(1993\) 5 C4th 813, 844, 850, 21 CR2d 373](#).

B. [§117.7] Purpose of Fitness Hearing

The purpose of the fitness hearing is to determine, before jeopardy attaches, if the child is amenable to the benefits of the juvenile court. See [Welf & I C §707\(a\)](#). If the prosecution requests a fitness hearing, the court may not hold a jurisdiction hearing or trial until this determination is made. [Cal Rules of Ct 5.766\(c\)](#).

In a fitness hearing, whether or not the child committed the offense is not the issue; the sole question is whether he or she would be amenable to treatment in the event that he or she is declared to be a ward. [People v Superior Court \(Rodrigo O.\) \(1994\) 22 CA4th 1297, 1303, 27 CR2d 796](#). The court must decide if the child's best interest would be served by retaining juvenile court jurisdiction. [People v Superior Court \(Zaharias M.\) \(1993\) 21 CA4th 302, 307, 25 CR2d 838](#).

C. Fitness Hearing Requirements

1. [§117.8] Under Welf & I C §707(a)(1)

Under [Welf & I C §707\(a\)\(1\)](#), the prosecuting attorney may request a fitness hearing if the child was 16 years old or older at the time of the alleged offense and the offense is not listed in [Welf & I C §707\(b\)](#). [Welf & I C §707\(a\)\(1\)](#); [Cal Rules of Ct 5.766\(a\)\(1\)](#).

2. [§117.9] Under Welf & I C §707(a)(2)

Under [Welf & I C §707\(a\)\(2\)](#), the prosecuting attorney may request a fitness hearing if the child was 16 years old or older at the time he or she committed any felony while a ward of the court under [Welf & I C §602\(a\)](#). [Welf & I C §707\(a\)\(2\)](#); [Cal Rules of Ct 5.766\(a\)\(2\)](#). Presumably the current felony would be one not listed in [Welf & I C §707\(b\)](#), or otherwise the fitness hearing would be held under [Welf & I C §707\(c\)](#). See [Cal Rules of Ct 5.766\(a\)\(2\)](#). The child comes under this section if, on at least

one prior occasion, he or she had committed two or more felonies, and the felonies were committed when the child was 14 years old or older. [Welf & I C §707\(a\)\(2\)](#); [Cal Rules of Ct 5.766\(a\)\(2\)](#).

3. [§117.10] Under Welf & I C §707(c)

Under [Welf & I C §707\(c\)](#), the prosecuting attorney may request a fitness hearing if the child was 14 years old or older at the time he or she committed the offense and the offense is one listed in [Welf & I C §707\(b\)](#). [Welf & I C §707\(c\)](#); [Cal Rules of Ct 5.766\(a\)\(3\)](#).

D. [§117.11] Waiver of Jurisdiction

Whether a person is tried in juvenile or adult court is not a question of subject matter jurisdiction (*In re Harris* (1993) 5 C4th 813, 837–838, 21 CR2d 373). A person may therefore be able to waive juvenile court jurisdiction either knowingly or by failing to object. *People v Nguyen* (1990) 222 CA3d 1612, 1620, 272 CR 523; see also *Jose D. v Superior Court* (1993) 19 CA4th 1098, 1100, 23 CR2d 664 (child waived juvenile court jurisdiction by failing to reveal minority until the trial was completed). If the child waives jurisdiction by lying about his or her age, the offense committed while defendant was a juvenile may be used as a strike. *People v Level* (2002) 97 CA4th 1208, 1213, 119 CR2d 551.

When a minor who has turned 18 before appearing in court has knowingly, intelligently, and advisedly waived the right to be treated as a juvenile, a court must generally certify the adult for prosecution as an adult. See *Rucker v Superior Court* (1977) 75 CA3d 197, 202–203, 141 CR 900. Although a minor who has attained the age of majority can move for a finding of unfitness, he or she does not have an absolute right to be found unfit, and the court retains discretion to make that determination. *Joey W. v Superior Court* (1992) 7 CA4th 1167, 1172, 9 CR2d 486. In some situations there is a compelling interest to try an adult as a juvenile. 7 CA4th at 1174 (there was an existing relationship between the court and the young adult seeking a waiver). In any event, *Rucker* only applies to an adult who wants to be tried as an adult, not to a juvenile who wants to be tried as an adult. *In re Anna S.* (1979) 99 CA3d 869, 872, 160 CR 495.

E. [§117.12] Initiating the Hearing

The prosecutor initiates a fitness hearing by filing a petition with the juvenile court. [Welf & I C §707\(a\), \(c\)](#); [Cal Rules of Ct 5.766\(a\)](#). Judicial Council form JV-600, Juvenile Wardship Petition, contains an item which, if checked, constitutes a motion for the fitness hearing and notice of the prosecutor's intent to seek to have the child prosecuted in adult court. Once a petition is filed, the court must require the probation department to investigate the child and submit a report on the issue of fitness and the

child's behavioral patterns and social history. [Welf & I C §707\(a\), \(c\), \(e\)](#); [Cal Rules of Ct 5.768\(a\)](#). See discussion in [§117.23](#).

Generally, only the prosecutor may initiate a fitness hearing. See *In re Rodney F.* (1988) 203 CA3d 177, 184, 249 CR 424. The court may initiate a fitness hearing, however, when a juvenile seeks to waive juvenile court jurisdiction or even when an adult who was a minor at the time of the alleged offense attempts a waiver. *In re Rodney F.*, *supra*, 203 CA3d at 184–185. In addition, because the fitness hearing is the only mechanism for transferring a case from juvenile to adult court, when an adult who was a juvenile at the time of the offense seeks a waiver, it is as if that person has initiated a fitness hearing. See *Joey W. v Superior Court* (1992) 7 CA4th 1167, 1173–1174, 9 CR2d 486.

F. [§117.13](#) Judicial Officers

Fitness hearings, like all juvenile court hearings, may be conducted by referees or by superior court commissioners who are assigned to sit as referees. See [Cal Rules of Ct 5.536](#). For a general discussion of powers of referees, see California Judges Benchguide 116: *Juvenile Delinquency Detention Hearing* §116.34 (Cal CJER).

Although a referee may not preside over a jurisdiction hearing without a stipulation (*In re Perrone C.* (1979) 26 C3d 49, 57, 160 CR 704), that requirement does not apply to a fitness hearing because jeopardy does not attach. *Charles R. v Superior Court* (1980) 110 CA3d 945, 957, 168 CR 284. It is always advisable, however, for the referee to obtain a stipulation and indeed the referee must do so if he or she is to have all the powers of a juvenile court judge under [Cal Const art VI, §21](#). [Cal Rules of Ct 5.536\(b\)](#).

The finality provisions of [Welf & I C §§250 and 252](#) (orders of referees not requiring approval of a juvenile court judge will become final within 10 days) do not apply to orders that need approval. *In re Clifford C.* (1997) 15 C4th 1085, 1087, 64 CR2d 873. Orders requiring approval are subject to rehearing on the court's own motion up until 20 judicial days after the hearing or 10 calendar days after service of the order, whichever is later. *In re Clifford C.*, *supra*, 15 C4th at 1093; see [Welf & I C §253](#).

Unless the child objects, the judicial officer who has conducted a fitness hearing may participate in any subsequent contested jurisdiction hearing relating to the same offense. [Cal Rules of Ct 5.770\(h\)](#) (hearings conducted under [Welf & I C §707\(a\)\(1\)](#)); [Cal Rules of Ct 5.772\(i\)](#) (hearings conducted under [Welf & I C §707\(a\)\(2\)](#) and (c)). The child may waive his or her right to disqualify the fitness hearing judge from presiding over further criminal proceedings in adult court without violating either due process or the privilege against self-incrimination. *People v Bryant* (1987) 190 CA3d 1569, 1573–1574, 236 CR 96.

G. Time Limitations

1. [§117.14] For Holding Fitness Hearing

The fitness hearing must be completed before the jurisdiction hearing is held. [Cal Rules of Ct 5.766\(c\)](#). If the child is not detained, the jurisdiction hearing must begin within 30 calendar days from the date the petition was filed. [Welf & I C §657](#); [Cal Rules of Ct 5.766\(c\)](#), [5.774\(a\)](#). If the child has been detained, the jurisdiction hearing must be held within 15 judicial days of the date of the detention order. [Cal Rules of Ct 5.774\(b\)](#). Attorneys will often waive time for the jurisdiction hearing to permit preparation for the fitness hearing.

If the court delays the commencement of fitness proceedings, this delay will not require dismissal of the proceedings, although it will require releasing the child from custody and resetting the petition as a nondetained case. *David B. v Superior Court* (1983) 142 CA3d 623, 627, 191 CR 157 (decided under former rule of court that required fitness hearings to be held within 13 days of detention).

2. [§117.15] Notice Requirements

Notice of the fitness hearing must be given at least five judicial days before the hearing. [Cal Rules of Ct 5.766\(b\)](#).

3. [§117.16] Continuances

A continuance to extend a fitness or any other delinquency hearing beyond the required time limit may be granted on request but only for good cause and only for the period that is absolutely necessary. See [Welf & I C §682\(b\)](#); [Cal Rules of Ct 5.776\(a\)](#). Neither stipulation between counsel and/or parties nor convenience of parties will constitute good cause in and of itself. [Cal Rules of Ct 5.776\(a\)](#). If a party seeking a continuance fails to comply with the requirements of [Welf & I C §682\(a\)](#) (notice filed and served at least two days before the hearing to be continued), the court must deny the motion for the continuance unless that party has shown good cause for failing to meet the procedural requirements. [Welf & I C §682\(c\)](#); [Cal Rules of Ct 5.776\(a\)\(1\)](#).

A judge may also grant a continuance when the child appears to be a danger to himself or herself or others as a result of drug use. [Welf & I C §708](#). In that event, the judge may continue the hearing and order the child taken to a designated facility. [Welf & I C §708](#). Once the child has been housed in a facility, [Welf & I C §5343](#) applies. [Welf & I C §708](#). For discussion of competency determinations generally, see [§117.20](#)

In addition, a 24-hour continuance must be granted on the request of any party who has not been furnished with the probation officer's report in

accordance with [Cal Rules of Ct 5.768](#) (see discussion in [§117.23](#)). [Cal Rules of Ct 5.768\(c\)](#).

An order for a continuance must state the facts requiring the continuance. [Welf & I C §682\(b\)](#); [Cal Rules of Ct 5.776\(a\)\(2\)](#).

H. [\[§117.17\]](#) Right to Counsel

The child who is the subject of a [Welf & I C §602](#) proceeding has an absolute right to an attorney unless he or she knowingly and intelligently waives this right. [Welf & I C §§658, 679](#); [Cal Rules of Ct 5.534\(h\)\(2\)\(A\)](#), [5.663\(c\)](#). If the court determines that the parent or guardian can afford counsel but has not retained one, the court must appoint counsel for the child and order the parent or guardian to reimburse the county. [Welf & I C §700](#); [Cal Rules of Ct 5.534\(h\)\(2\)\(A\)](#).

I. [\[§117.18\]](#) Discovery

A court may order discovery by the prosecution or by the child before a fitness hearing without any justification if the request is only for items listed in [Pen C §1054.1](#) or [§1054.3](#). *Clinton K. v Superior Court (1995) 37 CA4th 1244, 1246, 1250, 44 CR2d 140*. However, a court should not authorize pre-fitness hearing discovery unless discovery appears reasonably necessary and will not delay or prolong the proceedings. 37 CA4th at 1249.

J. Conducting the Hearing

1. [\[§117.19\]](#) Who May Be Present

At the fitness hearing, as with any juvenile delinquency hearing, the child who is the subject of the proceeding is a party and is therefore entitled to be present. [Welf & I C §679](#). In addition, [Welf & I C §§676, 676.5, and 679](#) and [Cal Rules of Ct 5.530\(b\)](#) permit the following persons to be present:

- Parents, or guardians or, if none can be found or none reside within the state, any adult relatives residing within the county or, if none, any adult relatives residing nearest the court.
- Counsel for child.
- Probation officer.
- Prosecuting attorney. See [Welf & I C §681\(a\)](#); [Cal Rules of Ct 5.530\(c\)](#).
- Up to two family members or support persons of a prosecuting witness's choosing (see [Pen C §868.5](#)). [Welf & I C §§676\(a\), 676.5\(a\)](#); [Cal Rules of Ct 5.530\(e\)\(2\)\(B\), \(D\)](#).

- Alleged crime victim and possibly the victim's family members. See [Welf & I C §676.5](#); [Cal Rules of Ct 5.530\(e\)\(2\)\(B\), \(D\)](#).
- Court clerk.
- Court reporter.
- Bailiff, at the court's discretion.
- Court-appointed special advocate (CASA). See [Cal Rules of Ct 5.530\(b\)\(6\)](#).
- Interpreter (see [Cal Rules of Ct 2.893](#)).

The court may also permit any of the child's relatives to be present at the fitness hearing on a sufficient showing. See [Cal Rules of Ct 5.534\(f\)\(1\)](#). Relatives may submit information to the court at any time. [Cal Rules of Ct 5.534\(f\)\(2\)](#). The court may also admit anyone who it determines has a direct and legitimate interest in the case or in the work of the court ([Welf & I C §676\(a\)](#)), or the public if the parent or guardian requests that the public be admitted or the child requests an open hearing ([Welf & I C §676\(a\)](#); [Cal Rules of Ct 5.530\(e\)\(2\)\(A\)](#)).

The public and crime victims and their support *must* be admitted as in any criminal trial if the petition alleges that the child has committed one of the crimes listed in [Welf & I C §676](#). [Welf & I C §§676\(a\), 676.5\(a\)](#); [Cal Rules of Ct 5.530\(e\)\(2\)\(C\)](#). [Welfare and Institutions Code §676\(a\)](#), providing that members of the public are to be admitted on the same basis as they may be admitted to criminal trials, applies to fitness hearings. *Tribune Newspapers West, Inc. v Superior Court* (1985) 172 CA3d 443, 447, 451, 218 CR 505.

Even with crimes enumerated in [Welf & I C §676](#), however, if the petition alleges certain sex crimes, the court must close the hearing if the prosecutor moves for closure at the victim's request and, in any event, must do so during the victim's testimony if the victim is under 16 years old. [Welf & I C §676\(b\)](#); [Cal Rules of Ct 5.530\(e\)\(2\)\(C\)](#). Moreover, the court may exclude victims and their support persons, but only after a hearing at which the person sought to be excluded has an opportunity to be heard and all the following conditions have been met ([Welf & I C §676.5\(b\)](#); see [Cal Rules of Ct 5.530\(e\)\(2\)\(E\)](#)):

- The moving party, who may be the child, shows that there is a substantial probability that overriding interests will be prejudiced by the victim's presence;
- The court has considered reasonable alternatives to excluding the victim;
- Any limitation on a victim's presence, including total exclusion, is narrowly tailored to serve the overriding interests that have been identified; and

- After the hearing, the court makes specific factual findings that support excluding the victim or limiting his or her presence.

If the child has been detained for an offense listed in [Welf & I C §676\(a\)](#), the court may not restrict the media from identifying the child without violating the constitutional prohibition against prior restraints. *KGTV Channel 10 v Superior Court* (1994) 26 CA4th 1673, 1684, 32 CR2d 181. Nor may the court preclude the press from attending an otherwise open hearing and reporting on the proceedings. 26 CA4th at 1685. However, the court may deny admittance altogether if it looks likely that the child will not receive a fair trial. *Tribune Newspapers West, Inc., supra*, 172 CA3d at 451.

The court may restrict the use of surnames in the courtroom (*KGTV Channel 10 v Superior Court, supra*) and may place limitations on the use of electronic media ([Cal Rules of Ct 1.150](#)).

2. [§117.20] Determination of Child’s Competency

When competency is in question, the court may not conduct a fitness hearing without determining competency even if there has not yet been a determination of whether jurisdiction is in the juvenile court or the adult criminal court. *Tyrone B. v Superior Court* (2008) 164 CA4th 227, 231, 78 CR3d 569. When necessary, the court may suspend proceedings and make a referral under [Pen C §4011.6](#) without a threshold determination of probable cause to believe the offense had been committed. *In re Mary T.* (1985) 176 CA3d 38, 44, 221 CR 364.

In the absence of a statutory procedure for determining competency in the juvenile courts, the court may conduct its own determination of the issue. The competency hearing should proceed as follows (*James H. v Superior Court* (1978) 77 CA3d 169, 177–178, 143 CR 398):

- The court must determine on the record whether there is doubt as to the child’s present ability to cooperate with counsel;
- If the court finds that the child is capable of cooperating with counsel, the fitness hearing should continue;
- If there is doubt, the court should suspend proceedings and hold a hearing regarding the child’s present ability to cooperate with counsel;
- If, after the hearing, the court finds that the child is able to cooperate with counsel, the fitness hearing should continue; and
- If the court finds that the child is unable to cooperate with counsel, the judge should institute proceedings under [Welf & I C §705](#).

The juvenile court may retain jurisdiction over a child while the child is subject to [Lanterman-Petris-Short \(LPS\)](#) proceedings. If he or she is

detained in a facility pursuant to LPS and if the person in charge of the facility determines that further juvenile court proceedings would be detrimental to the child's well-being, the juvenile court should suspend its jurisdiction for the time that the child is subject to the jurisdiction of the court that is overseeing the LPS proceedings. *In re Patrick H.* (1997) 54 CA4th 1346, 1359, 63 CR2d 455; Cal Rules of Ct 5.645.

3. [§117.21] No Right to Jury Trial

An adult who was a minor at the time the offense was committed is not entitled to an advisement of a right to a jury trial, nor does such a person have the right to be tried as an adult. See *In re Rodney F.* (1988) 203 CA3d 177, 186, 249 CR 424.

4. Presentation of Evidence

a. [§117.22] In General

In addition to a consideration of the behavioral patterns and social history of the child as contained in the probation report (see §117.23), the fitness determination must be based on any other relevant evidence. See *Welf & I C §707(a)(1), (2), (c)*. The prima facie case and the fitness determination must be based on evidence that is both competent and relevant. *Marcus W. v Superior Court* (2002) 98 CA4th 36, 41, 118 CR2d 919. Moreover, the court may consider extenuating or mitigating circumstances in evaluating each relevant criterion. See *Cal Rules of Ct 5.770(e)* (orders under *Welf & I C §707(a)(1)*), *5.772(e)* (orders under *Welf & I C §707(a)(2)* and *(c)*).

b. [§117.23] Probation Report

The probation report, which must be furnished to the child, the parent or guardian, and all counsel at least 24 hours before the fitness hearing is scheduled to begin (*Cal Rules of Ct 5.768(c)*), must contain (*Welf & I C §707(a), (c)*; *Cal Rules of Ct 5.768(a)*; see also *Cal Rules of Ct 5.770, 5.772*):

- Information on the behavioral patterns and social history of the child; and
- Information relevant to the determination of whether or not the child would be amenable to juvenile court care, treatment, and training, including information regarding each of the factors listed in *Welf & I C §707(a)* and *(c)*.

Under *Cal Rules of Ct 5.768(a)* and *Welf & I C §707(e)*, the report may also include information concerning:

- The social, family, and legal history of the child;

- Statements made by the child regarding the alleged offense;
- Statements by the parent or guardian;
- Statements by the social worker, probation officer, or parole agent who has supervised the child, if any, regarding the success of prior rehabilitation efforts;
- Written or oral statement of the victim, his or her parent or guardian, or his or her next of kin (see [Welf & I C §656.2](#)) to the extent such information is relevant, and
- Any other information relevant to a fitness determination.

The probation officer must recommend to the court whether the child should be determined to be fit to be dealt with under juvenile court law. [Cal Rules of Ct 5.768\(b\)](#). This report, which is prepared for a fitness hearing, is not suitable for a disposition hearing. *In re Devin J.* (1984) 155 CA3d 1096, 1101, 202 CR 543.

This report is a jurisdictional requirement for a finding of unfitness. *Raul P. v Superior Court* (1984) 153 CA3d 294, 298, 200 CR 360. The requirement cannot be waived even by the child's refusal to agree to a continuance that would cause the hearing to be held beyond the required time. 153 CA3d at 298–299.

c. [§117.24](#) Witnesses

Percipient witnesses are not required at a fitness hearing. *People v Superior Court (Ronald H.)* (1990) 219 CA3d 1475, 1477, 269 CR 4. The child may, however, request the prosecution to produce preparers of the probation report to establish a prima facie case. See 219 CA3d at 1478 (discussing detention hearings). The child may call percipient witnesses to defeat the presumption of unfitness on any of the five criteria (see [§117.5](#)). See Seiser & Kumli, *California Juvenile Courts: Practice and Procedure* §3.63[9] (LexisNexis, 2010).

d. [§117.25](#) Former Statements/Confessions

Statements made to a probation officer (see [Welf & I C §628](#)) that might not be admissible on the substantive question of guilt may be admissible in a fitness proceeding. *In re Wayne H.* (1979) 24 C3d 595, 602, 156 CR 344. On the other hand, the juvenile court judge has a duty to determine whether the confessions were voluntary and not coerced. *Marcus W. v Superior Court* (2002) 98 CA4th 36, 46, 118 CR2d 919. A confession that is coerced or involuntary is tainted and would not meet the requirement of being relevant and competent that is basic to a determination of fitness and a prima facie case. 98 CA4th at 45.

e. [§117.26] Use of Evidence

A child must be given use immunity for statements made at a fitness hearing despite Cal Const art I, §28, the truth-in-evidence section. *Ramona R. v Superior Court* (1985) 37 C3d 802, 808–811, 210 CR 204. Statements made during a fitness hearing may not be used as substantive evidence of guilt during a trial. 37 C3d at 810.

Statements made to a probation officer in *anticipation* of a fitness hearing are admissible for impeachment purposes at a later criminal trial (*People v Macias* (1997) 16 C4th 739, 757, 66 CR2d 659), as are statements made to retained psychologists in preparation for the fitness hearing (*People v Humiston* (1993) 20 CA4th 460, 476, 24 CR2d 515). Similarly, statements made *at* a fitness hearing are admissible in a later jurisdiction hearing but only for impeachment purposes. *Sheila O. v Superior Court* (1981) 125 CA3d 812, 817, 178 CR 418.

5. [§117.27] Prima Facie Case

In a Welf & I C §707(a)(2) or (c) situation, on the child’s motion, the court must determine whether the prosecution can make a prima facie showing that the offense alleged is a felony or is specified in Welf & I C §707(b). See *Edsel P. v Superior Court* (1985) 165 CA3d 763, 784–787, 211 CR 869; Cal Rules of Ct 5.772(b). Prima facie means “at first view” and is evidence that suffices for the proof of a particular fact until the contrary is shown. *In re Raymond G.* (1991) 230 CA3d 964, 972, 281 CR 625 (dependency case). The hearing at which this prima facie case must be established may be consolidated with the fitness hearing. *Edsel P. v Superior Court, supra*, 165 CA3d at 787; *Marcus W. v Superior Court* (2002) 98 CA4th 36, 41, 118 CR2d 919 .

6. [§117.28] Alibi Defense

Because the prosecution must, on request, establish a prima facie case, an alibi affirmative defense would not be relevant at a fitness hearing; the court must have already found, through the *Edsel P.* process, that a prima facie case of the child’s guilt has been made. *People v Superior Court (Rodrigo O.)* (1994) 22 CA4th 1297, 1303, 27 CR2d 796.

K. [§117.29] Findings and Orders

In making findings under Welf & I C §707(c), the court must also state the reasons for the findings, supported by evidence. *People v Superior Court (Zaharias M.)* (1993) 21 CA4th 302, 306, 25 CR2d 838. See discussion in §117.37. The findings must be stated in the order. Cal Rules of Ct 5.770(c) (orders under Welf & I C §707(a)(1)), 5.772(f) (orders under Welf & I C §707(a)(2) and (c)). Victims’ statements must be

considered by the court insofar as they are relevant to the fitness determination. [Welf & I C §707\(e\)](#).

The court must issue its findings and orders on Judicial Council form JV-710. See [§117.42](#)

1. [§117.30](#) Finding That Offense Is [Welf & I C §707\(b\)](#) Offense

If finding a child unfit under [Welf & I C §707\(c\)](#), the court must find that the alleged offense was one that was listed under [Welf & I C §707\(b\)](#). [Welf & I C §707\(c\)](#); [Cal Rules of Ct 5.772\(f\)\(2\)\(A\)](#). In this regard, it has been held that a misdemeanor cannot be a [Welf & I C §707\(b\)](#) offense. See *In re Sim J.* (1995) 38 CA4th 94, 97-99, 45 CR2d 30. A violation of [Pen C §245\(b\)](#) (assault with a deadly weapon), however, has been held to be a [§707\(b\)](#) offense. See *In re Pedro C.* (1989) 215 CA3d 174, 182, 263 CR 428. So is continuous sexual abuse of a child under [Pen C §288.5](#), even if the perpetrator is under 16 years old when the offense is first committed. *In re Emilio C.* (2004) 116 CA4th 1058, 1066-1067, 11 CR3d 85.

Moreover, even when an enhancement allegation is dismissed, the court may consider evidence supporting it in deciding whether an offense is a [§707\(b\)](#) offense. See *In re Gary B.* (1998) 61 CA4th 844, 851, 71 CR2d 824.

Armed robbery under former [Welf & I C §707\(b\)\(3\)](#) covers vicarious, as well as personal, arming. *In re Christopher R.* (1993) 6 C4th 86, 89, 23 CR2d 786.

2. [§117.31](#) Table of Requirements

Requirements for findings will depend on whether the case falls within [Welf & I C §707\(a\)\(1\)](#), (2), or (c).

	Child's Age When Offense Committed	Type of Offense	Prior Offenses	Required Findings
Welf & I C §707(a)(1)	16 or older	One not listed in Welf & I C §707(b)	Not applicable	Child is presumed to be fit. The court <i>may</i> find the child unfit if it finds the child to be unamenable to juvenile court treatment under any one of the criteria* on the next page. Welf & I C §707(a)(1) ; Cal Rules of Ct 5.770(b) .
Welf & I C §707(a)(2)	16 or older	Any felony	Must have been declared a ward	Child is presumed to be unfit. The court may find

	Child's Age When Offense Committed	Type of Offense	Prior Offenses	Required Findings
			of the court previously and have committed at least two prior felonies while 14 years old or older	the child fit only if it finds the child to be amenable to juvenile court treatment on <i>each</i> of the criteria* on the next page. Welf & I C §707(a)(2) ; Cal Rules of Ct 5.772(a), (c), (f)(3) .
Welf & I C §707(c)	14 or older	Felony listed in Welf & I C §707(b)	Not applicable	Child is presumed to be unfit. The court may find the child fit only if it finds the child to be amenable to juvenile court treatment on <i>each</i> of the criteria* on this page. Welf & I C §707(c) ; Cal Rules of Ct 5.772(a), (d), (f)(3) .

*Following are the criteria mentioned in column 5 of preceding table:

- The degree of criminal sophistication exhibited by the child;
- Whether the child can be rehabilitated before jurisdiction expires;
- The child's previous delinquent history;
- The results of previous attempts by the court to rehabilitate the child; and
- The circumstances and gravity of the alleged offense.

3. [§117.32] Findings Under Welf & I C §707(a)(1)

To determine that the child is unfit under [Welf & I C §707\(a\)\(1\)](#), the court must find by a preponderance of the evidence that ([Welf & I C §707\(a\)\(1\)](#); [Cal Rules of Ct 5.770\(a\), \(b\), \(c\)\(2\)](#)):

- The child was 16 years of age or older at the time of the alleged offense; and
- The child would not be amenable to the benefits of the juvenile court because of one or more of the criteria listed in [Welf & I C §707\(a\)\(1\)](#).

If the court finds the child fit under [Welf & I C §707\(a\)\(1\)](#), it need only state that finding. [Cal Rules of Ct 5.770\(c\)\(1\)](#).

4. [§117.33] Findings Under Welf & I C §707(a)(2)

The court must find the child unfit unless it finds one or more of the following (Welf & I C §707(a)(2); Cal Rules of Ct 5.772(c), (f)(1), (f)(3)):

- The child was under 16 years old at the time of the alleged felony offense; or
- The child had not been declared a ward at the time of the alleged offense or previously; or
- The child has not previously been found to have committed two or more felony offenses; or
- If the child had committed prior felony offenses, they were committed before the child had reached the age of 14; or
- The child would be amenable on *each* of the criteria listed in Welf & I C §707(a)(2).

If the child has failed to rebut the presumption of unfitness, the court must find the child unfit if (Welf & I C §707(a)(2); Cal Rules of Ct 5.772(f)(1)):

- The child has previously been found to have committed two or more offenses listed in Welf & I C §707(b) and was 14 years of age or older at the time the offenses were committed; and
- The child would not be amenable on one or more grounds listed in Welf & I C §707(a)(2).

These findings must be stated in the order. Cal Rules of Ct 5.772(f); see Judicial Council form JV-710 in §117.42.

To find the child fit, the court must find amenability on each of the criteria and must state the finding of amenability under each of the criterion. See Welf & I C §707(a)(2); Cal Rules of Ct 5.772(f)(3).

5. [§117.34] Findings Under Welf & I C §707(c)

The court must find the child unfit unless it finds one or more of the following (see Welf & I C §707(c); Cal Rules of Ct 5.772(d)):

- The child was under 14 years old at the time of the alleged Welf & I C §707(b) offense, or
- The offense is not listed in Welf & I C §707(b), or
- The child would be amenable on *each* of the criteria listed in Welf & I C §707(c).

If the child has failed to rebut the presumption of unfitness by proving amenability on each of the criteria listed in Welf & I C §707(c), in order to find unfitness, the court must find that (Welf & I C §707(c); Cal Rules of Ct 5.772(f)(2)):

- The child was 14 years old or older at the time of the alleged offense and the offense is listed in [Welf & I C §707\(b\)](#); and
- The child would not be amenable to the benefits of the juvenile court on one or more of the factors listed in [Welf & I C §707\(c\)](#).

These findings must be stated in the order. [Cal Rules of Ct 5.772\(f\)](#); see Judicial Council form JV-710 in [§117.42](#).

As with proceedings held under [Welf & I C §707\(a\)\(2\)](#), in order to find the child fit, the court must find amenability on each of the criteria and must state the finding of amenability under each of the criterion. See [Welf & I C §707\(c\)](#); [Cal Rules of Ct 5.772\(f\)\(3\)](#).

a. [§117.35] Overcoming the Presumption of Unfitness

The presumptions of [Welf & I C §707\(c\)](#) are rebuttable. *People v Superior Court (Zaharias M.)* (1993) 21 CA4th 302, 308, 25 CR2d 838. The court may not overcome the presumption, however, by making an overall (“gestalt”) determination of amenability to rehabilitation, rather than making a finding on each of the five criteria set out in [Welf & I C §707\(c\)](#). 21 CA4th at 306–307; see [Cal Rules of Ct 5.772\(f\)\(3\)](#).

When there is a presumption of unfitness, the court must show how the evidence acts to rebut the presumption. See *People v Superior Court (Robert L.)* (1989) 213 CA3d 54, 63, 261 CR 303 (insufficient for court to find minor, who was involved in a murder, fit merely because he did not actually fire the weapon). In rebutting the presumption of unfitness, the child need not prove innocence—a fitness hearing does not involve an adjudication of guilt—instead the issue is whether the child’s best interests would be served by retention of jurisdiction. *People v Superior Court (Zaharias M.)*, *supra*, 21 CA4th at 307.

In addition to finding the child to be amenable on each of the criteria in order to overcome the unfitness presumption of [Welf & I C §707\(c\)](#), for example, the court may also overcome the presumption by finding that the child was under 14 years old at the time the offense was committed or that the offense was not a [Welf & I C §707\(b\)](#) felony. See [Cal Rules of Ct 5.772\(d\)](#) and discussion in [§117.34](#).

The burden of proof for overcoming the presumption of unfitness for [§707\(b\)](#) offenses is preponderance of the evidence. *People v Superior Court (Steven S.)* (1981) 119 CA3d 162, 177, 173 CR 788. The child will not need to meet this burden, however, when there is an issue as to whether the child was properly charged with an offense that gives rise to the presumption; if there is such an issue, the prosecutor will be required to make a preliminary showing that the child has committed the offense noted in the petition. *Edsel P. v Superior Court* (1985) 165 CA3d 763, 778, 211 CR 869. When the child is presumed unfit, he or she may require the prosecution to first prove that the acts alleged constitute the offenses

named in [Welf & I C §707\(b\) or \(e\)](#). See *Edsel P. v Superior Court, supra*, 165 CA3d at 781–783. See discussion in [§117.27](#).

b. [\[§117.36\]](#) Exercise of Discretion

When the court is required to determine that the minor is unfit unless it makes findings supporting fitness under *each* of the five factors, a finding of fitness that is unsupported by substantial evidence is necessarily an abuse of discretion. See *Jimmy H. v Superior Court* (1970) 3 C3d 709, 715, 91 CR 600. For example, in a case in which two juveniles killed a store owner during a robbery, it was an abuse of discretion for the trial court to find lack of criminal sophistication merely because the offenders had no prior record of criminal or gang activity. *People v Superior Court (Jones)* (1998) 18 C4th 667, 683, 76 CR2d 641. As inept as the robbery was, the appellate court noted that there was criminal sophistication in obtaining the gun and other equipment beforehand. 18 C4th at 684. Even the facts that the juveniles had consumed alcohol beforehand and showed remorse afterwards did not overcome the presumption of unfitness because the drinking seemed to have been done to obtain courage and the later self-serving words of remorse paled before their callous action of shooting an innocent person in the face. 18 C4th at 685–686.

In *Charles R. v Superior Court* (1980) 110 CA3d 945, 955–956, 168 CR 284, the court of appeal found that the juvenile court judge correctly found the child unfit despite expert opinion that he would be amenable to juvenile court treatment. In that case, the offense was a sexually motivated knife wounding of a seven-year-old girl. The juvenile court erred, however, when it ruled that a child, who suffered from mental retardation and organic brain dysfunction, was unfit on the fifth criteria for his participation in a fatal shooting; in this case, the child’s mental capacity rendered the participation less grave than the offense itself would otherwise have indicated. *Rene C. v Superior Court* (2006) 138 CA4th 1, 13–14, 41 CR3d 71.

6. [\[§117.37\]](#) Statement of Reasons

A statement of reasons must clearly show the court’s evaluative process in applying the relevant criteria to the facts of the case. *People v Superior Court (Robert L.)* (1989) 213 CA3d 54, 63, 261 CR 303. While mere listing of the criteria may not be sufficient to support a finding of unfitness, neither a formal statement nor conventional findings of fact are required: it is sufficient if the court’s reasons are set out in such a way that the transcript may be susceptible of meaningful review of the unfitness order. *Francisco R. v Superior Court* (1980) 114 CA3d 232, 238, 170 CR 572.

☛ JUDICIAL TIPS:

- The Judicial Council Form, Juvenile Fitness Hearing Order (JV-710 in §117.42) is a mandated form setting out the required findings and orders. It makes it clear that the court is required to state specific reasons for its determinations on each and every one of the criteria for amenability.
- In making findings, judges should be sure to state the facts used to support a determination of amenability or its absence on each and every factor.

L. Post-Fitness Proceedings

1. [§117.38] Consequence of Finding of Unfitness

Once a juvenile has been found unfit, the case must proceed according to laws applicable in criminal court. [Welf & I C §707.1\(a\)](#). The child who is the subject of a petition in juvenile court is not subject to criminal proceedings for the same facts unless he or she has been found unfit for juvenile court. [Welf & I C §606](#).

If the child is found unfit, the court must make a bail order under [Welf & I C §707.1](#) and specify the facility. [Cal Rules of Ct 5.772\(g\)\(1\)](#). If the child is found unfit but is out of custody, the court must release the child on his or her own recognizance pending prosecution. [Cal Rules of Ct 5.772\(g\)\(1\)](#). The child is entitled to release on bail or on his or her own recognizance on the same terms as an adult who is alleged to have committed the same offense. [Welf & I C §707.1\(b\)\(4\)](#). In any case, the court must dismiss the juvenile court petition without prejudice. [Cal Rules of Ct 5.772\(g\)\(1\)](#).

The juvenile court does not necessarily lose jurisdiction over the child with respect to an earlier offense once he or she has been found to be unfit. *In re Ivan T.* (1999) 76 CA4th 624, 630, 90 CR2d 588. Under [Welf & I C §707.01\(a\)](#), the juvenile court retains jurisdiction with respect to any *previous* adjudication of a ward who has subsequently been declared unfit in these circumstances:

- The prior adjudication did not result in commitment to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ) (unless a [Welf & I C §785](#) hearing is held and juvenile court jurisdiction terminated). [Welf & I C §707.01\(a\)\(1\)](#).
- The prior adjudication did result in commitment to the DJJ. In this case, the DJJ also retains jurisdiction over this minor. [Welf & I C §707.01\(a\)\(2\)](#).

Whether *pending* or *future* petitions are heard in juvenile court depends on a number of factors, including the age of the child, whether

jeopardy has attached, and whether the new offense is one that gives rise to a presumption of unfitness. See [Welf & I C §707.01\(a\)](#).

Petitions Pending at Time of Finding of Unfitness

Has jeopardy attached?	What is child's age at time of offense?	What is presumption for offense that is basis of pending petition?	Where must pending petitions be heard?	Comments
No	16 years old or older	Not applicable	Criminal court (Welf & I C §707.01(a)(3))	Pending petitions are heard in criminal court if jeopardy has not attached and the child is over 16 or jeopardy has not attached and the offense gives rise to a presumption of unfitness.
No	Not applicable	Unfitness	Criminal court (Welf & I C §707.01(a)(3))	See comment above
Yes	Under 16 years old	Unfitness not presumed	Juvenile court (Welf & I C §707.01(a)(4))	Pending petitions are heard in juvenile court when any one of the factors (jeopardy, age, presumption) applies.

Petitions Filed Subsequent to the Finding of Unfitness

Was child convicted in criminal court after unfitness finding?	What is child's age at time of new offense?	What was basis for original unfitness finding?	What fitness presumption is applied to new offense?	Where must new petitions be heard?
Yes	16 years old or older	Not applicable	Unfitness	New petitions need not be filed in juvenile court (Welf & I C §707.01(a)(5))
No	16 years old or older	Solely on previous delinquent history and/or lack of prior rehabilitation attempts	Unfitness	New petitions need not be filed in juvenile court (Welf & I C §707.01(a)(6))
No	Not applicable	Not solely on previous delinquent history or lack of prior rehabilitation attempts	Not applicable	New petitions must be filed in juvenile court (Welf & I C §707.01(a)(7))

A case need not be returned to juvenile court after the court has found the minor unfit and the offense giving rise to a presumption of unfitness is later dismissed, leaving only felonies that alone would not support this presumption. *People v Self* (1998) 63 CA4th 58, 62–63, 73 CR2d 501. In this case, the juvenile court considered the minor’s amenability generally and not just the fact that a (former) §707(d) offense was charged. 63 CA4th at 63.

If the child is convicted in a criminal court after a finding of unfitness, the criminal court may commit the child to the DJJ unless limitations imposed by Welf & I C §1732.6 (DJJ commitment prohibited for certain offenses) apply. Welf & I C §707(a)(3).

2. [§117.39] Consequences of Finding of Fitness

If the child is found fit, the court must proceed with the jurisdiction hearing. Cal Rules of Ct 5.772(g)(2). If the child has not been found unfit, the juvenile court does not necessarily lose jurisdiction over a ward even when he or she has turned 18 and has been tried and convicted in adult court. See, e.g., *In re Mikeal D.* (1983) 141 CA3d 710, 716–718, 190 CR 602.

Unless the child objects, the judge who presided over the fitness hearing may preside over the jurisdiction hearing after finding the child to be fit. Cal Rules of Ct 5.770(h).

3. [§117.40] Three-Strikes Law

A juvenile adjudication can be a strike under the three-strikes law when there is (*People v Davis* (1997) 15 C4th 1096, 1101–1103, 64 CR2d 879):

- An express finding of fitness after the prosecutor fails to have the child found unfit under Welf & I C §707, or
- An implied finding of fitness which occurs when there is a qualifying juvenile adjudication and the minor is over 16 years of age.

The juvenile offense need not be listed in Welf & I C §707(b); it must be a qualifying offense under the three-strikes law and, in addition, must have been adjudicated in the same proceeding as at least one §707(b) offense. *People v Garcia* (1999) 21 C4th 1, 13, 87 CR2d 114.

Neither the fact that the adjudication of a juvenile offense occurred before robbery (minus the “being armed” requirement) was added to the list of strike offenses nor the fact that there was no jury trial for the juvenile adjudication disqualifies the juvenile adjudication as a strike. *People v Superior Court (Andrades)* (2003) 113 CA4th 817, 825, 830, 834, 7 CR3d 74. Nevertheless, a prior juvenile offense for battery under

Pen C §243(d) will not be a strike if the nature of the force was not likely to produce great bodily injury, even if it in fact did so. *People v Fountain* (2000) 82 CA4th 61, 69, 97 CR2d 824.

M. [§117.41] Appeals and Reviews

An order that a child is unfit is not appealable, but may be challenged by extraordinary writ. Cal Rules of Ct 5.770(i) (hearings held under Welf & I C §707(a)(1)), 5.772(j) (hearings held under Welf & I C §707(a)(2) and (c)). A petition for review of a judge's order of unfitness or denying an application for rehearing of the referee's determination of unfitness, must be filed no later than 20 days after the child's first arraignment on an accusatory pleading based on the allegations that led to the unfitness determination. Cal Rules of Ct 5.770(i), (j).

The prosecution is also entitled to a review by extraordinary writ of a finding of fitness. *People v Superior Court (Jones)* (1998) 18 C4th 667, 678, 76 CR2d 641. Although a child found unfit for juvenile court jurisdiction has 20 days in which to seek review (Cal Rules of Ct 5.772(j)), the prosecution has no specific time limit. *People v Superior Court (Rodrigo O.)* (1994) 22 CA4th 1297, 1302, 27 CR2d 796 (prosecution properly sought review before the jurisdiction hearing started and jeopardy attached). If the prosecution announces its intention to seek review and requests a continuance, the court must continue the jurisdiction hearing for not less than two judicial days to permit enough time to obtain a stay of further proceedings. Cal Rules of Ct 5.770(g), 5.772(h).

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4. THE COURT FINDS AND ORDERS (check one)

- a. **Welfare and Institutions Code section 707(a)(1)**
 The youth was at least 16 years old at the time of the alleged offense.

The court may find the youth fit if the court finds the youth amenable to treatment under one or more of the criteria under item 3. Conversely, the court may find the youth unfit if the court finds the youth is not amenable under one or more of the criteria under item 3 above.

- b. **Welfare and Institutions Code section 707(a)(2)**
- (1) The youth was at least 16 years old at the time of the alleged offense.
 - (2) The current alleged offense is a felony.
 - (3) The youth was a ward at the time of the current alleged offense.
 - (4) The youth is alleged to have previously committed two or more felony offenses when he or she was 14 years of age or older.

If the court finds all four facts true, the youth must be found unfit unless the court has found the youth amenable under all five criteria under item 3 above.

- c. **Welfare and Institutions Code section 707(c)**
- (1) The youth was at least 14 years old at the time of the alleged offense.
 - (2) The current alleged offense is an offense listed in Welfare and Institutions Code section 707(b).

If the court finds both facts true, the youth must be found unfit unless the court has found the youth amenable under all five criteria under item 3 above.

5. THE COURT ALSO FINDS AND ORDERS

- a. The youth **is a fit** and proper subject to be dealt with under juvenile court law.
 The next hearing is on *(date)*: _____ at *(time)*: _____
 for *(specify)*: _____
- b. The youth **is not a fit** and proper subject to be dealt with under juvenile court law.
- (1) The matter is referred to the District Attorney for prosecution under the general law.
 - (2) The petition filed on *(date)*: _____ is dismissed.
 - (3) The youth is to be detained in juvenile hall county jail (section 207.1).
 - (4) Bail is set in the amount of: \$ _____
 - (5) The youth is released on own recognizance.
 to the custody of: _____

Date: _____

 JUDICIAL OFFICER

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