

Competency v. NGI

A presentation involving rampant plagiarism and mostly
good advice

By Kate Frigo

Competency v. NGI

Competency

- * **Legal standard:** “No person who lacks substantial mental capacity to understand the proceeding 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.” Wis. Stat. Sec. 971.13(1)
- * **Ethical obligation;** must raise competency regardless of client’s consent

NGI

- * **Legal standard:** “A person is not legally responsible for criminal conduct as a result of a mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.” Wis. Stat. Sec. 971.15(1)
- * **Strategic decision;** need client’s consent to pursue NGI plea

Practically speaking, competency is the client's the ability to distinguish a judge from a grapefruit



Concerned about Competency?

Ask these questions:

- * If we have a jury trial in your case, who will be at the trial? What will the witnesses say?
- * What is my job? What is the judge's job? What is the DA's job? Who will make the ultimate decisions?
- * What are what are elements of the offense you are being accused of?
- * What is the defense to your crime going to be?
- * Would you rather have a court trial or a jury trial?
- * If we have a trial, do you want to testify or remain silent?

Competency: helpful case law

- * ***Dusky v. United States***, 326 U.S. 408 (1960) → defendant must be 1) rational, 2) have sufficient present ability to consult with counsel to a reasonable degree of rational confidence, and 3) have a rational and factual understanding of the proceeding
- * ***State v. Johnson***, 133 Wis. 2d 207 (1986) → defense counsel has an ethical duty to raise competency whenever it becomes apparent ; strategic considerations do not alleviate counsel's duty to raise competency

State v. Meeks

- * 263 Wis. 2d 794 (2003)
- * Defense counsel **IS NOT ALLOWED TO REVEAL CLIENT CONFIDENCES IN THE CONTEXT OF A COMPETENCY PROCEEDING**, unless the client gives permission
- * You cannot accept my summary of this case; you must read it yourself

Be aware of the scope

- * Duty to raise competency applies to revocation hearings; ***State ex rel. Vanderbeke v. Endicott***, 210 Wis. 2d 502 (1997)

How does the process work?

The 4-step summary

- * **STEP ONE:** defense (usually) files competency motion; either general or specific, depending on client's wishes
- * **STEP TWO:** If court finds probable cause to believe that competency issue exists, court will order "one or more" experts to examine client re: competency on inpatient or outpatient basis; Wis. Stat. Sec. 971.14
- * **STEP THREE:** Evaluator files report w/ court w/in time limits, Wis. Stat. Sec. 971.14(2)(b)
- * **STEP FOUR:** Once report is filed, either state or defense can challenge findings; see burden of proof spelled out in Wis. Stat. Sec. 971.14(4)(b)

What to do to raise competency: (Step One)

- * Draft and file a motion, either general or specific, as to your concern about competency; see attached examples
- * Prepare the proposed order for a competency evaluation, CR-205 and submit with your motion

Assistant State Public Defender Kate Frigo, attorney for the accused XXXXXX, now moves the Court for an order for an examination regarding the accused's competency to stand trial. XXXXXX's attorney brings this motion pursuant to sections 971.13 and 971.14 of the Wisconsin Statutes on the grounds that the accused's attorney has reason to doubt the accused's competency.

IN FURTHER SUPPORT, XXXXXX's attorney asserts the following: "No person who lacks substantial mental capacity to under the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense." Wis. Stat. Sec. 971.13(1). The court shall proceed under the competency statutes whenever there is reason to doubt the accused's competency to proceed. Wis. Stat. Sec. 971.14(1r).

State v. Meeks holds that an attorney's opinions, perceptions, and impressions relating to a former client's mental competency are confidential communications within the meaning of attorney-client privilege, and therefore cannot be revealed without the consent of the client. 2003 WI 104, 263 Wis. 2d 794, 666 N.W.2d 859. However, *State v. Johnson* requires defense counsel to raise competency whenever it becomes apparent. 133 Wis. 2d 207, 395 N.W.2d 176 (1986).

XXXXXX's attorney believes that XXXXXX is not able to participate in her own defense. This is based on past client interactions and one additional interview on 7/1/2013.

WHEREFORE, the accused's attorney respectfully requests that the Court order a competency evaluation pursuant to Wis. Stat. Sec. 974.14(2).

Inpatient or outpatient evaluation? (Step Two)

- * If your client is released on bail, the evaluation **must** be outpatient unless failure to cooperate or inpatient observation is necessary for an adequate evaluation; Wis. Stat. Sec. 971.14(2)(b)
- * Request jail credit for each day spent inpatient, Wis. Stat. 971.41(2)(a)

Time limits to file report (Step Three)

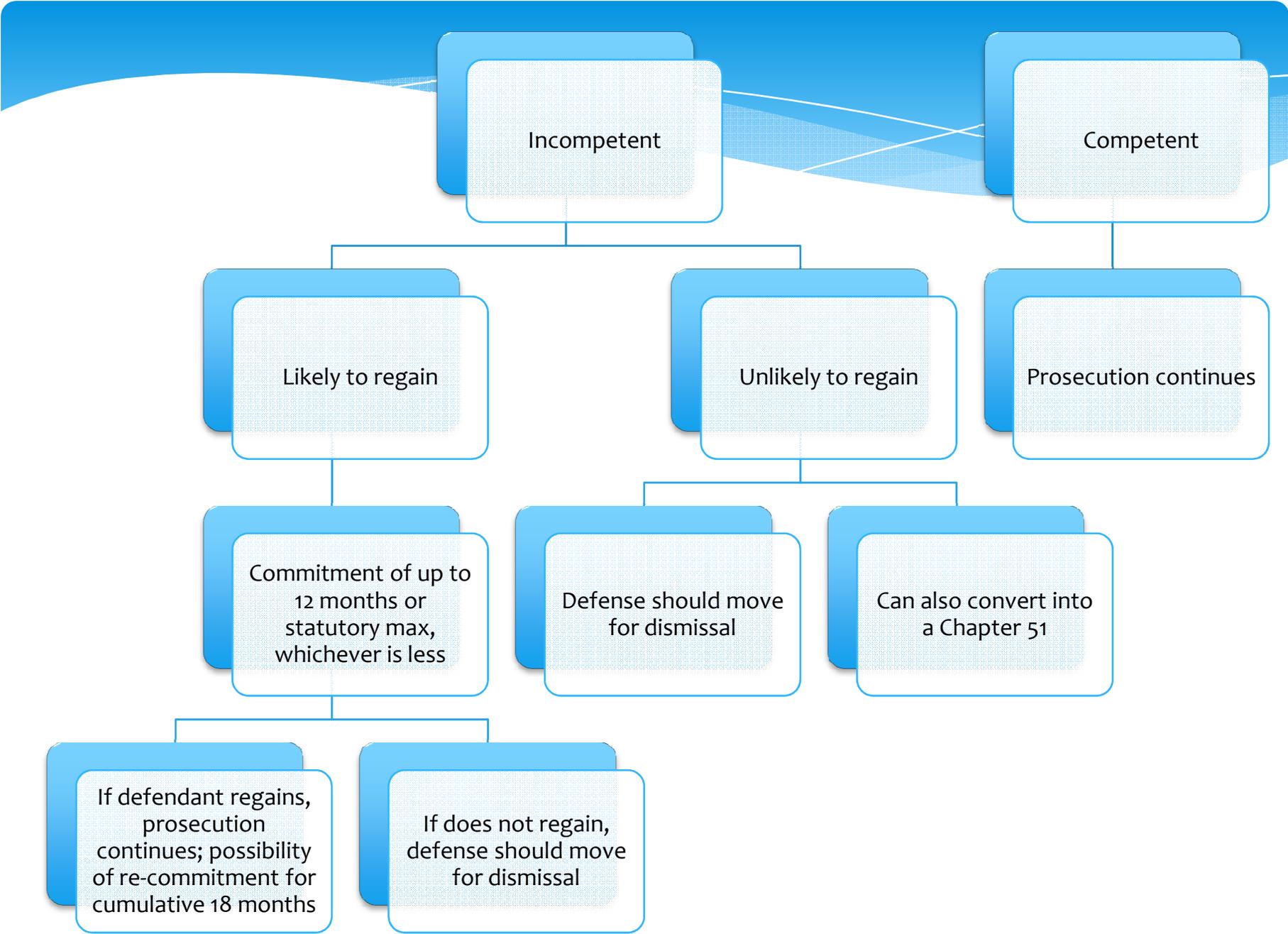
- * 30 days for outpatient;
- * 15 days for inpatient;
- * Wis. Stat. Sec. 971.41(2)(c)



Competency & the Consequences

- * Three potential outcomes:
 - * 1) Incompetent & unlikely to regain;
 - * 2) Incompetent but likely to regain;
 - * Competent





Incompetent

Competent

Likely to regain

Unlikely to regain

Prosecution continues

Commitment of up to 12 months or statutory max, whichever is less

Defense should move for dismissal

Can also convert into a Chapter 51

If defendant regains, prosecution continues; possibility of re-commitment for cumulative 18 months

If does not regain, defense should move for dismissal

BURDEN CHANGES

- * If the defense asserts competency, the accused shall be found competent unless the state proves incompetency by **clear and convincing evidence**
- * If the defense asserts incompetency or stands mute, the accused shall be found incompetent unless the state proves competency by the **greater weight of credible evidence**
- * Wis. Stat. 971.14(4)(b)
- * &^%\$IOPP#%&(

What if the client believes she is competent?

- * Although you have an ethical obligation to raise competency, after you have raised competency, your obligation is to your client.
- * At the hearing you must advance whatever position your client would like for you to advance.
- * We are not guardian ad litem.

Questions??

Not Guilty by Reason of Mental Disease or Defect (NGI)



- * **Theory:** the sane person is held accountable for her actions; the insane person is not
- * **Reality:** if an NGI plea is accepted, your client's freedom could be more restricted by the terms of the NGI agreement when compared with what would happen if your client was simply found guilty

Strategic decision

The right to proceed or not with NGI belong to the defendant, not counsel. ***State v. Byrge***, 225 Wis. 2d 702 (Ct. App. 1999)

Wis. Stat. Sec. 971.16(2)

- * If the defendant has entered a plea of not guilty by reason of mental disease or defect ***or if there is reason to believe that mental disease or defect of the defendant will otherwise become an issue in the case,*** an exam can be ordered.

How does the process work?

The 4-step summary

- * **STEP ONE:** Client & defense counsel together make strategic decision to file a motion to change plea;
- * **STEP TWO:** Judge orders 1-3 court appointed examiners to examine the defendant; defense may request it own expert;
- * **STEP THREE:** Bifurcated trial or bifurcated plea; and
- * **STEP FOUR:** If found NGI, commitment of the client to the Department of Health Services

How do you start the NGI process? (Step One)

- * Personally I have never entered an NGI plea at the outset of a case because I rarely have the opportunity to discuss the strategic advantages and disadvantages of an NGI plea with my client
- * Wis. Stat. 971.05(3) suggests that the NGI plea should be entered at arraignment, after filing of the information or complaint
- * ***State v. Kazez***, 192 Wis. 2d 213, 531 N.W.2d 332 (Ct. App. 1995) makes clear that you can change a NG plea to NG & NGI, but must do so well in advance of trial
- * Make sure you join the NGI plea w/ a plea of not guilty!

The accused, XXXXX, by counsel Assistant State Public Defender Kate Frigo, now moves this court to change her pleas as follows:

- In 12-CM-XXXX, the defendant changes her plea in count one from not guilty to not guilty and not guilty by reason of mental disease or defect;
- In 12-CM-XXXX, the defendant changes her plea in count one from not guilty to not guilty and not guilty by reason of mental disease or defect;
- In 12-CM-XXXX, the defendant changes her plea in count one from not guilty to not guilty and not guilty by reason of mental disease or defect; the defendant changes her plea in count two from not guilty to not guilty and not guilty by reason of metal disease or defect.

The defendant makes this motion to change her plea pursuant to *State v. Kazez*, 192 Wis. 2d 213, 531 N.W.2d 332 (Ct. App. 1995)(holding that a motion to change a plea must be timely so as to give the state suitable notice before trial). The defendant further asks the court to implement the procedures mandated by Wis. Stat. Sec. 971.16.

The Court Appointed Examination (Step Two)

- * Don't be afraid to suggest an expert to the court to conduct the evaluation;
- * Also, if you know the court-appointed expert is going to be terrible, consider asking for your own expert

Prove it up! (Step Three)

- * After the report comes back, you will decide whether you would like to stipulate to one or both bifurcated phases or have a trial on all issues;
- * State does not have to stipulate to NGI finding by expert and may request the trial portion; See e.g. ***State v. Murdock***, 2000 WI App 170
- * If you have a trial, the same jury must hear both phases

The trial

Daniel Sickles

- The defense has the burden to a reasonable certainty by the greater weight of the evidence, Wis. Stat. §971.15(3)
- 5/6 verdict is all that is needed
- 5th Amendment still applies—no self incrimination
- Directed verdict: ***State v. Leach***, 124 Wis. 2d 648; see also Erick O. Magett



We won! Well, sort of...

- * **LENGTH OF COMMITMENT (post 7/30/02):**
- * If you successfully litigate an NGI claim, the court will commit the defendant to the Department of Health and Social Services for a specified period not to exceed the maximum sentence for felonies or 2/3 of the maximum sentence for misdemeanors; Wis. Stat. §971.17(1)(d)

We won! Well sort of...

- * If your client is dangerous → inpatient mental health facility
- * If your client is not deemed dangerous by clear and convincing evidence → conditional release to the department
- * If court lacks information to make determination immediately after trial, can order department of health and human services to conduct predispositional investigation

<https://www.youtube.com/watch?v=fAbuRQiwC6w>

1:55-2:30

We won!

Well, sort of...

MORE DIFFICULT SUPERVISION

- * The department may contract with public and private agencies to provide treatment and services → translation: Your client still may get a PO from DOC for “safety” monitoring
- * Your client will have oversight on medication monitoring
- * Drug testing!
- * Your client may lose her/his driver’s license

SAME COLLATERAL CONSEQUENCES

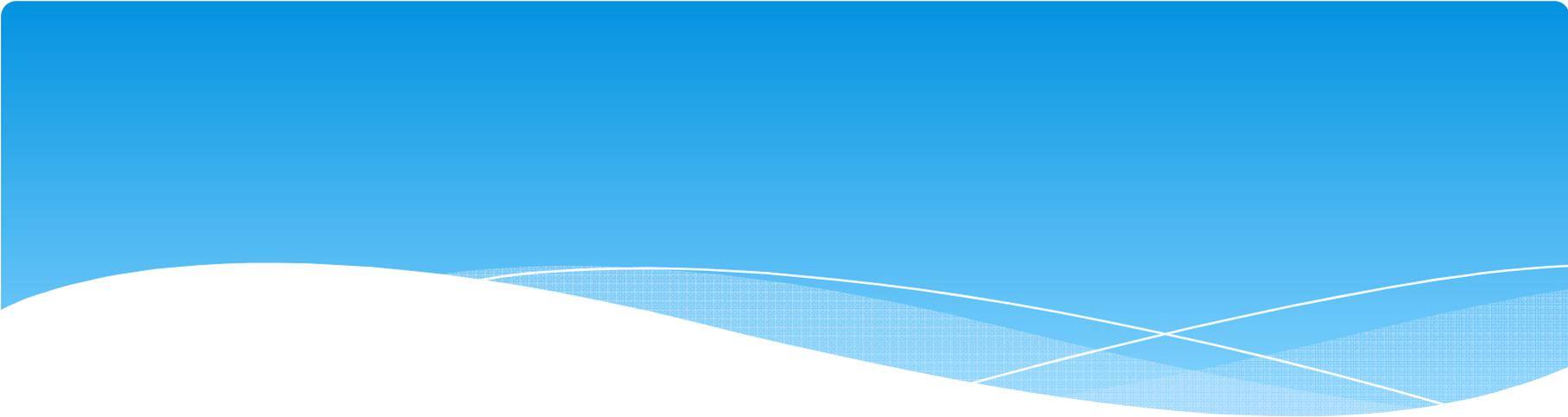
- * Lose firearm rights, sex offender registry

Can conditional release get revocated? (it can get revoked too)

- * Client may be taken into custody upon allegation that conditions have been violated
- * Department may submit a statement of probable cause and a petition to revoke an order for conditional release
- * Hearing w/in 30 days; state has the burden of proof, clear and convincing

Does it ever end?

- * Petition for conditional release may be filed by a person committed to institutional care
- * Petition for termination may be filed by a person on conditional release
- * OR, 60 days before the commitment ends, the department notifies all involved parties AND county could pursue chapter 51 if appropriate



Yes, yes it ends.
Thank you have a good lunch!