CHAPTER FOUR
Competency to Stand Trial
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CHAPTER FOUR

COMPETENCY TO STAND TRIAL

I. OVERVIEW

A. INCOMPETENCY IS NOT THE SAME AS INSANITY

Insanity is a substantive defense that excuses criminal charges. Insanity, or the "mental disease or defect" defense, refers to the defendant's mental state at the time of the alleged offense. A person is not responsible for having engaged in criminal conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense. Ind. Code § 35-41-3-6(a). The procedure for asserting the defense of mental disease or defect is found at Ind. Code § 35-36-1 and Ind. Code § 35-36-2.

Incompetency refers to mental or physical inability to understand or assist at critical stages of proceedings. Rather than focusing on the defendant's mental state at the time of the alleged offense, incompetency depends on the defendant's current mental state. Incompetency leads to postponement of proceedings, see Dragon v. State, 383 N.E.2d 1046 (Ind. 1979), or, in the event that there is no substantial probability of a defendant being restored to competence, may lead to the dismissal of charges. See State v. Davis, 898 N.E.2d 281 (Ind. 2008). The procedure for raising and determining competence to stand trial is found at Ind. Code § 35-36-3.

B. A DEFENDANT MUST BE COMPETENT BEFORE STANDING TRIAL

Due process requires defendant be competent before being made to stand trial. Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896 (1975); Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836 (1966).

Making an incompetent defendant stand trial would violate the common-law view that persons should not be tried *in absentia* and violate the right to be informed of the accusation, to confront one's accusers, and to have effective assistance of counsel under the 6th and 14th Amendments to the U.S. Constitution.

Donald v. State, 930 N.E.2d 76 (Ind. Ct. App. 2010) (although Ind. Code § 35-36-3-1 does not require it, federal due process clause requires that defendant be competent for hearing on probation revocation).

Compare Hutchison v. State, 82 N.E.3d 305 (Ind. Ct. App. 2017) (trial court did not commit fundamental error by failing to conduct competency evaluation before revoking defendant's probation).

Mast v. State, 914 N.E.2d 851 (Ind. Ct. App. 2009) (defendant received IAC where counsel advised him to plead guilty without waiting for results of two competency evaluations).

Compare Barber v. State, 141 N.E.3d 35 (Ind. Ct. App. 2020) (trial counsel not ineffective for failing to raise competency of D with intellectual disability and low I.Q to plead guilty).

1. Test - Understand and Assist

In Dusky v. United States, the U. S. Supreme Court set out the test for competence to stand trial as follows:

(a) Does the accused have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding?"

(b) Does he have "a rational as well as factual understanding of the proceedings against him?"

See Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct. 788 (1960).

The federal district court found Dusky competent to stand trial because he was oriented to time and place and had some recollection of events. The Eighth Circuit Court of Appeals wrote that Dusky "understood what he was charged with, knew that if there was a trial it would be before a judge and jury, knew that if found guilty he could be punished, …knew who his attorney was and that it was his duty to protect the defendant's rights," and could furnish at least some relevant historical information about the case with substantial accuracy. However, Dusky's counsel argued that Dusky suffered from schizophrenia, which caused "confused thinking," and rendered him unable to "interpret reality from unreality." The Circuit Court affirmed the trial court's finding of competence. Dusky v. United States, 271 F.2d 385 (8th Cir. 1959).

The Supreme Court held that both a factual understanding and rational understanding were required, as well as an ability to consult with counsel with a reasonable degree of rational understanding. The Court remanded to the district court to hold a hearing based on this test.

While Ind. Code § 35-36-3-1(b) codifies this standard simply as "whether the defendant has the ability to understand the proceedings and assist in the preparation of his defense," it is important not to lose sight of both the language and facts of Dusky itself.

One commentator has suggested that "the 'rational understanding' component of Dusky should be understood to require 'decisional competence,' that is, a defendant's capacity to make, communicate, and implement minimally rational, self-protective choices within the context of the criminal case." T. Maroney, "Emotional Competence and 'Rational Understanding': A Guide for Defense Counsel," reprinted in the *Indiana Defender*, July 2011, p.1. (Full text of the article, Emotional Competence, Rational Understanding, and the Criminal Defendant, 43 Am. Crim. L. Rev. 1375 (2006), including citations, available at http://ssrn.com/abstract=892474.) Maroney goes on to suggest that "both cognition and emotion - colloquially, *thinking and feeling* - make important contributions to such capacity." Id.

> McManus v. Neal, 779 F.3d 634 (7th Cir. 2015) (Indiana state courts did not reasonably apply federal constitutional standard in affirming trial court's finding that defendant was competent to stand trial, where he suffered panic attacks during trial and was medicated with antidepressants that, according to expert testimony, would make a person drowsy and alter their decision making, perception and judgment; murder conviction reversed; proper question is whether Defendant had present factual and rational understanding of proceedings and capacity to assist his lawyers; Indiana Supreme Court misapplied standard by suggesting Defendant was competent because "the consensus of the witnesses was that the medications assisted McManus in participating in his trial.")

Note: The federal constitution does not prohibit a state from imposing a higher standard of competence for a defendant who seeks to waive counsel and proceed pro se. See Indiana v. Edwards, 128 S. Ct. 2379 (2008) ("Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under Dusky but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.")

Cf. Godinez v. Moran, 509 U.S. 389 (1993) (Entry of a guilty plea and consequent waiver of rights does not require a heightened level of competence, although there must be a separate finding of a knowing, voluntary, and intelligent waiver.)

2. Burden of Proof

There is no burden on the defendant to prove himself incompetent. The only burden that exists rests on trial judge to satisfy himself that the accused is or is not competent to stand trial. Wallace v. State, 486 N.E.2d 445, 454 (Ind. 1985).

The fact that Ind. Code § 35-36-3-1 et. seq. does not allocate the burden of proof on the State as to competence does not render the statute unconstitutional under the Fourteenth Amendment. Montano v. State, 649 N.E.2d 1053 (Ind. Ct. App. 1995).

A state statute may constitutionally put the burden of proof on the defendant to prove by a balance of probabilities that he is incompetent to stand trial and may establish a rebuttable presumption that defendant is competent, Medina v. California, 505 U.S. 437, 112 S. Ct. 2572 (1992), but a state may not require a defendant to prove by "clear and convincing evidence" that he is incompetent to stand trial. Cooper v. Oklahoma, 517 U.S. 348, 116 S. Ct. 1373 (1996).

3. No Time Limit

Competency to stand trial may be raised at any time, including long after trial, conviction and sentencing. Smith v. State, 443 N.E.2d 1187 (Ind. 1983). See also Tinsley v. State, 260 Ind. 577, 298 N.E.2d 429 (Ind. 1973).

4. Judicial Determination

Court can observe defendant's demeanor, including uncooperative behavior, and determine defendant is competent to stand trial. Timmons v. State, 500 N.E.2d 1212, 1217 (Ind. 1986).

Appellate standard of review of trial court's finding on the competency issue is abuse of discretion. Barnes v. State, 634 N.E.2d 46, 49 (Ind. 1994).

a. No Right to Jury Determination

The Indiana Constitution's provision that "[i]n all civil cases, the right of trial by jury shall remain inviolate" does not guarantee a jury trial on the issue of a defendant's competency to stand trial. State ex rel. Van Orden v. Floyd Circuit Court, 274 Ind. 597, 412 N.E.2d 1216 (1980).

5. When Hearing Required

Court must hold competency hearing when it has reasonable grounds to believe defendant lacks ability to understand proceedings and assist in preparation of his defense. Ind. Code 35-36-3-1.

Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836 (1966) (when doubt exists, judge has duty to hold hearing).

Beesley v. State, 533 N.E.2d 112, 113 (Ind. 1989) (hearing required only when there is evidence before court that creates reasonable and *bona fide* doubt as to defendant's competency to stand trial).

Adams v. State, 509 N.E.2d 812 (Ind. 1987) (opinion of two court-appointed psychiatrists may obviate need for hearing where two of three psychiatrists say defendant is competent).

Cotton v. State, 753 N.E.2d 589 (Ind. 2001) (trial court's determination that competency hearing is unnecessary is reviewed on appeal for abuse of discretion).

a. Waiver

An incompetent defendant cannot knowingly or intelligently waive the right to have the court determine his capacity to stand trial. Pate v. Robinson, 86 S. Ct. 836, 841 (1966).

Waiver is an inapposite concept in competency determination. However, attempted waiver or specific withdrawal of request to determine competency bears on court's decision whether or not to hold a hearing. Dragon v. State, 383 N.E.2d 1046, 1047 (Ind. 1979).

6. Detention of Incompetent Defendants Beyond a Reasonable Time Violates Due Process

It is a violation of due process for a state to detain a person found unfit to stand trial for longer than the reasonable period of time necessary to determine whether there is a substantial probability he or she will be fit to stand trial in the near future. If no probability of improvement, defendant must be released, unless he is subject to involuntary commitment under state law. Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845 (1972).

7. Dismissal of Charge for Incurably Incompetent Defendant

Addressing a question Jackson v. Indiana specifically left open, State v. Davis, 898 N.E.2d 281 (Ind. 2008) held that it violates basic due process to hold criminal charges over head of defendant about whom it has been determined there is no substantial probability of being restored to competence. Trial court is authorized to dismiss charges under such circumstances.

Curtis v. State, 948 N.E.2d 1143 (Ind. 2011) (pending criminal charges do not violate defendant's right to due process if trial court has not involuntarily committed defendant and has not made appropriate finding that defendant will never be restored to competency).

Gross v. State, 41 N.E.3d 1043 (Ind. Ct. App. 2015) (due process required dismissal of Class B felony child molesting and Class D felony dissemination of matter harmful to minor charges filed in 2003, where defendant's pretrial confinement extended beyond maximum time allowed by law and superintendent at the facility at which he is confined determined that there is a substantial probability he will never be restored to competency)

Matlock v. State, 944 N.E.2d 936 (Ind. Ct. App. 2011) (trial court did not abuse its discretion by denying defendant's motion to dismiss, even though the time defendant was detained while incompetent exceeded the maximum sentence he could receive for class A misdemeanor OWI; the State has substantial interest in determining guilt or innocence of someone who may drive again after regaining competency).

J.S. v. State, 937 N.E.2d 831 (Ind. Ct. App. 2010) (where it was clear that juvenile was not going to regain competency before turning 18 and juvenile court lost jurisdiction, juvenile court did not abuse its discretion by dismissing case even though mental health expert did not make a finding that he would never be restored to competency).

Denzell v. State, 948 N.E.2d 808 (Ind. 2011) (when the record reflects that defendant can be restored to competency, but he purposely decompensates, he may not assert due process violation).

Jones v. State, 918 N.E.2d 436 (Ind. Ct. App. 2009) (where misdemeanor sentences would have had to run consecutively because they were committed while defendant was released on his own recognizance, the 756 days defendant spent either in jail or in DMH had not exceeded the maximum sentence and motion to dismiss third misdemeanor should have been denied).

Habibzadah v. State, 904 N.E.2d 367 (Ind. Ct. App. 2009) (trial court properly denied motion to dismiss attempted murder charge against incompetent defendant because it was possible for defendant to be restored to competency and he has not been confined for longer than the potential maximum sentence he faced).

8. DMHA, not trial court, decides whether competency can be restored

State v. Coats, 3 N.E.3d 528 (Ind. 2014) (while Ind. Code § 35-36-3-1(b) gives the trial court authority to decide whether a defendant is competent to stand trial, Ind. Code § 35-36-3-3 vests sole authority in DMHA to decide if a defendant can be restored to competency; thus, the trial court lacked discretion to deny State's request to commit defendant to DMHA where trial court had earlier declared him incompetent).

II. PROCEDURES

A. HEARING REQUIREMENT

1. Whenever Reasonable Grounds Exist

Ind. Code § 35-36-3-1(a) requires a competency hearing only where there is evidence before trial court creating a reasonable and *bona fide* doubt as to defendant's competence to stand trial. Brown v. State, 516 N.E.2d 29, 30 (Ind. 1987).

Manuel v. State, 535 N.E.2d 1159 (Ind. 1989) (trial court's failure to order competency

hearing *sua sponte* was not an abuse of discretion, although defendant was handicapped and had difficulty communicating, where the record did not demonstrate that either counsel or anyone else believed defendant to be incompetent).

Feggins v. State, 272 Ind. 585, 400 N.E.2d 164 (1980) (although court-appointed psychiatrists' reports contained observations that might have given rise to *bona fide* doubt as to necessity of competency hearing, such observations did not mandate a hearing where both psychiatrists determined that defendant was competent to stand trial and there was no evidence of history of serious mental disorder, no unusual courtroom behavior, nor any prior determination of incompetency).

Fine v. State, 490 N.E.2d 305 (Ind. 1986) (trial court's comment during guilty plea hearing - that defendant didn't understand the proceedings - referred to defendant's misunderstanding regarding the availability of an Alford plea, rather than the general proceedings against him, and did not require hearing on competence).

Clifford v. State, 457 N.E.2d 536 (Ind. 1984) (trial court did not err in failing to conduct hearing regarding defendant's competence to stand trial where examining doctors reported he was competent. Indiana statute and due process considerations require hearing take place only where evidence before court raises *bona fide* reasonable doubt regarding Defendant's sanity).

Underhill v. State, 477 N.E.2d 284 (Ind. 1985) (trial court did not err in accepting defendant's guilty plea without first holding competency hearing; defendant filed notice of insanity, which he withdrew after three court-appointed doctors examined him and found him competent to stand trial).

Hill v. State, 451 N.E.2d 683 (Ind. Ct. App. 1983) (trial court did not err in failing to conduct competency hearing before accepting defendant's guilty plea).

a. Cases Showing a *Bona Fide* Doubt as to Competency

Tinsley v. State, 260 Ind. 577, 298 N.E.2d 429, 433 (1973) (judicial finding appointing guardian for defendant on grounds that he was incapable of managing his affairs because of mental illness created a *bona fide* doubt as to his competency to stand trial on criminal charges).

People v. Chambers, 36 Ill.App.3d 838, 345 N.E.2d 119 (1976) (defendant was paranoid schizophrenic, and answers were non-responsive). See also *Competency to Stand Trial of Criminal Defendant Diagnosed as "Schizophrenic" - Modern State Cases*, 33 A.L.R.4th 1062 section 7.

State v. Spivey, 65 N.J. 21, 319 A.2d 461 (1974) (defendant's cursing and spitting on his counsel).

Scott v. Commonwealth, 555 S.W.2d 623 (Ky. App. 1977) (appellate court inferred *bona fide* doubt from trial court's order for "brain scan, complete psychiatric evaluation and such treatment as evaluation may indicate").

Torres v. Prunty, 223 F.3d 1103, 1110 (9th Cir. 2000) (evidence that defendant's paranoid delusion that he was the victim of medical conspiracy had expanded to include

his attorney and the court created *bona fide* doubt about his competence to stand trial).

b. Appointment of Experts

If the trial court determines that reasonable grounds exist to order a competency evaluation, Ind. Code § 35-36-3-1(a) requires that:

> The Court shall appoint two (2) or three (3) competent, disinterested:
>
> (1) psychiatrists;
> (2) psychologists endorsed by the Indiana state board of examiners in psychology as health service providers in psychology; or
> (3) physicians;
>
> who have expertise in determining competency. At least one (1) of the individuals appointed under this subsection must be a psychiatrist or a psychologist. However, none may be an employee or a contractor of a state institution (as defined in Ind. Code § 12-7-2-184).

The trial court has discretion to determine whether reasonable grounds exist to order evaluation of competency. Beesley v. State, 533 N.E.2d 112, 113 (Ind. 1989).

Timmons v. State, 500 N.E.2d 1212, 1217 (Ind. 1986) (court required to appoint psychiatrist only after determining reasonable grounds for hearing exist).

Green v. State, 421 N.E.2d 635 (Ind. 1981) (bare assertion that defendant was incompetent to stand trial and assist in his defense was insufficient to warrant appointment of psychiatrists).

Armour v. State, 948 N.E.2d 810 (Ind. Ct. App. 2011) (where defendant had been committed by another court and was receiving psychiatric treatment for extended period, there were reasonable grounds to believe he lacked the ability to understand and assist in preparation of defense; trial court abused its discretion by denying request for expert evaluation).

c. Conflicting Opinions

Barnes v. State, 634 N.E.2d 46 (Ind. 1994) (where there is a conflict of evidence submitted by physicians, the appellate court will not overturn the trial court's determination whether defendant was competent to stand trial as long as reasonable grounds exist to support it).

Brewer v. State, 646 N.E.2d 1382, 1385 (Ind. 1995) (trial court is vested with discretion to determine if reasonable grounds exist to find that a defendant is competent to stand trial; appellate court defers to trial court's finding and will normally reverse only if finding was clearly erroneous).

2. Factors Requiring Further Inquiry

Factors which may be sufficient to require further inquiry as to competency: (a) pronounced history of irrational behavior; (b) inappropriate courtroom demeanor; or (c) medical opinion.

Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896 (1975).

Mato v. State, 429 N.E.2d 945 (Ind. 1982) (the Indiana statute recognizes that not every occurrence outside the norm will require a competency hearing, but such occurrences may have a cumulative effect).

3. Waiver of Hearing

There can be no valid waiver of due process rights by a person who is incompetent to stand trial. Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836 (1966).

Bramley v. State, 543 N.E.2d 629 (Ind. 1989) (trial court may not properly permit an incompetent defendant to damage himself before jury by waiving his rights when it is clear the waivers are due to his incompetency).

Tinsley v. State, 260 Ind. 577, 298 N.E.2d 429 (1973) (one who may be incompetent cannot knowingly and intelligently waive his right to hearing on the matter), *supplemental opinion at*, 312 N.E.2d 72.

4. Prior Finding/Prior Commitment or Treatment

Smith v. State, 443 N.E.2d 1187 (Ind. 1983) (prior finding of competency in companion case cannot substitute for full hearing when one is required).

Drope v. Missouri, 420 U.S. 162, 95 S. Ct. 896 (1975) (finding of incompetency which is predicated on medical opinion may trigger review of competency).

Harshman v. State, 451 N.E.2d 46 (Ind. 1983) (no reasonable ground for believing defendant lacked competence, although defendant had been committed for treatment of mental illness 17 years before).

5. Timing

a. Before Final Submission to Trier of Fact

Ind. Code § 35-36-3-1(a) provides in pertinent part:

If at any time before the final submission of any criminal case to the court or the jury trying the case, the court has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of his defense, the court shall immediately fix a time for a hearing to determine whether the defendant has that ability. (Emphasis added).

b. Post-Trial

Issue of competency may be raised at any time before, during or long after trial has ended. Smith v. State, 443 N.E.2d 1187 (Ind. 1983).

In certain situations, evidence coming to light after the trial may be so significant and compelling as to create reasonable grounds to question a defendant's competency at the time of trial, and to require a hearing on the question. Tinsley v. State, 260 Ind. 577, 298 N.E.2d 429 (1973); Timberlake v. State, 753 N.E.2d 591 (Ind. 2001).

Fine v. State, 490 N.E.2d 305 (Ind. 1986) (need for hearing to determine competency to stand trial may be raised at any time by court on its own motion or by any other person).

Timberlake v. State, 753 N.E.2d 591 (Ind. 2001) (where the issue of competency was known at trial and available on direct appeal, it is not available as a freestanding claim in post-conviction relief).

Isom v. State, 170 N.E.3d 623 (Ind. 2021) (declining to consider whether IC 35-36-3-1(a) applies to post-conviction proceedings because new evidence did not raise reasonable or bona fide doubt about defendant's competency).

6. Involuntary Medication with Antipsychotic Drugs

In Washington v. Harper, 494 U.S. 210 (1990), the United States Supreme Court held that a prisoner could be involuntary medicated if he was a danger to himself or others and medication is in his medical interest. Id. at 227.

In Riggins v. Nevada, 504 U.S. 127 (1992), the Court reversed the murder and robbery convictions and death sentence of Riggins, where he had moved pretrial to discontinue involuntary medication and the trial court denied his motion without stating its rationale. Following Harper, *supra,* the Court held that once Riggins moved to discontinue his involuntary medication, the State of Nevada was obligated to show that the medication was medically appropriate and necessary. Id. at 135. The Court noted that it had not developed substantive standards for judging involuntary treatment with antipsychotics in the trial and pre-trial setting but wrote that Nevada would have satisfied its burden of showing necessity by making the same showing required in Harper – that in light of less intrusive alternatives, the antipsychotics were essential to the safety of Riggins and others. Id. In the alternative, the Court wrote, "the State might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means." Id.

The Riggins Court wrote, "It is clearly possible that … side effects [from the medication] had an impact upon not just Riggins' outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel." The Court went on to write that such prejudice can sometimes be justified by an essential state interest, but because Riggins had not raised the issue of whether he had a right to have the jury see him in his un-medicated state, and his motion to discontinue medication was denied without any showing by the State, the Court simply remanded to the trial court for further proceedings.

In Sell v. U.S., 539 U.S. 166 (2003), the Court reviewed a trial court's pretrial ruling denying Sell's motion to discontinue antipsychotic medication for his trial. As in Riggins, the Court noted that medicating an incompetent defendant to restore competency can have side effects that undermine the fairness of the trial. The Sell Court set out the following standards for determining whether the state may forcibly administer antipsychotic drugs to a mentally ill defendant facing in order to render that defendant competent to stand trial. The trial court may not allow forced medication unless it finds that the treatment is (1) medically appropriate, (2) substantially unlikely to have side effects that may undermine the fairness of the trial, and (3) taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests. Sell v. U.S., 539 U.S. 166, 179 (2003).

Important governmental interests are at stake when a defendant is charged with a serious crime against a person or against property. Id. at 180.

See Fentiman, *Whose Right Is It Anyway?: Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant*, 40 U. Miami L.Rev. 1109 (1986).

a. Medicating defendant in effort to restore or maintain competency

The administration (or abuse) of drugs can render an otherwise competent defendant incompetent, be insufficient to restore competency to stand trial, or undermine the fairness of the trial in other ways.

McManus v. Neal, 779 F.3d 634 (7th Cir. 2015) (Indiana state courts did not reasonably apply federal constitutional standard in affirming trial court's finding that defendant was competent to stand trial, where he suffered panic attacks during trial and was medicated with antidepressants that, according to expert testimony, would make a person drowsy and alter their decision making, perception and judgment; murder conviction reversed; proper question is whether defendant had present factual and rational understanding of proceedings and capacity to assist his lawyers; Indiana Supreme Court misapplied standard by suggesting defendant was competent because "the consensus of the witnesses was that the medications assisted McManus in participating in his trial.").

State v. Maryott, 6 Wash. App. 96, 492 P.2d 239 (1971) (reversal where drugs visibly affected defendant's demeanor).

State v. Murphy, 56 Wash.2d 761, 355 P.2d 323 (1960) (reversal because drugs induced casual attitude, which may have influenced jury to impose death penalty).

7. Second Competency Determination

A defendant may become incompetent after a competency determination, and reasonable grounds might exist to require another hearing. Malo v. State, 266 Ind. 157, 161, 361 N.E.2d 1201, 1204 (1977).

Competency is not a static condition. Timberlake v. State, 753 N.E.2d 591 (Ind. 2001).

Minnick v. State, 965 N.E.2d 124 (Ind. Ct. App. 2012) (defendant not entitled to new competency evaluation before new sentencing hearing where Logansport State Hospital earlier advised trial court that defendant was competent and at hearing defendant assisted counsel and offered relevant testimony), *trans. denied*.

Isom v. State, 170 N.E.3d 623 (Ind. 2021) (even assuming that section 35-36-3-1 applies to post-conviction proceedings, defendant's refusal to cooperate with counsel was not a change in circumstances to warrant competency determination).

Stover v. State, 621 N.E.2d 664 (Ind. Ct. App. 1993) (at sentencing, defense counsel indicated defendant was no longer receiving medication and requested new competency hearing; trial court's denial of motion to have defendant re-examined was not an abuse of discretion where defendant's comments at sentencing hearing were lucid).

Denes v. State, 508 N.E.2d 6 (Ind. 1987) (no abuse of discretion in failing to conduct second competency hearing before trial for attempted murder; report submitted by physician indicated that defendant, who had been in remission from mental illness, would again be incompetent by time of trial if his regular medication was not resumed; no showing that defendant's capacity to understand and participate in his defense was impaired).

Stolarz v. State, 445 N.E.2d 114 (Ind. Ct. App. 1983) (trial court did not err in failing to hold competency hearing during trial where earlier pretrial competency hearing found defendant competent and where request for evaluation at trial was made by the State, not defendant; further, it was improper for defendant, on appeal, to cite the State's in-trial motion for competency as grounds for reversal).

Gibson v. State, 490 N.E.2d 297 (Ind. 1986) (where defendant had been found competent to stand trial three months earlier, trial court did not abuse discretion by failing to hold competency hearing before accepting guilty plea; defendant testified he was free of influence of drugs or alcohol and did not suffer from mental/emotional disability; his attorney explained that defendant was depressive but had been found competent earlier; concern for competency does not equal doubt concerning competency).

B. FINDING THAT DEFENDANT LACKS COMPREHENSION; COMMITMENT PROCEDURE - B.9.e

1. Division of Mental Health and Addiction to provide services; defendant to be held in least restrictive setting

Ind. Code § 35-36-3-1(b) provides, in part:

> If the court finds that the defendant has the ability to understand the proceedings and assist in the preparation of the defendant's defense, the trial shall proceed. If the court finds that the defendant lacks this ability, it shall delay or continue the trial and order the defendant committed to the division of mental health and addiction. The division of mental health and addiction shall provide competency restoration services or enter into a contract for the provision of competency restoration services by a third party in the:
>
> (1) location where the defendant currently resides; or
>
> (2) least restrictive setting, appropriate to the needs of the defendant and the safety of the defendant and others.
>
> However, if the defendant is serving an unrelated executed sentence in the department of correction at the time the defendant is committed to the division of mental health and addiction under this section, the division of mental health and addiction shall provide competency restoration services or enter into a contract for the provision of competency restoration services by a third party at a department of correction facility agreed upon by the division of mental health and addiction or the third party contractor and the department of correction.

2. After Finding: Division to Report Back to Court

Within 90 days, the superintendent of the state institution or the director or medical director of the third-party contractor shall certify to the court "whether the defendant has a substantial

probability of attaining" competency "within the foreseeable future." Ind. Code § 35-36-3-3(a).

After 90 days, if the defendant does not have a substantial probability of attaining competency, the institution shall initiate regular commitment proceedings under Ind. Code § 12-26. If a substantial probability does exist, the institution shall hold the defendant until he attains competency or for 6 months, whichever occurs first. Ind. Code § 35-36-3-3(b).

If, after 6 months, the defendant has not attained competency, the institution shall initiate commitment proceedings under Ind. Code § 12-26. Ind. Code § 35-36-3-4.

Initiation of commitment proceedings does not cause dismissal of the criminal charges.

3. Attainment of Competence to Stand Trial

Whenever the defendant attains the ability to understand the proceedings and assist in the preparation of the defense, the institution shall certify that fact to the court. The court shall immediately order the sheriff to return the defendant. Upon the defendant's return, the court shall hold the trial as if no delay had occurred. Ind. Code § 35-36-3-2. See Wallace v. State, 486 N.E.2d 445 (Ind. 1985).

PRACTICE POINTER: Although Ind. Code § 35-36-3-2 does not provide for judicial review of the psychiatric institution's certification that the defendant has regained competency, and appears to place a mandatory duty on the trial court to conduct the trial "as if no delay [ ] had occurred", under the Federal Constitution the trial court has the continuing authority and duty to ensure that the defendant is not subjected to trial while incompetent. See Malo v. State, 266 Ind. 157, 161, 361 N.E.2d 1201, 1204 (1977). Due process requires a defendant to be competent before being made to stand trial. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975).

4. Self-Incrimination

A defendant protected by Miranda when arrested may self-incriminate under the influence of procedures designed to make him competent to stand trial. Having become competent to stand trial, he or she may find that a conviction has been made nearly certain.

PRACTICE POINTER: A defense psychology expert may provide information to less knowledgeable mental health professionals about ways to conduct therapy without requiring defendants to self-incriminate. Also, a defense expert can assist the client's attorney in drafting letters of instruction to treatment facilities indicating limits on therapeutic interventions that must be observed.

5. Competency Hearing Unrelated to Commitment Hearing

Competency hearings and involuntary commitment hearings are separate proceedings with different purposes.

Jackson v. Indiana, 406 U.S. 715, 92 S. Ct. 1845 (1972) (it is a violation of due process for the government to confine defendant indefinitely, solely on basis of his incompetence to stand trial).

People v. Lang, 498 N.E.2d 1105, 1119-20 (Ill. 1986) (finding that person is mentally ill

and subject to involuntary commitment is not necessarily indicative of competency to stand trial; person can be mentally ill and dangerous, and still understand nature of proceedings and assist in preparation of defense), *superseded by statute as stated in* In re Diana M., 847 N.E.2d 518 (Ill. App. 2016).

A defendant who is alleged to be mentally ill and either dangerous or gravely disabled, and whose commitment is reasonably expected to require custody, care, or treatment in a facility for more than 90 days, may be subject to civil commitment (see Ind. Code § 12-26-7-1). Such findings do not necessarily indicate unfitness for trial, and periodic fitness hearings should be sought.

C. PLACEMENT

Leedy v. State, 998 N.E.2d 307 (Ind. Ct. App. 2013) (placement in DMHA facility (Logansport State Hospital) did not violate defendant's right to due process, even though uncontested testimony showed that Larue Carter Center was better equipped to treat defendant's severe brain injury; Ind. Code § 35-36-3-1 requires commitment to DMHA facility and evidence established that DMHA facility had sufficient expertise to treat defendant), *trans. denied*.

III. CONDITIONS AFFECTING COMPETENCY

A. INTELLECTUAL DISABILITY

A defendant with intellectual disability may or may not be competent to stand trial. The severity of the disability and the existence of other impairments are key factors.

PRACTICE POINTER: Although individuals with an intellectual disability may be competent to stand trial, they are not eligible for the death penalty or life without parole under Indiana Code § 35-36-9 and Ind. Code § 35-50-2-9(a). The prohibition against cruel and unusual punishments in the 8th Amendment to the U.S. Constitution forbids the execution of a person with an intellectual disability. Atkins v. Virginia, 536 U.S. 304,122 S. Ct. 2242 (2002).

1. Mental Age

Courts often refer to evidence that a defendant functioned at a low mental age.

State v. Coville, 558 P.2d 1346 (Wash. 1977) (mental age of five or six years).

State v. Caralluzzo, 228 A.2d 693 (N.J. 1967) (mental age of five years).

Williams v. State, 628 S.W.2d 848 (Tex. App. 1982) (competence questioned when defendant was born with multiple birth defects including hydrocephalus, had brain damage, and functioned at a mental age of 10-12 years under normal circumstances and six years of age when under stress).

2. Intelligence Quotient

Low IQ has been held to interfere with defendant's ability to communicate with attorney.

State v. Rogers, 419 So.2d 840 (La. 1982) (defendant's IQ was between 50 and 55; examining doctors concluded that he was unable to comprehend charges against him or

participate in his defense).

3. Intellectual Disability in Combination with Mental Illness

People v. Samuel, 629 P.2d 485 (Cal. 1981) (defendant with IQ of 68 plus history of delusions, auditory hallucinations, and brain damage caused by glue sniffing; was unfit to stand trial).

But see White v. Estelle, 669 F.2d 973 (5th Cir. 1982) (chronic paranoid schizophrenic with an IQ of 69-75 found competent to stand trial).

4. Intellectual Disability and Physical Handicap

Defendant may be found fit to stand trial where combination of disabilities does not prevent communication but makes it more difficult.

State v. Williams, 381 So.2d 439 (La. 1980) (defendant not competent to stand trial where he suffered from a speech handicap plus moderate intellectual disability that made him unable to understand what was said to him, and unable to communicate with his attorney);

Ex parte Hagans, 558 S.W.2d 457 (Tex. Crim. App. 1977) (evidence of defendant's IQ of 83, abnormal brain waves, and epilepsy was sufficient to require a competency hearing before trial).

McDowell v. State, 456 N.E.2d 713 (Ind. 1983) (defendant who was deaf, uneducated, and intellectually disabled found competent; others could communicate with defendant through interpreters, and, while this made process of trial preparation arduous, it did not preclude defendant from standing trial).

People v. Kaufman, 384 N.E.2d 468 (Ill. App. 1978) (visual and auditory impairment as result of childhood spinal meningitis, as well as IQ of 61, did not render defendant incompetent to stand trial).

5. Other Cognitive Deficits

Defendants who do not have intellectual disability, but who have cognitive deficits as a result of traumatic brain injury, exposure to lead or other neurotoxins, or other causes, may also be functionally impaired to the point that they are not competent to stand trial.

B. MENTAL ILLNESS or DISORDER

The fact that defendant exhibits signs of mental illness or disorder or has been diagnosed as mentally ill does not per se render him incompetent. See, e.g., Hensley v. State, 575 N.E.2d 1053 (Ind. Ct. App. 1991) (schizophrenic rape defendant competent to stand trial, where defendant was aware of charges against him and able to assist his attorney and demonstrated at competency hearing that he was aware of victim's name and denied raping anyone). Neither does the fact that he has a disorder requiring medication. See Sherwood v. State, 485 N.E.2d 97 (Ind. 1985).

However, a mental illness or disorder certainly may affect a defendant's ability to rationally understand the nature of the charges and proceedings, and to consult with counsel with a

reasonable degree of rational understanding. In addition to schizophrenia and other psychotic disorders, mood disorders such as bipolar disorder and depression, and anxiety disorders, including PTSD, may render a defendant incompetent to stand trial. In particular, mood disorders can impact a defendant's "decisional competence." Depression may block a defendant's self-protective motivation, such that a defendant may accurately grasp the facts of her legal circumstances, but be unable to care about the best outcome, or in the alternative may be motivated to choose a self-harmful outcome. Mania may cause a defendant to wildly misjudge the risk he is facing and to make poor decisions. See, generally, T. Maroney, *"Emotional Competence and 'Rational Understanding': A Guide for Defense Counsel,"* reprinted in the *Indiana Defender*, July 2011, p.1.

C. MEDICAL CONDITIONS

Dementia, Parkinson's, Huntington's, strokes, seizure disorders and other medical disorders can also have impaired functioning that renders defendant's incompetent to stand trial. Frontal lobe brain damage can impair emotional capacity and rational decision-making.

D. ALCOHOL AND DRUG ABUSE

Alcohol and drug abuse or addiction do not necessarily render a defendant incompetent to stand trial.

Underwood v. State, 535 N.E.2d 507 (Ind. 1989) (defendant was not entitled to competency hearing or to psychiatric examination, notwithstanding his testimony during hearing on motion for psychiatric examination that he abused alcohol and drugs, was at times confused and had difficulty understanding events occurring around him and was on prescribed antidepressants; other statements made by defendant during hearing supported trial court's conclusion he understood proceedings and was able to assist his counsel in preparation of his defense), *cert. denied*, 493 U.S. 900, *reh'g denied,* 493 U.S. 985.

Gibson v. State, 490 N.E.2d 297 (Ind. 1986) (trial court did not abuse discretion by failing to hold competency hearing before accepting guilty plea; defendant testified he was free of influence of drugs or alcohol and did not suffer from mental/emotional disability; his attorney explained that defendant was depressive but had been found competent to stand trial three months earlier; concern for competency does not equal doubt concerning competency).

In re Artis, 179 Cal. Rptr. 811 (Cal. App. 1982) (court found ineffective assistance of counsel when defendant was allowed to plead guilty, where, on the morning of the plea, he was allegedly given a drug that could have affected his competence to stand trial).

People v. Rogers, 309 P.2d 949 (Cal. App. 1957) (when defendant deliberately ingests drugs to render himself unfit to stand trial, he thereby waives his right to be present at trial and tried only while competent).

See generally, Annotation, *Propriety of Criminal Trial of One Under the Influence of Drugs or Intoxicants at Time of Trial*, 83 ALR3d 1067 (1978).

E. DEFENDANT'S UNWILLINGNESS TO COOPERATE

Courts are reluctant to find incompetence based solely on non-cooperation. Unwillingness to assist in defense is different from inability to assist. Ferry v. State, 453 N.E.2d 207 (Ind. 1983).

Perry v. State, 471 N.E.2d 270 (Ind. 1984) (succession of five public defenders does not indicate inability to rationally consult with attorneys).

F. MEMORY LOSS — AMNESIA

Ritchie v. State, 468 N.E.2d 1369 (Ind. 1984) (memory loss does not render defendant incompetent to stand trial).

U.S. v. Stevens, 461 F.2d 317 (7th Cir. 1972) (amnesia is not a bar to prosecution of an otherwise competent defendant).

Wilson v. U.S., 391 F.2d 460 (D.C. Cir. 1968) (required post-trial determination whether defendant's lack of memory had effect on defendant's right to fair trial and effective assistance of counsel; court listed 6 factors which should be considered in making such findings).

See Reagon v. State, 251 N.E.2d 829, 834 (Ind. 1969) (DeBruler, J., dissenting) (amnesia effectively eliminates a defendant's mental capacity to render his attorney such assistance as a proper defense demand, and therefore renders the defendant incompetent).

G. PLEA OF INSANITY

Plea of not guilty by reason of insanity does not in itself raise reasonable basis for believing defendant to be incompetent. Like v. State, 426 N.E.2d 1355 (Ind. Ct. App. 1981).

IV. STRATEGIES

A. DECIDING WHETHER TO INTRODUCE QUESTION OF COMPETENCY

1. Incompetency - Defense Perspective

A finding of incompetency has several disadvantages for the defendant, especially in misdemeanor and lesser felony cases. The finding necessarily restricts a defendant's liberty by removing him from the streets and from the courts without an intervening adjudication of guilt; hospitalization may far exceed maximum possible sentence; and examination by psychiatrists may help the prosecution to combat an insanity defense.

2. Other Alternatives for Incompetent Defendant

a. Attorney Raises Other Issues Pre-Trial

Jackson v. Indiana, 406 U.S. 715, 740-41, 92 S. Ct. 1845, 1859 (1972) (Court made note of §4.06(3) of the Model Penal Code, which would permit an incompetent accused's attorney to contest any issue "susceptible of fair determination prior to trial and without the personal participation of the defendant" or would permit an evidentiary hearing at which certain defenses could be raised on the basis of which the court could quash the indictment).

b. Proceeding to Trial

People ex rel. Myers v. Briggs, 263 N.E.2d 109 (Ill. 1970) (faced with the potential injustice of imprisoning for life a defendant whose competence could never be restored,

even though he stood a strong chance of acquittal at trial, the court sanctioned the route of proceeding to trial with a concededly incompetent defendant).

See generally, Uelman, *Competency to Stand Trial*, §17.04[2][b] in Bernstein, *Criminal Defense Techniques*.

3. Things to Consider Before Raising Competency

(a) If a minor offense, the length of commitment for treatment may exceed the possible maximum sentence;

(b) The stigma from a finding of mental illness may be more objectionable to the defendant than the stigma of conviction;

(c) In the evaluation, the defendant may be required to reveal information better kept secret to the court-appointed expert;

(d) The defendant may prefer a punishment involving a prison sentence over a commitment to a mental hospital for treatment;

(e) If the case against defendant is weak or if the defense does not depend upon the competence of the client, counsel may believe defense would prevail at trial despite defendant's incompetence.

(f) Under Ind. R. Prof. Conduct, Rule 1.14(b), when the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(g) Once initiated, competence proceedings cannot be waived by the defense until court determines defendant is competent. Determination may be based on observation.

4. Restrictions on Defense Attorney at Competency Hearing

a. Attorney-Client and Work-Product Privileges

Counsel may not disclose discussions protected by the attorney-client and work-product privilege. A lawyer has an obligation to make reasonable efforts to resist disclosure of such evidence, including motions for protective orders. Ind. R. Prof. Conduct 1.14(c) and Ind. R. Prof. Conduct 1.6, Comments 1-3 and 14.

b. Scope of Cross

The scope of cross-examination of counsel is limited to what he observed; such behavior is not communication. The lawyer must give testimony as to his conclusions from discussions with client because of the special nature of the competency determination. Bishop v. Superior Court, 150 Ariz. 404, 724 P.2d 23 (1986).

B. COURT-APPOINTED EXPERTS

Under Palmer v. State, 486 N.E.2d 477 (Ind. 1985), court-appointed experts are obliged to consult with the defense prior to trial. Court appointed experts are not partisans of the defense; be circumspect in dealing with them.

Psychologist's privilege is subject to a competency evaluation exception. Ind. Code § 25-33-1-17(2). Statements are not privileged if made to court-appointed psychiatrist who is not treating defendant.

> Corder v. State, 467 N.E.2d 409 (Ind. 1984) (physician-patient privilege (formerly Ind. Code § 34-1-14-5, now Ind. Code § 34-46-3-1) does not apply to court-appointed psychiatrists).

C. EXPERT EVALUATION

In the wake of Dusky, mental health professionals began to identify criteria related to its two-part test. See, e.g., Barry A. Bukatman, J.L. Foy & Edward DeGrazia, *"What is competency to stand trial?"* Amer. J. of Psychiatry 127, 9 (March 1971): 1225-1229. A meaningful evaluation of competency to stand trial should focus on the following criteria.

Defendant's Ability to:

1. Understand his current legal situation.
2. Understand the charges made against him.
3. Understand the legal issues and procedures in his case.
4. Understand the possible dispositions, pleas, and penalties.
5. Understand the facts relevant to his case.
6. Identify and locate witnesses.

Defendant's Ability to Communicate with Counsel and to:

7. Comprehend instructions and advice.
8. Make decisions after advice.
9. Follow testimony for contradictions or errors.
10. Maintain a collaborative relationship with his attorney.
11. Testify if necessary and be cross-examined.
12. Tolerate stress at the trial or while awaiting the trial.
13. Refrain from irrational behavior during the trial.

The Commentary to The ABA Criminal Justice Mental Health Standards, Standard 7-4.1, stresses that a competency evaluation should focus on the defendant's functional abilities, and on rational understanding. The defendant should have "an ability to perceive rationally and without distortion." Similarly, the relationship with defense counsel must go beyond a superficial capacity to carry on a conversation. Defendant should be able "to discuss the facts of the case with counsel 'without paranoid distrust.'"

Court-appointed experts may gloss over the criteria related to the defendant's ability to participate rationally in his defense and may be particularly dismissive of emotional impairments on rational decision-making. The attorney must ensure that this crucial aspect of the competency determination is fully appreciated by the expert and explored in a realistic manner in his or her evaluation.

D. PROTECTING THE CLIENT

See ABA Criminal Justice Section Standards, Mental Health, Standard 7-3.1 *et seq.*

1. Monitoring the Prosecution's Examination

Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866 (1981) (reserving a decision on whether Sixth Amendment permits defense counsel to be present during the evaluation itself).

Fleenor v. Farley, 47 F.Supp.2d 1021, 1068-72 (S.D. Ind. 1998) (when State seeks to use evidence from psychiatric examination against defendant, both the Fifth and Sixth Amendments impose some limitations. Defense counsel should have prior notice of the examination and its intended scope).

Houston v. State, 602 P.2d 784 (Alaska 1979) (Sixth Amendment was held to require presence of counsel at court-ordered mental evaluation interview and defense psychiatrist permitted to attend also).

See Roesch, Ronald and Golding, Stephen L., *Competency to Stand Trial* (Urbana, U. of Ill. Press, 1980) (Chapter 4 discusses procedures used in the examination of defendants).

2. Protecting the Client from Self-Incrimination

a. Court's and Lawyers' Obligations to Explain

Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel apply to court-compelled psychiatric examinations; therefore, statements of a defendant obtained in violation of these safeguards are inadmissible as well as opinions based thereon. Estelle v. Smith, 451 U.S. 454, 101 S. Ct. 1866 (1981).

Sims v. State, 601 N.E.2d 344, 346-47 (Ind. 1992) (In 1988, defendant was convicted of sexual battery; court ordered defendant to attend and complete sex offender treatment counseling. In 1990 defendant was convicted of child molesting. In the second trial, a counselor testified to statements defendant made in the course of sex offender psychological treatment; held, admission of defendant's statements violated the privilege against self-incrimination).

Cf. McKune v. Lile, 536 U.S. 24, 122 S. Ct. 2017 (2002) (denying injunctive relief to an inmate facing sanctions for refusal to participate in a sex offender treatment program that would have required admission of guilt).

Dickson v. State, 533 N.E.2d 586, 588 (Ind. 1989) (no requirement to warn defendant of right to remain silent before psychiatric evaluations where defendant filed notice of intent to offer insanity defense; in Estelle v. Smith, 451 U.S. 454 (1981) defendant did not raise insanity defense; court on its own ordered defendant to undergo

psychiatric evaluation). See Fleenor v. Farley, 47 F.Supp.2d 1021, 1068-72 (S.D. Ind. 1998).

ABA Standard for Criminal Justice §7-3.5(b), Mental Health Standards. "In any evaluation, whether initiated by the court, prosecutor or defense, the defendant's attorney and the mental health or mental retardation professional conducting the evaluation have independent obligations to explain to the defendant and to ensure that defendant understands to the extent possible: the purpose and nature of the evaluation; the potential use of any disclosures made during the evaluation; the conditions under which the prosecutor will have access to information obtained and reports prepared; and the consequences of defendant's refusal to cooperate in the evaluation."

ABA Standard for Criminal Justice, Mental Health Standards, §7-3.5(c).

"Presence of attorney during evaluation.

(i) When the scope of the evaluation is limited to defendant's present mental competency, the defense attorney is entitled to be present at the evaluation but may actively participate only if requested to do so by the evaluator.

(ii) When the scope of the evaluation is not limited to defendant's present mental competency, the defense attorney may be present at the evaluation only with the evaluator's prior approval, and if present may actively participate only if requested to do so by the evaluator.

(iii) When psychological testing is administered, attorneys who are present should be aware that test content is protected by law and that disclosure of that content can undermine the test's validity as a measure of a person's functioning.

(iv) The prosecutor may not be present at any mental evaluation of defendant."

b. Psychiatrists/Psychologists

Incriminating statements made to a psychiatrist during a compulsory psychiatric examination are inadmissible when offered to demonstrate guilt even though they may be admissible to demonstrate mental condition. Phelan v. State, 406 N.E.2d 237, 239 (Ind. 1980).

The examining psychiatrist is required to "fully describe the nature and purpose and lack of confidentiality of the examination to the examinee at the beginning of the examination." American Psychiatric Association, *Principles of Medical Ethics (Psychiatry)*, §4, annotation 6 (1981).

Psychologists are also required to inform defendants of the legal limits of confidentiality in the evaluation. American Psychological Association, *Ethical Principles of Psychologists*, principle 5, 36 American Psychologist 633, 636 (1981).

CAVEAT: (1) there is no remedy if no warning is given; and
(2) an incompetent defendant will probably not understand the warning.

E. PREPARING FOR THE HEARING

1. Use of Consultant - Expert

Unless you are engaged in a "battle of the experts" in which quantity as well as quality of testimony becomes relevant, your client is better served if you are able to use one expert in a consultant capacity during the course of a competency hearing and another to testify. The consultant-expert:

- can observe the proceedings and point out to defense counsel errors and flaws that the attorney may not have noticed;
- has access to restricted materials such as MMPI booklets, WAIS manuals and the like which the lawyer would have difficulty obtaining.

2. Cross Examination of Opposing Expert Witnesses

In addition to an examination of the data and procedures, attention should ultimately be focused upon the expert's knowledge of the legal standards controlling the determination of competency and whether his conclusion is realistically and properly based upon those standards.

Keep in mind:

- psychiatrists and psychologists typically testify in conclusory terms, often parroting the statutory language, thus depriving the court of a proper evidentiary base for its determination of the defendant's competency. An expert witness who testifies to an opinion may be compelled to disclose the facts or data underlying the opinion by Indiana Rule of Evidence 703;
- psychiatrists and psychologists often confuse the legal criteria for incompetency with criteria for the existence of mental dysfunction, criminal responsibility, and need for treatment; and
- psychiatrists and psychologists are not sufficiently conversant with legal matters to be able to judge, whether or not *this* defendant, facing these charges, in light of the existing evidence, will be able to assist his attorney in a rational manner.

3. Preparation for "On the Spot" or Illusory Tests of CST by Presiding Judges

Provide your expert with information about the trial judge's approach to CST. Does he view the test of competency as a functional one, one of mental illness interpretation, or as a minimal standard of rationality to be decided on the basis of behavior in the courtroom and responses to direct questions from the bench?

Counsel should anticipate and defuse illusory tests that courts use to justify findings of competency by incorporating "common sense" tests into the expert's evaluation, and countering with evidence that definitively demonstrates incompetency.

F. TACTICS FOR RE-OPENING OF COMPETENCY

- Lay the foundation in both defense and prosecution expert testimony and/or extra-judicial interviews that defendant, although presently competent, could easily become incompetent

under certain circumstances.

- Keep defense expert apprised of all current developments in client's case, trial, confinement, etc., which could impact the defendant's competence to stand trial.
- Consider informing prosecution expert of comparable data.
- Secure findings of fact and conclusions of law at prior judicial competency determination that allow for re-opening of competency inquiry under certain specified circumstances as well as under general catch-all right to further competency hearings.
- Educate court and experts to legal and psychological/psychiatric reasons why competency determination is not a one-shot affair.