

# NUTS AND BOLTS

## A Practical Overview of Mental Competency and the Insanity Defense

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### I. WHY DO YOU NEED TO KNOW THIS STUFF?

- A. It is impossible to practice criminal law without encountering mental health issues.
- B. The degree to which an attorney can identify, solve, blame or alleviate mental health problems can frequently determine the quality of the outcome achieved for the client.
- C. Your license may depend on it!

### II. Wis. Stats. 971.13 Competency.

(1) No person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense as long as the incapacity endures.

#### A. State v. Johnson, 133 Wis. 2d 207 (1986)

“...strategic considerations do not eliminate defense counsel’s duty to request a competency hearing.” id at 221

“...the failure to present this information to the court...was so serious as to deprive Johnson of a fair trial.” id at 224

“conduct constituted deficient performance...” id at 224

#### B. Wis. Stats. 971.14 Competency Proceedings. (1) Proceedings. (a) The court *shall* proceed under this section *whenever* there is *reason to doubt* a defendant’s competency to proceed. (emphasis added)

#### C. IT’S UNCONSTITUTIONAL “*Fundamental fairness* precludes criminal prosecution of a defendant who is incompetent...” State ex rel. Matalik v. Schubert, 57 Wis. 2d 315 at 322 (1973)

#### D. EVENTS

1. COMPETENCY RAISED Technically a prosecutor could raise the issue, but that’s just not a good idea. However, raising competency *does* have implications for the attorney/client relationship.

2. PROBABLE CAUSE FINDING **971.14 (1) (c)** Some interesting procedural wrinkles here

3. EXAMINATION ORDERED **971.14 (2)** Different possibilities for choosing examiners under **subs.(a), (am) and (g)**

(a) INPATIENT OR OUTPATIENT?

(1) Day-for-day sentence credit for IP **971.14 (2) (a)**

(2) If on bail release must be OP unless failure to cooperate or IP observation necessary for adequate examination **971.14 (2) (b)**

(3) IP reports due w/in 15 days of order or arrival at facility unless good cause shown and 30 days for OP reports **971.14 (2) (c)**

#### E. THE REPORT: SOME OBSERVATIONS

#### F. THE COMPETENCY HEARING 971.14 (4) (b)

1. The defense must elect to assert incompetency, competency or stand mute

2. If the defense asserts *incompetency* or stands mute, the state has the burden of proving competency by the greater weight of credible evidence
3. If the defense asserts *competency*, the state has the burden of proving incompetency by clear and convincing evidence
4. Competency to make an informed decision on the use of psychotropic medications may also be at issue.

### III. NGI? YOU MUST BE CRAZY!

A. Wis. Stats. 971.15 Mental responsibility of defendant. (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of 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.

B. EXAMINATION 971.16 (2) If the defendant has entered a plea of not guilty by reason of mental disease or defect or there is reason to believe that mental disease or defect of the defendant will otherwise become an issue in the case, the court may appoint at least one physician or at least one psychologist, but not more than 3 physicians or psychologists or combination thereof,... The fact that the physician or psychologist has been appointed by the court shall be made known to the jury and the physician or psychologist shall be subject to cross-examination by both parties. (emphasis added)

#### C. BITS AND PIECES

1. The defense has the burden to a reasonable certainty by the greater weight of the credible evidence. 971.15(3)
2. The right to proceed or not with an NGI belongs to the defendant, not counsel. State v. Byrge, 225 Wis. 2d 702 (Ct. App. 1999)
3. The state must consent to a jury waiver for the NGI portion separately. State v. Murdock, 2000 WI App 170
4. A 5/6 verdict is all that is required. 971.165(2)
5. The 5<sup>th</sup> Amendment still holds for the NGI portion. State v. Langenbach, 2001 Wis. App. 222

#### D. OK. NGI. NOW WHAT?

1. The court must commit the defendant to the custody of the Department of Health and Social Services for a specified period not to exceed the maximum sentence including enhancers (minus good time in pre-TIS felony cases). **971.17(1)**
2. Misdemeanors are up to 2/3 the maximum **971.17 (1)(d)**
3. The court must determine dangerousness and if not found by clear and convincing evidence, then conditional release to the custody of the department must be ordered. **971.17(3)(a) and (c)**
4. Involuntary medication may be ordered if the state proves by clear and convincing evidence incompetency to make an informed decision. **971.17(3)(b)**

#### E. AND SO ON...

1. **971.17(4) Petition for Conditional Release AND SO ON...**
2. **971.17 (5) Petition for Termination**

#### F. TACTICAL PROBLEMS ASSOCIATED WITH THE NGI PLEA

1. The prosecutor and judge may learn more about your client than you might want!
2. The bifurcation instruction, while greatly improved, still could encourage a guilty verdict.
3. It is hard to proceed with the inconsistent defenses: “I didn’t do it” and “OK I did it, but I’m not responsible” and maintain credibility.
4. A “win” may involve as great or greater loss of liberty!
5. Experts tend to make a moral judgment first and a professional judgment second.