A PRIMER ON PRACTICE AND PROCEDURE IN COMPETENCY PROCEEDINGS [1]

By Peter D. Goldberg

I. General

A. Mental state, whether mens rea, scienter, competence, insanity or responsibility, is a fundamental concern of American law, both criminal and civil. Mental and emotional health problems are, furthermore, widespread, though too frequently disregarded, health factors among the general population. Mental or emotional health problems whether in connection with competency or responsibility issues or bail, sentencing, client-attorney communication, or even morale questions, should therefore be a central concern in criminal representation.

B. Defendants tried and convicted while legally incompetent are deprived of the due process right to a fair trial. Drope v. Missouri, 420 U.S. 162, 172 (1975); Pate v. Robinson, 383 U.S. 375 (1966).

C. Distinction between competence and responsibility (NGI):

1. "Competence" relates to the defendant's mental condition after the arrest through the entire proceedings until disposition and in some cases, up until the court loses jurisdiction over the case.

2. "Responsibility" (insanity) relates to defendant's mental condition at the time of the offense and her/his ability to control and conform conduct to legal/societal norms.

3. In many successful non-responsibility (NGI) cases, competency is the first issue, which lays the initial psychiatric foundation for the defense of the actively psychotic defendant.

[1] Sections 971.13 and 971.14, Stats., which govern competency are very detailed. This outline does not restate the specific statutory provisions, procedures, rules and standards, but rather is meant as a litigation and strategic supplement.

II. Preliminary Considerations

A. As with all aspects of defense preparation, prompt action and detailed records are critical.

1. Objective, circumstantial facts are helpful in mental health assessments, so witnesses should be interviewed respecting mental health relevant facts immediately.

2. You as an attorney (preferably through a third party) should record impressions as to mannerisms, movements, affect, behavior, comments.

3. Consider early clinical interview by a defense psychiatrist/psychologist. Retain as a "consultant" to avoid generating formal reports.

B. Relating to a client with mental health problems

1. Do not automatically accept the "M.O." (mental observation) label. Attempt to distinguish between mental impairments and the effects of fatigue, drugs, trauma, depression, fear or other emotions. Attempt to identify the mentally retarded or organic brain damaged defendants. Also check to see if slowness and/or inability to understand discussions is possibly a product of blunt force brain trauma such as accidents as child, in car, or during alleged crime or arrest, etc.

2. Court-related mental health workers (e.g. WCS in Milwaukee) should be contacted to see if prior local treatment or cases reveal historical information unobtainable from the defendant.

3. Initially, at least, treat the defendant the same as you would any other client. Do no condescend or patronize.

4. Be yourself; be genuine.

5. Identify yourself and your role. Explain what is to occur and what you need. Do not say you want to

"help" – that is often a frightening code word to those with mental health system experience.

6. Recognize that they may be mentally ill but not necessarily incompetent. They may be inarticulate, illiterate, confused or frightened. Many merely need assistance in structuring reality.

7. Empower them; see if you can get them to make decisions.

8. Recognize that an individual with mental retardation may tend to feign understanding. You should test comprehension if you suspect cognitive limitations or disabilities.

C. Mental health data, even if not supportive of incompetence or lack of criminal responsibility, may be useful for purposes of bail programming, sentencing or simply relating to your client.

III. Competency

A. Basic rule: "No person who lacks substantial mental capacity to understand proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." See secs. 971.13(1) and 971.14, Stats.

1. "To lack substantial mental capacity" does not necessarily imply a mental disease or defect. See, e.g., State ex. rel. Haskins v. County, Court of Dodge County, 62 Wis.2d 250, 214 N.W.2d 575 (1975). (deaf and incapable of speech); State v. Leach, 122 Wis.2d 339, 363 N.W.2d 235 (19 (amnesia); State v. McIntosh, 139 Wis.2d 339, 412 N.W.2d 894 (1986) (amnesia).

2. There is no need to identify a specific mental disease or defect in determining incompetence. State v. Byrge, 2000 WI 101, 237 Wis2nd 197, 614 N.W.2d 477. Nor is a person who has mental health problems or requires medication necessarily incompetent.

3. Requisite degree of understanding and assistance: "to consult with attorney with a reasonable degree of rational understanding"; to understand at least "the

essence of the charge, the defenses available, the essentials of criminal proceedings"; ability "to rationally communicate", State ex. rel. Haskins, supra 263, fn. 2; Dusky v. United States, 362 U.S. 402(1969); "to rationally aid in preparation of defense." State v. Johnson, 133 Wis.2d 207, 395 N.W.2d 176 (1986); Drope v. Missouri, supra, 420 U.S. at 171.

4. The traditional "understand and assist" standard, see, State v. Byrge, supra, 237 Wis.2d at 214, 229, however, is potentially on the verge of being expanded to require "decisional" capability.

   a. In State v. Garfoot, 207 Wis. 2d 214, 558 N.W.2d 214 (1997), Chief Justice Abrahamson observed:

      "Many questions remain unanswered: What decision-making abilities are encompassed by the Dusky formulation? To what extent do the Dusky tests include an accused's appreciation of the trial's significance, and his or her own situation as a defendant in a criminal prosecution? What is the relation between the Dusky tests and legal rules relating to decision making by criminal defendant?" Also see State v. Debra A.E., 188 Wis. 2d 111, 523 N.W.2d 727 (1974)(decision-making ability may be necessary for competence in post-conviction stages).

   b. Cooper v. Oklahoma, 517 U.S. 348 (1996) held that competence includes the ability to make decisions committed to the defendant by law and assist in others. These clearly include whether to plead, whether to testify, and whether to try the case to judge or jury, but also should be understood to include consultation or decisions such as on jury strikes and lesser included offenses.

5. The ability to testify in an adversarial circumstance, that is cope with cross-examination, should also be considered a separate competency, in addition to and beyond the ability to decide whether to testify.

a. A right to testify is established in law. See, State v. Burroughs, 117 Wis. 2d 293, 344 N.W.2d 149 (1984); State v. Boykins, 119 Wis. 2d 272, 350 N.W.2d 710 (Ct. App. 1984). The issue then arises whether an individual is capable of testifying, or, if not, whether the right is meaningless.

b. A mentally retarded individual, for instance, may have problems with other than simple questions, may need questions frequently rephrased, may have memory deficits, and may be overly susceptible to leading questions.

6. Competence to plead is a separate competency more clearly requiring decisional abilities, in that the decision to plead requires a knowing and intelligent waiver. Godinez v. Moran, 509 U.S. 389(1993).

B. When raised: at any time there is "reason to doubt" a defendant's competency to proceed as well.

1. Competency considerations apply from the time of initial appearance through sentencing. Although sec. 971.13 and 14, Stats., do not apply to revocations or appeals, the Wisconsin courts have established a competency requirement as a function of due process. See, State ex. rel. Vanderbeke v. Endicott, 210 Wis.2d 502, 563 N.W.2d 883 (1997) (revocations); State v. Debra A.E., 188 Wis.2d 111, 523 N.W.2d 727 (1994) (appeals). Competency during extraditions remains an undecided issue.

2. Competency during the pendency of criminal proceedings cannot be waived. Pate v. Robinson, 383 U.S. 375 (1966); State v. Johnson, 133 Wis.2d 207, 395 N.W.2d 176 (1986).

3. Where defense counsel has reason to doubt the competency of his client, he must raise the issue with the trial court; and may not avoid doing so for strategic considerations. Not to do so constitutes ineffective assistance of counsel. State v. Johnson, supra.

C. Caveat: State v. Slagoski, 2001 WI App., _____Wis.2d _____, _____N.W.2d_____, recently held that statements during preconviction competency evaluations can be used at sentencing against the defendant, for instance, to support future dangerousness.

1. Experienced examiners often warn defendants that they will not record what might be said about the alleged offense. But Slagoski refers to other statements and clearly covers observations of conduct in the institution.

2. This was held to violate neither Fifth or Sixth Amendment rights. The non-discretionary obligation of counsel to raise the issue per Johnson does not appear to have been raised in Slagoski. The constitutional issues may still be alive as a consequence.

3. This may require an attempt to develop an Evans type privilege. See, State v. Evans, 72 Wis.2d 225, 252 N.W.2d 664 (1977).

4. Counsel may wish to attend any interviews.

D. How raised:

1. By defense counsel, defendant, prosecution or the court, sua sponte. A court may act in response to a client's demeanor or colloquies. State v. Byrge, supra.

2. A counsel's motion may be made orally or written - - the latter should involve an offer of proof.

3. Facts delineating "reason to doubt" may be required; an attorney's statement is not necessarily the controlling factor for initiating competency proceedings. State v. Weber, 146 Wis.2d 817, _____ N.W.2d _____ (1988); State v. Knight, 65 Wis.2d 582, 223 N.W.2d 550 1974).

4. An evidentiary hearing on whether there is a "reason to doubt" competency may be required. The determination of the necessity of an exam lies in the discretion of the court, not the attorney.

E. Procedures set forth in sec. 971.14, stats.

1. Probable cause determination, upon complaint or hearing, sec. 971.14(1)(c); unnecessary if after preliminary hearing has been held or there has been a conviction.

a. The hearing beyond the complaint requires an affidavit averring material falsehoods in the complaint. Witnesses may be called and cross-examined subject to court limitations.

b. Should probable cause not be found it should result in a dismissal; sec. 971.14(1)(c).

2. Competency Examination

a. One or more examiners; they need not be psychiatrists but must have "specialized knowledge determined by the court to be appropriate." sec. 971.14(2)(a).

Consider other than forensic psychiatrists or psychologists, such specialist's as neuro-logists, gerontologists, rheumatologists (Lupus).

Determine the particular expertise and experience of the court-appointed or institutionally provided examiner and don't easily accept a non-specialist with regard to particular problems.

b. If the defendant has been released on bail, outpatient examinations preferred, secs. 971.14 (2)(b); 971.14(1)(a).

c. The court should order impatient only where determined "necessary." sec. 971.14(2)(a).

(1.) Milwaukee Rules of Thumb

a. if a felony client is actively psychotic, ship to Mendota; Winnebago;

b. if a misdemeanor client is actively psychotic, ask forensic unit for an immediate evaluation and oral report, or Mendota.

c. If non-psychotic but in need of treatment: felonies in jail; misdemeanors voluntary sign in to mental health complex or release to WCS mental health unit with outpatient forensic.

3. Identify who the examiner the court has appointed. Depending on the expert, defense counsel may want to present evidence informally at a staffing pre-interview preferably so the examination would focus on what aspects of competency are in question.

4. If the lack of competency manifests itself in the dynamics of your interaction with the client, you may wish to attend the examination or have the examiner observe your interaction.

5. Medication and treatment during the examination period: Defendant may receive treatment voluntarily but may refuse unless necessary to prevent physical harm to defendant or others. sec. 971.14(2)(f); see also, State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 416 N.W.2d 823 (1987). Statutory changes now require separate hearing and findings to involuntarily medicate - - 10 day time limit.

6. Option to have examined by other experts. sec. 971.14(2)(g).

7. Examiner's reports. Sec. 971.14(2) and (3); distribution, sec. 971.14(4)(a).

8. Defense attorney may be necessary as a witness to make a complete record as to the second part of the

competency test. Documenting attorney client interviews and what problems were occurring and the impossibility of improving all are important for establishing competence as well as to educate the judge about the special needs of the client.

9. Even if the court has found the client competent, if you disagree, continue to document examples and make a record by affidavit either in order to justify a reexamination or for appeal.

F. Judicial Determination Regarding Competency

1. The determination is a legal issue for the court and not strictly a medical decision merely to be determined by the expert's report or testimony. State ex rel. Haskins v. Dodge County Court, 62 Wis.2d 250, 214 N.W.2d 575 (1974). A psychiatric classification need not be established. State v. Byrge, 237 Wis.2d at 229.

2. Opportunities to present other evidence may be waived. Sec. 971.14(4)(b). An attorney may waive that right on behalf of the client. State v. Guck, 176 Wis.2d 845, 500 N.W.2d 910 1993).

3. Teleconferencing permissible. Sec. 971.14(1)(c); but the proponent must make a showing of good cause under sec. 807.13(2)(c), stats.

4. Burden of persuasion on state by greater weight of credible evidence. Sec. 971.14(4)(b); State v. Garfoot; State v. Byrge.

5. The competency inquiry must be tailored to the facts of the case and the stage of the proceedings. State v. Debra A.E., supra, 188 Wis.2d at 124-125; but see State v. Byrge, supra, 225 Wis.2d at 712-713. The decision is "functional in nature, context dependent and pragmatic in orientation." State v. Debra A.E., supra, 188 Wis.2d at 725, fn. 7, citing A.B.A Criminal Justice Mental Health Standards, sec. 7 – 41 commentary at 175 (1986). "Competency determinations fluctuate depending on the differing demands placed on defendants in differing proceedings." Id., citing Uphoff, R.J., The Role of the

Criminal Lawyer in Representing the Mentally Impaired Client, 1988. Wis. L.Rev. 65, 87 n. 99.

6. McGarry Instrument, an assessment instrument frequently used by examiners, provides guide to areas of inquiry. It's areas of concern are:

   a. appraisal of available legal defenses
   b. unmanageable behavior
   c. quality of relating
   d. planning of strategy including plea
   e. appraisal of participant roles
   f. understanding of court procedure
   g. appreciation of charges
   h. appreciation of penalties
   i. appraisal of likely outcome
   j. capacity to disclose facts
   k. capacity to realistically challenge witnesses
   l. capacity to testify relevantly
   m. self-defeating/self-serving motivation

7. DSM-IV R (diagnostic and Statistical Manual) see responsibility section. Although a psychiatric designation is not required, frequently a definable mental disorder exists, in which case the DSM categories and explanations may be a helpful tool in elucidating the practical manifestations of the disorder.

8. In dicia of incompetence include irrational behavior, the client's demeanor, prior medical opinions on competence. Drope v. Missouri, 420 U.S. at 180; State v. Byrge, 2000 WI at ¶48, 237 Wis.2d at 229. Byrge also delineates a judge's potential focuses: orientation to time, place, and persons, manner of answering questions, inflection and volume, posture, attention span, eye contact, focus on witness, body language, reaction to events in courtroom, conferring with counsel, Id at 2000 WI ¶44, 237 Wis.2d at 226, fn. 18.

9. "Malingering" is a frequent judgment encountered in evaluations. It has a relatively precise psychiatric meaning, elucidated in section V.65.2 of the DSM. What at times seems to be a highly subjective or even

convenient diagnosis by examiners should be tested against that definition.

G. Interlocutory review of a disputed competency decision would seem more appropriate than for most trial issues. While ordinarily the Court of Appeals is reluctant to "piecemeal" disposition of a case with review of non-final

orders, see, State ex rel A.E. v. Green Lake County Circuit Court, 94 Wis.2d 98, 101 228 N.W.2d 125 (1980), a defendant's understanding, assistance and decision-making role and abilities are so consequential for a fair trial and the consequences of an erroneous determination of competence so "dire", Cooper v. Oklahoma, supra, 517 U. S. at 364, that properly raised competency issues may be compelling for interlocutory review.

1. If possible, constitutionalize the issues, because serious constitutional questions are most compelling. State v. Jenich, 94 Wis.2d 74, 97b, 288 N.W.2d 114 (1980).

2. Frame the issues in terms of the newer aspects of competence such as decisional or testimonial competency.

H. Commitment, release, discharge sec. 971.14(5) and (6).

1. The commitment can last no longer than two years.

2. The time of commitment must be closely watched in misdemeanors. And since, mental health issues can frequently be involved in disorderly conduct cases; Class B misdemeanors with a 90-day maximum sentence then time must be carefully watched. On misdemeanors the clients are still entitled to local "good time".

3. Jurisdiction of the court is not ended by release. State ex. rel. Potter v. Wolke, 80 Wis.2d 197, 257 N.W.2d 881 (1977). Although released from a commitment, the case can potentially be reactivated and the defendant brought in to be re-examined for competency.

I. Sentence credit, sec. 971.14(5)(b).

J. Guardian at Litem. In some cases, consider the appointment of a guardian where you and client are at loggerheads. It may be feasible under sec. 880.15 and 880.33, Stats.; See also, State v. Debra A.E., 188 Wis.2d at 135.