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# Competency of Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System:

## *A Call to Action for the Criminal Justice Community*

*Developed by The Arc's National Center on Criminal Justice and Disability®*


*National Center on Criminal Justice & Disability NCCJD®*

## About NCCJD®

The Arc's National Center on Criminal Justice & Disability® is the national focal point for the collection and dissemination of resources and serves as a bridge between criminal justice and disability professionals. NCCJD pursues and promotes safety, fairness, and justice for all people with intellectual and developmental disabilities as suspects, offenders, victims, or witnesses.

## About The Arc

The Arc is the largest national community-based organization advocating for and serving people with intellectual and developmental disabilities and their families. The Arc encompasses all ages and more than 100 different diagnoses including autism spectrum disorder, Down syndrome, Fragile X syndrome, and various other developmental disabilities. With over 650 chapters nationwide, The Arc is on the front lines to ensure that people with intellectual and developmental disabilities and their families have the support and services they need to be fully engaged in their communities. The Arc promotes and protects the human rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes. Visit thearc.org for more information.



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# Competency of Individuals with Intellectual and Developmental Disabilities in the Criminal Justice System:

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# Introduction

*Ashley Brompton, J.D., Criminal Justice Fellow, National Center on Criminal Justice and Disability*

People with intellectual and developmental disabilities (I/DD)[1] interact with the criminal justice system at a disproportionately higher rate[2] compared to those without I/DD. In cases where a person has I/DD, competence is raised as an issue and the criminal court is required to make determinations as to a person's ability to make legal decisions based on his or her physical and mental capacity. These determinations are called 'competency determinations' and attempt to measure a person's ability to make knowing, informed decisions at a variety of points in the legal process.

This white paper aims to demystify the questions surrounding competency issues in the criminal justice system with respect to individuals with I/DD. It works to reconcile the ideal response of the criminal justice system when interacting with someone with I/DD with the reality of adjudicating criminal cases day-to-day. There are two different views coexisting within ideas of competency. First, there is the ideal—that individuals with I/DD will be fully accommodated in the criminal justice system to ensure their competence at each stage of the case, allowing them to fully realize and exercise their rights within the criminal justice system. Second, there is the reality that sometimes, even when all players act with the best of intentions, individuals with I/DD may be found incompetent by judges who may lack critical information and resources, and a system that is ill-equipped to serve this population. However, there are some circumstances in which a finding of incompetency can *help* the defendant. For example, a finding of incompetency can lead to the suppression of a false confession that wrongfully incriminates the defendant.[3] These complexities need to be considered by both criminal justice and disability professionals looking to learn more about competency to better serve justice-involved individuals with I/DD.

*While it is important for criminal justice and disability professionals to embrace the aspirational goals of making the system work better for individuals with I/DD, they must also recognize the reality of the role of competency determinations in the criminal justice system and the impact of findings of competency or incompetency.*

These ideals and the realities of the current system can be in tension with each other due to the limited options presented by today's criminal justice system. Today, the options are incarceration or commitment due to incompetency or competency restoration. Such options may be in direct conflict with the best solution, which is allowing the person to move forward in a fair and inclusive way, while also protecting the individual's due process rights. We must continue to work toward reform and bettering the system while at the same time addressing the concerns that are present everyday within it.

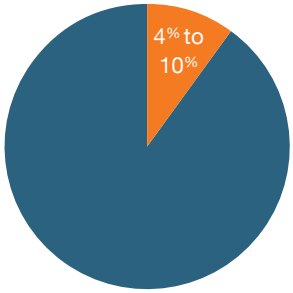
1 "People with intellectual disability (ID)" refers to those with "significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18", as defined by the American Association on Intellectual and Developmental Disabilities (AAIDD) in its manual, Intellectual Disability: Definition, Classification, and Systems of Supports (Schalock et al., 2010), and the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5), published by the American Psychiatric Association (APA, 2013). "People with developmental disabilities (DD)" refers to those with "a severe, chronic disability of an individual that- (i) is attributable to a mental or physical impairment or combination of mental and physical impairments; (ii) is manifested before the individual attains age 22; (iii) is likely to continue indefinitely; (iv) results in substantial functional limitations in 3 or more of the following areas of major life activity: (I) Self-care, (II) Receptive and expressive language, (III) Learning, (IV) Mobility, (V) Self-direction, (VI) Capacity for independent living, (VII) Economic self-sufficiency; and (v) reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated," as defined by the Developmental Disabilities Assistance and Bill of Rights Act 2000. In everyday language people with ID and/or DD are frequently referred to as people with cognitive, intellectual, and/or developmental disabilities.

2 Leigh Ann Davis, People with Intellectual Disability in the Criminal Justice System: Victims and Offenders (2009), *available at* http://www.thearc.org/what-we-do/resources/fact-sheets/criminal-justice.

3 False confessions are common for individuals with I/DD than the general public. Based on a review of false confessions, Robert Perske has identified 53 individuals with I/DD who have falsely confessed to serious felonies and were later exonerated. Robert Perske, *False Confessions From 53 Persons With Intellectual Disabilities: The List Keeps Growing*, 46 Intellectual and Developmental Disabilities 468 (2008).

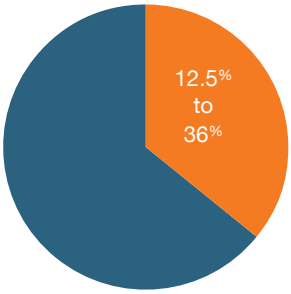
## *People with I/DD and Competency: The Numbers*

Estimated Number of People with An Intellectual Disability Facing Criminal Charges



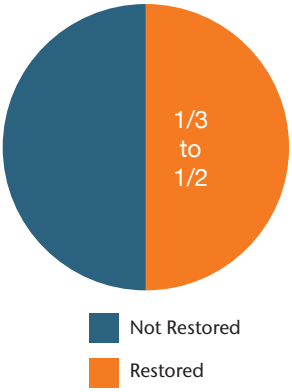

Although self-reporting may skew the data, studies have found that between 4 and 10 percent of adults who face criminal charges in the United States have an intellectual disability. Barry W. Wall & Paul P. Christopher, *A Training Program for Defendants With Intellectual Disabilities Who are Found Incompetent to Stand Trial*, 40 J. AM. ACAD. PSYCHIATRY L. 366, 366 (2012).

Individuals with an Intellectual Disability Found Incompetent to Stand Trial




One study found that between 12.5 to 36 percent of individuals with an intellectual disability who undergo evaluations are determined to be incompetent. Douglas Mossman, et al., *AAPL Practice Guidelines for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. of Am. Acad. of Psychiatry and L. (Supplement) S3, S44 (2007).

Defendents Found Incompetent Who Are "Restored" to Competency




This graphic represents the high estimate of individuals with ID who are restored. An estimated 1/3 to 1/2 of individuals with I/DD found incompetent are restored to competency. Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial from a Clinical Perspective*, 31 NEW. ENG. J. CRIM. & CIVIL CONFINEMENT 81, 104 (2005).

Competency is a critical issue in nearly every stage of a criminal case, from the investigation to initial charges, through adjudication and sentencing, through incarceration and reentry, and in some instances where the sentence is death, at execution. At each of these stages, the system is not designed to address competency of individuals with I/DD, as exemplified by the lack of I/DD-specific evaluations, restoration programs, resources, and expertise. This white paper addresses some of the varying competency standards within the criminal justice system and how individuals with I/DD are particularly impacted throughout the process. It will also chronicle specific challenges they face when there is a question of competency and outline policy recommendations to ensure that individuals with I/DD obtain the same basic protections as any other person in the criminal justice system. In addition, this white paper discusses the differences between competency and 'not guilty by reason of insanity',[4] as well as addresses the processes to evaluate, determine, and restore competency to stand trial (which are not designed for people with I/DD), *Atkins*[5] standards and competency, competency evaluation litigation, competency to waive *Miranda*[6] rights, and the impact of guardianship on people in the criminal justice system. While this is not a complete review of all of the competency standards that could come up in a criminal case, it provides a general overview to spark future discussion, debate, and research.

*The administration of justice demands that issues of capacity and competency are recognized when in question and are assessed in a fair and appropriate way, with the understanding that the presence of a disability alone is not sufficient to make a finding of incompetency.*

Written as an educational resource and advocacy tool for criminal justice professionals and disability advocates, as well as justice-involved individuals and those who support them, this white paper serves to outline

4 In some jurisdictions, not guilty by reason of insanity can be referred to as not criminally responsible. These two terms have the same meaning throughout this white paper.
5 *Atkins v. Virginia*, 536 U.S. 304 (2002) holds that individuals with intellectual disability cannot be executed.
6 *Miranda v. Arizona*, 384 U.S. 436 (1966).

problematic issues faced by individuals with I/DD. It reveals challenges with the current competency framework and suggests best practices and potential solutions to these issues. This white paper closes with policy and program recommendations for the criminal justice system that focus on: (1) creating a dialogue about the notion of competency and capacity within the criminal justice system; (2) beginning a discussion about the impact of competency determinations and the myriad of accommodations that people with I/DD are routinely denied in the criminal justice system that could help them achieve capacity; and (3) increasing the likelihood that the competency of people with I/DD is evaluated properly and with appropriate accommodations and/or treatment in mind.

The system must be reformed to ensure that (1) individuals with I/DD are provided the accommodations they need and (2) incompetency is only found in cases where there is a true lack of understanding that cannot be overcome with appropriate accommodations. Determinations of incompetency play a critical role in the system and are designed to protect individuals from being prosecuted when they do not understand the charges against them or the process of a criminal case. The following table addresses some of the pros and cons of findings of competency and incompetency.

## *Benefits and Dangers of Defendants with I/DD Being Found Competent or Incompetent*

### *Finding of Competency*

| Pros | Cons |
|---|---|
| Trial can continue; defendant doesn't have to be unnecessarily institutionalized | A defendant who potentially does not understand the criminal justice process could be facing loss of liberty by a system he or she doesn't understand |
| Ideally the defendant receives accommodations and support | The defendant may have been found competent and not provided with any accommodations he or she needs |

### *Finding of Incompetency*

| Pros | Cons |
|---|---|
| Support or treatment can be provided as necessary | Often long wait times for treatment |
| The court may be made aware of accommodations that could assist the defendant in attaining competency | Potentially longer length of institutionalization than if found competent and sent directly to jail following conviction |
| The defense attorney may determine that a finding of incompetence is the best outcome for the client | Lack of community options for non-dangerous offenders |
| | Lack of appropriate inpatient treatment for people with I/DD |
| | Can potentially spill over into other contexts that can harm the defendant, such as the ability to provide informed consent, enter into contracts, etc. |
| | A defendant found incompetent who has a defense not dependent on his ability to work with his attorney (e.g., an alibi defense) may be unable to present it and end the case, extending his or her involvement in the criminal justice system |
| | Treatment is designed to get the individual moving through the system, it is not necessarily designed to provide the maximum benefit to the individual |

## *What We Know: A Brief History and Overview*

In 1960, the United States Supreme Court established the standard of competency that a defendant must show in order for a criminal prosecution of that individual to move forward. *Dusky v. United States* outlined that a defendant must have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and a rational as well as factual understanding of the proceedings against him."[7] What was not made clear in that decision is what the standard meant and to what stages and actions within the criminal justice process it applied.

*Since* Dusky, *the competency to stand trial standard has been expanded upon, but it is still not clear how the standard should apply to persons with mental illness as opposed to persons with I/DD.*

Scholars largely agree that competency to stand trial is fact-specific and depends on the seriousness and complexity of the charges, what is expected of a defendant in his or her case, the defendant's relationship with his or her attorney, and other situation-specific factors.[8] A diagnosis of I/DD does not necessarily make someone incompetent, but it may trigger an inquiry into the issue, depending on the facts of the case. Any party to a criminal proceeding may raise the question of a defendant's competency—the defense attorney, prosecutor, or judge—and a hearing may be ordered to further examine the issue. If a person is found incompetent, proceedings against him or her cannot continue.

There are three basic requirements in *Dusky* that all have to be met in order for a person to be found competent to stand trial. The requirements vary by state, but these are the *minimum* constitutional requirements. The requirements were described in more understandable language in *Drope v. Missouri*, another Supreme Court case; the Court stated that "[a] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[9] Each state has different laws regarding competency. NCCJD's Criminal Justice and Disability Legislative Database includes competency statutes that pertain to people with I/DD from across the nation.[10]

Other competencies also require that the individual meet the *Dusky* standard in addition to other standards, such as competency to waive counsel in a criminal trial and competency to plead guilty. Additional competencies with different standards may be relevant in a criminal trial of someone with I/DD, depending on the specific facts of the case. Examples include competency to waive *Miranda* rights, competency to confess, competency to represent oneself and competency to be executed (see chart on page five, for descriptions of some types of competencies in criminal cases).

7 362 U.S. 402, 402 (1960).
8 *See, e.g.* Thomas Grisso, Evaluating Competencies: Forensic Assessments and Instruments (2nd ed. 2007).
9 420 U.S. 162, 171 (1975).
10 *See* http://www.thearc.org/what-we-do/programs-and-services/national-initiatives/nccjd/legislative-resources/by-state to see a list of competency laws by state.

## Different Types of Competencies and Their Standards

| Type of Competency | Standard |
|---|---|
| Competency to waive *Miranda* rights/competency to confess | Knowing, intelligent and voluntary waiver of *Miranda*[11] rights - a suspect must understand the nature of his or her 5th Amendment rights against self-incrimination, and be able to make an informed decision about whether to waive or invoke those rights. |
| Competency to stand trial | *Dusky v. United States*[12] - defendant must have a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational as well as factual understanding of the proceedings against him." |
| Competency to plead guilty | *Godinez v. Moran*[13] - the competency standard for pleading guilty is the same as the competency standard for standing trial established in *Dusky v. United States* |
| Competency to waive the right to be represented by counsel | *Godinez v. Moran*[14] - The competency standard for waiving the right to counsel is the same as the competency standard for standing trial established in *Dusky v. United States* |
| Competency to represent oneself (note that this is different than competency to waive counsel) | *Edwards v. Indiana*[15] - states can require a higher level of competency (as compared to the Dusky standard) when contemplating an individual's ability to represent himself. |
| Competency to be sentenced to death/executed | *Atkins v. Virginia*[16] - individuals with an intellectual disability cannot be executed under the 8th Amendment; *Hall v. Florida*[17] - there can be no hard IQ cut off for the determination of intellectual disability; *Ford v. Wainwright*[18] - a capital defendant must be understand that he is being executed and why in order to be competent for execution. |

11 *Miranda v. Arizona*, 384 U.S. 436 (1966)
12 362 U.S. 402 (1960).
13 509 U.S. 389 (1993).
14 *Id.*
15 554 U.S. 164 (2008).
16 536 U.S. 304 (2002).
17 134 S.Ct. 1986 (2014).
18 477 U.S. 399 (1986).

## Story from the System: Kamran's Story

Kamran K. is a young man from Mississippi who became involved in the criminal justice system. Kamran, a then 16 year old who has autism[19] and mental illness, was arrested for sexual battery several years ago. Based on his disabilities, Kamran's competence to stand trial was questioned, and the judge ordered a competency evaluation. Eight months passed before that competency evaluation took place, and during those eight months Kamran sat in solitary confinement in jail, receiving neither accommodations nor treatment. His sensitivity to light and sound exacerbated the difficulty of spending months alone in jail, and his mental health deteriorated.

When Kamran finally received a competency evaluation, he was found competent to stand trial. However, a parallel evaluation was also underway, and Kamran was found by the court to be a danger to himself or others. In Mississippi, defendants can be found competent

19 Kamran was diagnosed with what was then known as Asperger's Syndrome. The DSM-5 has eliminated Asperger's as a diagnosis—now it is part of the more general Autism Spectrum Disorder. Some advocates have taken issue with the elimination of this diagnosis and view what was known as Asperger's to be distinct from other forms of autism, but we are referring to it as autism based on the DSM-5 definition.

to stand trial while simultaneously being civilly committed because they are determined to be a danger to themselves or others. He was civilly committed in April 2016 and his criminal case was put on hold.[20] Again though, Kamran was forced to wait in jail—his health continuing to deteriorate—because of gaps in the criminal justice and mental health care system. Kamran is, at the time of publication of this paper, still on a waitlist for a psychiatric bed and remains in solitary confinement in jail. Throughout his ordeal, he has received virtually no meaningful psychiatric treatment.

*Kimberly, Kamran's mom, states:*

*We have been living a nightmare since December 12, 2014 when my son was charged with sexual battery. My son has severe Asperger's. Kamran has had problems with self-regulation since the third grade, is emotionally immature, has trouble relating to peers his own age, and can be misunderstood due to his poor communication skills. In jail, my son has been tased, told he was the devil, and told that God did not love him. It has broken my heart to see him so down that he has wished for a guard to shoot him. He is honest, has a good heart, and is very sorry for what happened. I feel like my son has been placed somewhere he does not belong. Our family wants him to get the help he needs, but we don't feel like jail or prison is doing anything but furthering his issues, and this long wait for some type of treatment has not helped him at all.*

Since his arrest, Kamran's options have been severely limited with only two possible paths: jail or inpatient hospitalization. In reality, hospitalization has proved to be a nonexistent option thus far due to seemingly insurmountable wait times and red tape. Equally troubling is the lack of community-based supports that are available to Kamran, both before and after his arrest. Today, by all accounts, Kamran is *less* equipped to live safely in the community than on the day he was arrested. Unless there is change, Kamran's ordeal has just begun, as his trial will commence if and when his civil commitment is lifted.

## *Emerging Issues Regarding Competency for Individuals with I/DD*

As has been described above, the role and standards of competency were not designed with individuals with I/DD in mind. While courts routinely make competency determinations in cases of defendants with mental illness, they often have little experience in making such decisions for those with I/DD, which requires a different focus. The need for training and familiarity with I/DD for criminal justice professionals cannot be overstated. Because individuals with I/DD continue to be overrepresented in the criminal justice system, attorneys, judges, and court personnel must have a basic understanding of I/DD. They require training on how to communicate effectively with people with I/DD and on appropriate accommodations to help reduce the risk of erroneous and potentially harmful legal decisions.

Alternatives to incarceration and innovative solutions need to be considered where appropriate and available. Rather than the current paradigm, which has criminal justice professionals choosing the "lesser of two evils" between jail and inpatient treatment, the criminal justice system may consider other solutions for people with I/DD to ensure that the need for safety is balanced with due process, inclusivity, and the overall goal of deinstitutionalization. Such solutions could include diversion options, such as an expansion of outpatient treatment options that, while available on a limited basis, are hardly common, community-based services/programs before arrest (pre-arrest diversion), education for legal professionals on interacting with individuals with I/DD and necessary accommodations, and a comprehensive understanding of the differences between I/DD and mental illness and how they impact a person's capacity differently.[21]

The different sections of this white paper explore the current system and highlight the need for more tools,

20 It is unclear how Kamran's case has been "paused," but the impression from his attorney is that, upon treatment and release from his civil commitment, the criminal case will resume.

21 It is worth noting that there are many individuals who have both I/DD and a mental illness. This is known as having a dual diagnosis and requires special consideration in determination of competency.

accommodations, and understanding at all stages of criminal justice proceedings as a matter of due process, basic fairness, and the requirements of disability rights laws.

## *A Note on Terminology: Competency vs. Capacity*

A note in reference to the following articles: There is some disparity between the way criminal defense attorneys and courts view competency and how others, including some disability advocates and some disability rights attorneys, view competency. For attorneys who work in criminal law, specifically prosecutors and defense attorneys, competency is viewed as a distinct term of art meant to describe a particular legal standard and finding during a criminal case. However, to scholars, disability advocates, people with I/DD, and family members, competency may be used as a much broader and all-encompassing term that actually refers to capacity. Thus, the authors of this paper may approach the concept of competency differently.

## *Consider the definitions below:*

*Competency:* Competency is a legal finding. Competency proceedings are conducted to allow the court to determine the individual's mental capacity at various points in the legal proceeding. At each of these points, a different standard of capacity is required. See the chart on page 5 entitled *Different Types of Competencies and Their Standards*.

*Capacity:* Capacity refers to the ability to understand the nature and effect of one's acts. Capacity is a fluid concept; an individual may have the requisite capacity in one moment and lack capacity in another. The determination to be made is whether an individual has the ability to understand the nature and effect of his or her acts at a specific moment in time.

# Competence to Stand Trial—The Experience of Defendants with an Intellectual Disability Compared to Those with a Mental Illness

*Robert D. Fleischner, Center for Public Representation*

It is fundamental to American jurisprudence that criminal defendants cannot be put at risk of losing their life or liberty if they cannot understand what is happening to them.[22] The modern articulation of this ancient concept springs from a series of Supreme Court cases, beginning with *Dusky v. United States*.[23] The constitutional test for competence to stand trial is whether the defendant has sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding and a rational and factual understanding of the proceedings and can assist in his or her own defense.[24] Not surprisingly, most defendants who are found not competent to stand trial have a mental disability—either an intellectual disability or mental illness.

*Jackson v. Indiana*[25] set out the rules for what happens after a defendant is found incompetent to stand trial. In that case, experts determined that Mr. Jackson, who was illiterate, deaf, and mute, was not only presently incompetent but that the chances he would ever be competent were virtually non-existent. Nevertheless, following state law, the trial court committed him to an institution until he became "sane" enough to be tried.[26] Reasoning that the "nature and duration of commitment must bear some reasonable relation" to the purpose of the commitment, the Supreme Court held that Mr. Jackson could not be held any longer than reasonably "necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."[27] The Court, therefore, held that it was permissible to commit an incompetent defendant to a facility for restoration of competency, but that the term of the confinement had to be reasonable.

There are probably more than 60,000 evaluations of defendants' competence to stand trial each year.[28] Although the processes and standards are the same for each, the outcomes are often quite different for people with intellectual disabilities and those with mental illness. This brief section will examine how courts and clinicians tend to respond depending on the defendant's disability.[29]

## *Frequency of Intellectual Disability as a Basis for Incompetency Compared To Mental Illness*

Although the data may be skewed by its reliance on self-reporting, it appears that 4 to 10 percent of adults who face criminal charges in the United States have an intellectual disability.[30] Although the exact number is unknown, probably 12,000 defendants are found to be incompetent each year.[31] It is likely though that the overwhelming majority of these defendants have a mental illness. According to studies from the early 1990s, between six and sixteen

22 Cranay D. Murphy, *Mental Incompetence: Adjusting to Modern Forms of Civility*, 41 S.U.L. Rev. 281, 283-88 (2014) (tracing development of the law of competence to stand trial from 14th century England and France).
23 362 U.S. 402, 403 (1960).
24 *Id.; Drope v. Missouri*, 420 U.S. 162 (1975) (requiring defendant be capable to consult with attorney).
25 406 U.S. 715 (1972).
26 *Id.* at 718.
27 *Id.* at 738.
28 Douglas Mossman, et al., *AAPL Practice Guidelines for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. of Am. Acad. of Psychiatry And L. (Supplement) S3 (2007), S3 (using estimates from 2000 and predicting annual increases).
29 Other related competencies are beyond the scope of this paper. For example, the Supreme Court held that execution of a prisoner who is "insane" violates the Constitution, *Ford v. Wainwright*, 477 U.S. 399, 409-10 (1986), and likewise that the execution of prisoners with "mental retardation" is a violation of the 8th Amendment. *Atkins v. Virginia*, 536 U.S. 304, 309-14 (2002). Not surprisingly, other cases examining the scope and meaning of the prohibitions have followed.
30 Barry W. Wall & Paul P. Christopher, *A Training Program for Defendants With Intellectual Disabilities Who are Found Incompetent to Stand Trial*, 40 J. Am. Acad. Psychiatry L. 366, 366 (2012).
31 Mossman, et al, at S55.

percent of all adult defendants who are assessed to be incompetent to stand trial are diagnosed as having an intellectual disability.[32]

Defendants with serious mental illness are more likely to be determined to be incompetent than those with an intellectual disability. Between 12.5 to 36 percent of individuals with an intellectual disability who undergo evaluations are determined to be incompetent.[33] By comparison, 45 to 65 percent of defendants with schizophrenia or other psychotic diagnoses referred for assessment are determined incompetent.[34]

A case law review confirms that it is often difficult for a defendant with an intellectual disability to be found incompetent. (Defendants with both an intellectual disability and mental illness or physical disabilities are more likely to found incompetent.) Despite current negative sentiments about their accuracy and value as absolute measurements, IQ scores and "mental age" are frequently important factors that weigh in one direction or the other.[35] The Supreme Court recently disapproved of strict IQ cutoffs when states decide a prisoner's competency to be executed, suggesting instead using factors recognized by modern "medical practice" like deficiencies in adaptive functioning, past performance, environmental factors and upbringing.[36] The same sorts of factors should apply to all defendants when considering competency to stand trial.

## *Commitment and Restoration Compared*

Defendants with an intellectual disability are less likely to attain competence. Research indicates that 80-90 percent of defendants with mental illness are restored to competency within six months.[37] Many defendants with mental illness are able to be assisted in restoring competency primarily through the use of psychotropic medications.[38] In some cases medication may even be administered involuntarily to render the defendant suitable for trial.[39] Defendants with intellectual disabilities without symptoms of mental illness, however, may not be suitable for medication interventions.[40]

Also, unlike their counterparts with mental illness, many defendants with an intellectual disability may never have been competent. Therefore, attainment of competency—not restoration—is the goal of institutionalization. Clinicians then will encounter complex challenges, including the need for individually designed educational programs which may include, for instance, mock trials and role playing.[41]

The process may be exacerbated by the fact that commitment for restoration may be to a facility that is unsuited for providing habilitation and treatment to individuals with an intellectual disability—for example, a state psychiatric hospital or, in some jurisdictions, a jail or prison (which is probably inappropriate for all incompetent defendants).[42] Some states require restoration to take place in a hospital, others permit it. Only a few states require that the defendant meet civil commitment criteria to be hospitalized for restoration.[43]

*For some, perhaps many, defendants with intellectual disabilities, restoration might have a better chance of success in the community rather than in an institution. But, as is true for defendants with mental illness, there is both a lack of community-based programs and judges' reluctance to release an incompetent defendant to the community. So even where outpatient restoration programs are available, they are seldom used.*[44]

Even when some level of treatment is available in an appropriate setting, studies show that only about one-third to one-half of defendants with an intellectual

32 Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial from a Clinical Perspective*, 31 New Eng. J. Crim. & Civil Confinement 81, 94 (2005).
33 Mossman, et al. at S44 (citing studies).
34 *Id.*
35 For a review of cases see Deborah B. Dove, *Competency to Stand Trial of Criminal Defendant Diagnosed as "Mentally Retarded"—Modern Cases*, 23 A.L.R. 4th 493.
36 *Hall v. Florida*, 134 S.Ct. 1986, 1993-96 (2014).
37 Pinals at 104.
38 *Id.* at 83 (finding medication to treat incompetent defendants critical component in competency restoration).
39 *Sell v. U.S.*, 539 U.S. 166 (2003).
40 Pinals at 104.
41 The "Slater Method" used at Eleanor Slater Hospital in Rhode Island is often cited as an example of a thoughtful restoration program for incompetent defendants with an intellectual disability. *See*, Pinals at 95-96. For proposed elements of a model competency restoration *see* Mossman at S57-S58.
42 For example, a Massachusetts defendant found incompetent to stand trial due to intellectual disability may be, in some circumstances, committed to the Bridgewater State Hospital, a medium security prison.
43 Mossman et al. at S55-56.
44 *Id.*

disability achieve competence.[45] And the treatment time is typically much longer when compared to a defendant who has a mental illness. Moreover, there are concerns that individuals with intellectual disabilities obtain only a superficial level of competency that may not be long-lasting.[46] A Louisiana case is a good example. The prosecution's witnesses testified that the defendant had successfully participated in a restoration program. Another expert testified, and the court agreed, that the defendant had been conditioned to say what he was taught, but his words were "hollow" and without any cognitive understanding. The court found that while the defendant had a factual understanding of the proceedings, he lacked the ability to consult with his counsel, to assist in his defense, and to rationally understand the legal proceedings.[47]

## *Discharge and Dismissal of Charges*

Incompetent defendants with mental illness and those with intellectual disabilities for whom the process is taking an "unreasonable" time, share three common problems. First is the reliability of clinicians' predications that the defendant will never be competent. Individual variables for each defendant make predictions difficult.[48] Second is the court's determination of whether a reasonable time has passed and, third, the unwillingness of some judges to discharge incompetent defendants despite the rules in *Jackson*. If the underlying charges involve violence, judges may be hesitant to discharge defendants from facilities even when restoration is not possible. Dismissal of charges is more likely if the defendant meets the criteria for civil commitment and can be kept institutionalized that way. However, if the defendant is able to propose an available community services plan that is suitable to the individual and likely to protect the public, some previously reluctant judges may be persuaded.

Although the legal requirements are the same, people with intellectual disabilities face increased challenges when their competence to stand trial is questioned, as compared to defendants with mental illness.

45 Pinals at 104.
46 *Id.*
47 *U.S. v. Duhon*, 104 F. Supp. 2d 663, 675 (W.D. La. 2000).
48 Pinals at 102-03.

# Competency versus Not Guilty By Reason of Insanity

*Hillary Frame, NCCJD Legal Intern, Wake Forest University School of Law*

The concepts of the insanity defense and incompetence to stand trial are often conflated and confused by the general public. Sometimes used interchangeably by people outside the legal world, these concepts differ greatly; they have different requirements and implications. Competency measures the defendant's ability to appreciate the implications of his or her actions *at the present time*. Insanity[49] measures a defendant's ability to appreciate the consequences of his actions *at the time the crime was committed*. A defendant with an intellectual or developmental disability could find himself in a position where his state of mind at the time of the offense or at trial is an issue, making both competency and insanity relevant to defendants with I/DD.

## *Competency to Stand Trial*

A finding of incompetence to stand trial acts as a pause in the trial; until the defendant can understand the charges against him and the court process, the trial cannot continue. The standard for competency to stand trial is "whether he has a rational as well as factual understanding of the proceedings against him" and whether he can assist in his own defense.[50] This has nothing to do with whether or not the person is guilty, but whether the person has a basic understanding of the charges against him and the consequences of the trial. Competency to stand trial is measured at the time of the trial. Someone could have been completely out of touch with reality before trial, but have a clear understanding during the trial and thus be found competent. Having a mental illness or I/DD does not make one automatically incompetent to stand trial. In fact, having I/DD or a mental illness is not enough to even bring the claim of incompetency or insanity. There has to be a concern that the I/DD or mental illness actually affected the defendant's ability to understand the charges against him and the legal process.

## *Competency to Stand Trial Timeline and Process*

Competency to stand trial has a very distinct timeline. First, the prosecutor, defense lawyer, or the judge will raise concerns about the defendant's ability to stand trial. A physician or other professional will then evaluate the defendant. This evaluation will use a battery of psychological tests along with interviews conducted by the physician to determine a recommendation for the defendant's competency to stand trial. The most common evaluation given to individuals with I/DD is the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR). Based on criteria the Supreme Court laid out for competency to stand trial, the CAST-MR has separate sections for Basic Legal Concepts, Skills to Assist Defense, and Understanding Case Events.[51] The CAST-MR mostly relies on material in the defendant's case. It also emphasizes the ability of the defendant to cooperate with his counsel.[52]

The judge makes the ultimate decision on a defendant's competency based on the testimony of experts and the evaluations they conduct. If the judge decides that the[53] defendant is competent, then the trial will proceed. If the judge finds that the defendant is incompetent to stand trial, the defendant will enter treatment to restore him or her

49 Insanity does not necessarily refer to individuals who are "insane" or have mental illness; instead it refers to individuals who are not criminally responsible due to a lack of appreciation for their actions.
50 *Dusky v. United States*, 362 U.S. 402, 402 (1960).
51 Richard Rogers and Jill Johansson-Love, *Evaluating Competency to Stand Trial with Evidence Based Practice*. 37 J. Am. Acad. Physchiatry L. 450 (2009).
52 *Id*.

## About the CAST-MR[53]

- For individuals over 18 who are *already diagnosed with an intellectual disability*
- Tests three main areas: Basic Legal Concepts (tests understanding of basic legal terms; multiple choice), Skills to Assist Defense (tests ability to assist in his own defense; multiple choice), and Understanding Case Events (open ended questions about his/her own case)
- Requires a 4th grade reading level, even though it is designed for people with ID
- Sample questions:
  - Part 1: What does the judge do? Answers: a) defends you; b) decides the case; c) works for your lawyer
  - Part 2: What if the police ask you to sign something and you don't understand it? What would you do? Answers: a) refuse to talk to them; b) sign it anyway; c) ask to see your lawyer
  - Part 3: What were you doing that caused you to be arrested?[1]

53 Gary B. Melton, Et Al., Psychological Evaluations for the courts, Third Edition: A Handbook for Mental Health Professionals and Lawyers 155-156 (3d ed. 2007).

to competency.[54] Different states have varying maximum lengths of time that a person can be held while he or she is in restoration treatment.

## Restoration to Competency to Stand Trial

As the amount of time it takes to restore someone increases, the likelihood of restoration decreases. In a study in Florida, "87 percent of people restored to competency...were restored in 9 months or less."[55] However, people with I/DD often take longer to be restored and are restored at lower rates. Studies show that only about one-third to one-half of defendants with an intellectual disability achieve competence.[56] In addition, most restoration programs are not designed for the specific needs of people with intellectual disabilities.[57] However, the Slater Method is structured for people with I/DD. Instructors are told "to use simple language, to speak slowly and clearly, and to use concrete terms and ideas."[58] These methods can increase the likelihood that a person with I/DD will be restored to competency for trial, by targeting his or her specific needs. Some individuals with I/DD are not competent to begin with due to a lack of understanding of the various legal and factual issues in their case, which means they must first be taught the relevant information.

## Insanity

The insanity defense is depicted as a "get out of jail free" card among the general public. It is depicted as something that can be used successfully to avoid conviction by anyone with a cognitive disability. However, there are legal standards for insanity and more than simply having a mental illness or I/DD is required, similar to the competency standard. In fact, the defense is used rarely and is even more rarely successful. And even when someone is found not guilty by reason of insanity, he or she is often not released or "getting away with it."

54 Douglas Mossman, et al., *AAPL Practice Guidelines for the Forensic Psychiatric Evaluation of Competence to Stand Trial*, 35 J. of Am. Acad. of Psychiatry and L. (Supplment) S3 (2007), S3-S72 (2007).
55 Nastassia Walsh, *When Treatment is Punishment: The Effects of Maryland's Incompetency to Stand Trial Policies and Practices,* Justice Policy Institute(Oct. 2011), *available at* http://www.justicepolicy.org/research/8161.
56 Debra A. Pinals, *Where Two Roads Meet: Restoration of Competence to Stand Trial from a Clinical Perspective*, 31 New. Eng. J. Crim. & Civil Confinement 81, 104 (2005).
57 *Id.* at 17.
58 Ronald Schouten, *Commentary: Training for Competence—Form or Substance?* 31J. Am. Acad. of Psychiatry L. 202-204 (2003).

## *The Slater Method*[59]*:*

**Training Program for Restoration Competency**

**Table 1** Summary of the Slater Method: Training Tool Rationale

| MR Impairment | Phase I<br>Knowledge-based Training | Phase II<br>Understanding-based Training |
|---|---|---|
| Cognition | The client must learn:<br>• the purpose of training sessions (1)<br>• the charges (1)<br>• possible pleas (1)<br>• potential consequences (1)<br>• the role of the courtroom personnel (1)<br>• the purpose of going to court (1)<br>• the purpose of going to trial (1) | The client must understand that:<br>• this is an adversarial proceeding, and he/she is accused (1,3)<br>• he/she cannot be punished just because he/she is accused (1,3)<br>• a plea is different from a finding (1,3)<br>• the case may go to trial, but it probably won't (1,3,4)<br>• a plea bargain means giving up some rights (1,3) |
| Communication | The client must learn:<br>• the importance of speaking with his/her attorney (4)<br>• the importance of listening in court (4)<br>• the importance of saying "no" if he/she doesn't understand something (4)<br>• how to testify appropriately (4) | The client must be able to:<br>• understand that the opposing counsel may try to trip him/her up<br>• tell his/her story without self-incrimination<br>• tell all details of his/her story to the attorney<br>• resist leading questions and appreciate and be able to stick to a defense strategy |
| Emotions and Behavior | The client must learn:<br>• to display appropriate behavior (5)<br>• not to display inappropriate behavior (5) | • role-playing sessions to assess ability to tolerate the stress of courtroom proceedings (1-5) |

* Numbers in parentheses denote the main module number(s) where this information is reviewed (see Table 2).

59 Barry Wall, et al., *Restoration of Competency to Stand Trial: A Training Program for Persons with Mental Retardation*, 31 J. Am. Acad. Psychiatry L. 189, 194 (2003).

## *Standards of Insanity*

Each state has its own statute that outlines a standard for what makes someone legally insane. Generally, the definition of insanity is that, at the time of the crime, a person was unable to understand the consequences of his or her actions. There are four main definitions for insanity:[60]

- M'Naughten Rule: at the time that he committed the act, the defendant was laboring under such a defect of reason, from disease of mind, that he did not know the nature and quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong.
- Irresistible Impulse Rule: at the time he committed the act, the defendant was laboring under such a defect of reason, from disease of the mind, that he had lost the power to choose between right and wrong.
- The Durham Rule: the defendant is not criminally responsible if his unlawful act is the product of a mental disease or defect.
- American Law Institute Model Penal Code: at the time of such conduct, as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.

Each state, the District of Columbia, and federal law has its own statute defining insanity, but each fits into at least one of the broad definitions above. The fact finder in each case is generally responsible for the determination if the defendant has criminal responsibility for his or her actions. One can be found either guilty but insane or not guilty by reason of insanity either through plea or trial verdict.

60 Henry Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post-Clark Era*, 18 U. Fla. J. L. & Pub. Pol'y 7 (2007). A list of the standard used in each state can be found at *United States Insanity Defense*, US Legal Law Digest, http://lawdigest.uslegal.com/criminal-laws/insanity-defense/7204 (2016).

## *The Process of the Insanity Defense*

As previously stated, there are four main standards for insanity. However, insanity is always offered as an explanation for why a person is less culpable for a crime. Then the fact finders in the trial, whether that is the judge or the jury, decide whether or not to render a verdict for not guilty by reason of insanity. In the alternative, the insanity defense can also be offered as a plea. Despite its depiction in the media as a very common defense, it is only used in 0.93% of cases.[61] In addition, a 1991 study found that "[a]pproximately 10% of those pleading insanity were discharged, withdrawn, or found not guilty, while 64% were found guilty and 26% were acquitted NGRI."[62]

I/DD does not automatically qualify someone as insane or even open up the insanity defense for use. Instead, it depends on the individual circumstances of the case and if the person knew the consequences of his actions at the time of the crime. In addition, while a defendant may be found not guilty by reason of insanity, this does not mean that he or she is released. Often the defendant will be treated at a state mental hospital, which can result in a longer confinement than if he or she had been imprisoned.[63]

Ultimately, competency to stand trial and the insanity defense differ in their results, time frame, and standard procedures. A finding of incompetency may pause or delay the prosecution of a case while a finding of insanity happens at the end of a trial or plea and ends the case. Competency is measured at the time of the trial whereas insanity is measured by exploring the state of mind of the defendant at the time of the criminal act. Competency challenges are not particularly rare when defendants have I/DD, but use of the insanity defense is much less common. In the future, more dissemination of information to the public about the differences between competency to stand trial and the insanity defense is needed.

61 George L. Blau & Richard A. Pasewark, *Statutory Changes and the Insanity Defense: Seeking the Perfect Insane Person*, 18 L. & Psychol. Rev. 69, 74 (1994).
62 Lisa A. Callahan, et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight State Study*, 19 Bull Am. Acad. Psychiatry L. 331, 335 (1991).

63 In *Jones v. U.S.*, the Supreme Court stated that, "the preponderance of the evidence standard comports with due process for commitment of insanity acquittees." *Jones v. U.S.*, 463 U.S. 354, 368 (1983).

# Suggestions for Importing Definitions of Intellectual Disability from the Capital Context to Competency Proceedings

*Andrew Flood, Stanford University School of Law*

Even though intellectual disability has a clear impact on a defendant's ability to assist counsel and understand proceedings, current competency standards fail to integrate properly modern scientific approaches to I/DD and differentiate intellectual disability from mental illness. Defendants with intellectual disabilities frequently experience problems engaging in abstract thinking and the type of "goal-directed behavior" that requires a person to make decisions and understand their consequences. As a result, a defendant's ability to follow the criminal justice process will often be limited and unlikely to satisfy the *Dusky* demand of a "rational as well as factual understanding(s) of the proceedings." Defendants with I/DD also struggle with decision-making, as it also requires "integrative thinking" and "an awareness of a hierarchy of goals and desires."[64] These decision-making difficulties can have an impact on a defendant's capacity to consult with her lawyer, make strategic decisions, or provide relevant information to assist with her own defense.[65]

Moreover, individuals with intellectual disabilities often overestimate their own abilities and have developed sophisticated "masking techniques" to hide their impairments—what is commonly called the "cloak of competence."[66] Given that the current system requires the judge or counsel to raise competency issues, there is an especially high risk of failing to identify and hold hearings for individuals who, in reality, may not truly understand the proceedings or provide the kind of effective self-assistance that a competent defendant would. Even if a defendant with an intellectual disability is identified by the court and found incompetent to stand trial; however, the current system's methods for handling these defendants are still inadequate.

It is important to note that there are important differences between determination of ID in the capital (dealth penalty) context (*Atkins/Hall*) and in the competency context. In the capital context, the issue is (mostly) one of definition—does the defendant have ID? In incompetency, the issue is inevitably more subjective—ability to understand the proceedings and work with counsel. Unlike in the capital context, where a finding of ID is enough to prohibit sentencing to death, a finding of ID is not sufficient to find incompetency to stand trial. Thus, a factual analysis must also be conducted. However, there are important lessons and ideals that can be gleaned from the capital context and used in the competency context. Below are suggested changes in the current competency landscape, borrowing from the capital case standards.

1. Expert witnesses' testimony on intellectual disability and competency should be subject to higher scrutiny from the courts. States should develop specific certification criteria for experts who assess intellectual disability generally and ID and competency specifically, and these criteria should be tied to evolving standards in the field.

Determining competency due to intellectual disability is still a largely discretionary practice. Often, each side of the adversarial process will have "dueling experts" where the exact same facts are analyzed, the same tests are given, but the results and recommendations to the court on competency differ. In some cases, facts are presented to the court that are favorable to a finding of competency, preying on the lack of sophistication judges have in understanding what people with I/DD can do and still have a disability. It is important that legislatures and courts hold forensic

64 Practitioner's Guide at 22.
65 Deficits in decision-making also have major implications for a defendant's ability to properly understand and evaluate plea deal options, but this complex additional area of competence falls outside the scope of this paper.
66 Robert Edgerton, The Cloak of Competence (2d ed. 1993).

witnesses to a high standard of expertise. Moreover, state legislatures and the courts should develop criteria that require a level of training in diagnosing intellectual disability. While professional psychological organizations have published "ethical codes and practice guidelines" for forensic testimony, there are currently no mechanisms requiring these guidelines be followed.[67] By developing more concrete standards and threatening loss of license if a clinician neglects best practices in assessment and testimony, decision-makers could prevent faux-experts from taking advantage of judicial deference to expert testimony in this field to promulgate bad science, and the substantial harm to defendants that results. In conjunction with these broad recommendations on expert testimony, more research is generally needed in this area.

*Determination of intellectual disability involves, as listed above, a complex series of inquiries that are very distinct from assessments of mental illness—defendants with an intellectual or developmental disability face different challenges from persons with mental illnesses in communication, comprehension, and overall cognitive functioning, all of which inform competency.*

2. Competency proceedings should be reformed to differentiate between intellectual disability and mental illness and to provide alternative methods of treatment and alternative pathways to current restoration programs for defendants with intellectual disabilities.

As currently established, competency proceedings do not properly account for the differences between mental illness and intellectual disability, either in the early stages of the proceedings (where potential incompetence is identified and the court undertakes a competency inquiry) or in response to a finding of incompetence.

Above all, this distinction is vital not only in how competency is determined at trial, but because once a finding of incompetency has been made, "competency restoration programs for persons with intellectual disabilities are inappropriate since the likelihood of restoration to competency is low."[68] Some scholars, like Barry Wall and Paul Christopher, have outlined training programs for people with intellectual disabilities who are found incompetent to stand trial that may be effective in restoring competence to satisfy the current legal standard,[69] but intellectual disability is still a "lifelong condition."[70] There can be no real "restoration" of competency, because there cannot be any medicating or legitimate changes to the underlying condition. More research is needed on current restoration practices and facilities.

The challenge for criminal defense advocates will be to successfully analogize the protection of a defendant with an intellectual disability against the death penalty to his protection against being tried while incompetent. As the Court reiterated in *Medina v. California*, "the Due Process Clause affords an incompetent defendant the right not to be tried."[71] Meanwhile, the Court invalidated capital punishment for defendants with intellectual disabilities under the Eighth Amendment.[72] Advocates could argue for the importation of intellectual disability definitions in the capital context to competency doctrine in several ways. First, *Atkins* and *Hall* both found that the execution of offenders with intellectual disabilities is problematic on "evolving standards of decency" grounds and found that existing state standards (that were not tied to current medical definitions of I/DD) did not adequately safeguard the rights of these defendants. The concept of due process is similarly one of the "least confined" rights and "most absorptive of powerful social standards of a progressive society."[73]

Much like understanding of the cognitive effects of intellectual disability has led the Court to protect offenders from the death penalty, competency

67 Nancy Haydt, *The DSM-5 and Criminal Defense: When Does a Diagnosis Make a Difference?*, 2015 Utah L. Rev. 847 (2015).

68 Haleigh Reisman, *Competency of the Mentally Ill and Intellectually Disabled in the Courts*, 11J. Health & Biomed. L. 199, 230 (2015).
69 Barry Wall and Paul Christopher, *A Training Program for Defendants with Intellectual Disabilities Who Are Found Incompetent to Stand Trial*, 40 J. Am. Acad. Psychiatry Law 366 (2012) (conducting a study on the Slater Method and articulating findings on restoration of competency for individuals with borderline intellectual functioning).
70 Reisman at 229.
71 *Medina v. California*, 505 U.S. 437, 449 (1992) (citing *Drope v. Missouri*, 420 U.S. at 172-73).
72 See *Atkins v. Virginia*; *Hall v. Florida*.
73 *Medina v. California*, 505 U.S. at 454 (O'Connor, concurring).

proceedings should be re-structured to account for changing scientific standards differentiating between underlying disorders, whether intellectual disability or mental illness, that may cause a defendant to be incompetent to stand trial.

Second, advocates could emphasize the Court's position in *Medina* that due process requires a suspension of criminal proceedings "until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him."[74] Advocates could highlight the tension this leaves between restoration proceedings and the nature of intellectual disability, given that defendants with intellectual disabilities severe enough to hinder their understandings of proceedings or ability to assist counsel are unlikely to "regain" competency. The Court's outlining of the intellectual disability prongs

*As such, the protection of due process rights, like the right to not be tried while incompetent, should also evolve with changing standards in medicine, law, and advocacy.*

in the capital context could then be referenced as a possible approach for testing in competency proceedings and the basis for an alternative path for defendants with I/DD. In this way, rather than highlighting the discrepancies in how the same population is treated in the capital and competency contexts, advocates could focus more on the potential incompatibility of the due process right to not be tried while incompetent with intellectual disability, both because of common behaviors, such as masking techniques, and the problems with "restoring" intellectual disability.

The most promising approach, however, may be to interpret *Atkins* as holding that when courts are required to more closely investigate cognitive disabilities, such as intellectual disability, there is a greater need to rely on current scientific definitions and frameworks. In a realm like competency, where highly individualized inquiries over whether the defendant understands the proceedings before him or her and can effectively assist counsel, there is a similar need for a rigorous, scientific approach to diagnosis. Assessments of adaptive behavior, with a focus on the individual's unique cognitive strengths and especially deficits would be especially useful in determining competency. Moreover, while there is not a risk of death as a sentencing option, there are serious potential ramifications as to restoration's effectiveness if the defendant has an intellectual disability and not mental illness.

If the criminal justice system is to deal more effectively with defendants with intellectual disabilities while promoting dignity and justice, the difficult questions above must be investigated and discussed. This discussion is in full swing in the realm of the death penalty, and it is time to expand it to competency and other areas of our justice system. Intellectual disability may not affect competency in every area of the law in the same way—competency to enter into a contract cannot equate to competency to stand trial. But, where a significant deprivation of liberty is at risk in the criminal system, whether incarceration or capital punishment, there must be some consistency in how the courts approach the diagnosis or determination of conditions like intellectual disability.

Advocates against the death penalty have creatively fought for and crafted an exception for defendants with intellectual disability, one in which diagnosing intellectual disability is not an impressionistic, judge-driven assessment, but closely tied to scientific, predictable standards. Only through this kind of rigorous approach can the courts accurately and consistently determine whether defendants with intellectual disability are competent to stand trial.

74 *Id.* at 448.

# Warehousing Individuals with I/DD and Mental Illness: Current Litigation to Oppose Unconstitutional Competency Wait Times

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The cornerstone of our nation's criminal justice system is that a person is innocent until proven guilty. Therefore, a person cannot be deprived of his or her right to liberty without a fair trial and due process of law. Similarly, state and federal law protects against the criminal prosecution of those incompetent to stand trial. When the competency of an individual to stand trial is questioned, due process requires that the individual be evaluated to determine if he or she understands the trial that is before him or her and if he or she is able to aid in his/her own defense. These seemingly similar due process interests have been found to be at war with each other in recent years. While waiting to be evaluated for competency before a trial can even begin, as well as waiting to be transferred for restoration of competency after being found incompetent, individuals with I/DD, as well as mental illnesses, are generally kept in jail. Due to the large and ever growing number of individuals with mental disabilities who wind up in the criminal justice system, psychiatric hospitals are filled to the brim, and the individuals awaiting competency hearings and restoration are sent to jail until space can become available, for weeks, months, and even years.

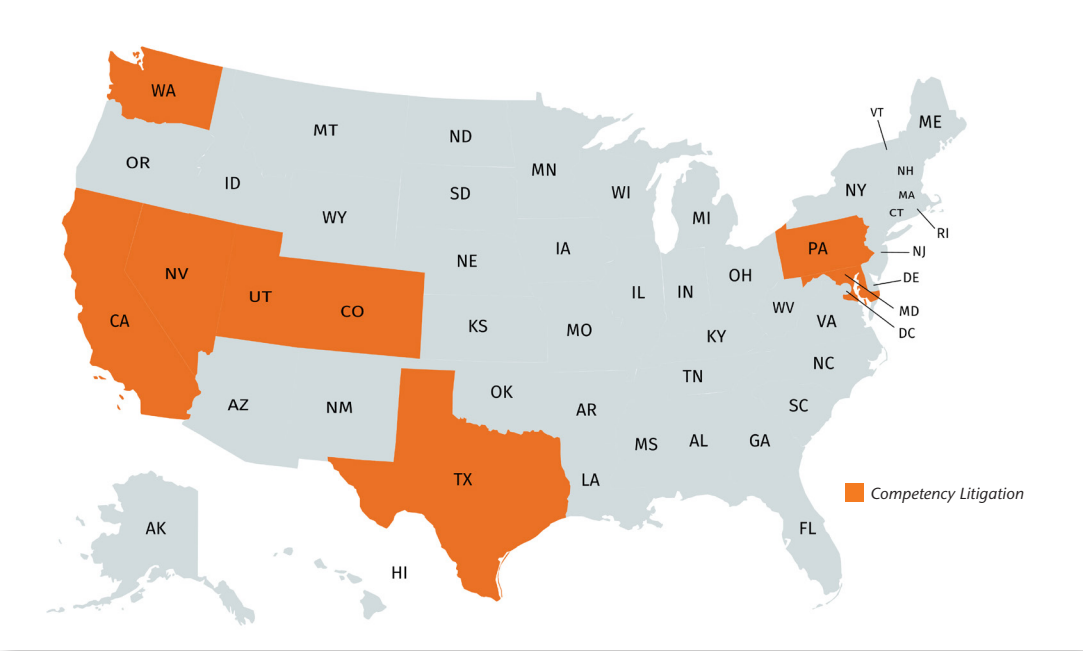
This potential violation of constitutional rights is experienced by the I/DD population in large numbers. People with I/DD who find themselves to be defendants in the criminal justice system are more likely than neurotypical defendants to require a competency evaluation. Around 12,000 people a year are found incompetent to stand trial and 4,000 of those people are hospitalized for treatment.[75] Due to poor resources and limitations, there is often a wait for such hospitalization. This waiting is done in poorly staffed jails, where the staff may have little to no knowledge about caring for people with I/DD and mental illness; additionally, often no treatment is given to these individuals while they wait. In the general jail population, they are vulnerable to abuse, rape, and other traumas. Conversely, it is also a common experience for those with I/DD who are placed in solitary confinement to deteriorate mentally, be at risk for violent outbursts, severe psychological symptoms, and/or suicide.

For example, "A" has an intellectual disability and was arrested in Los Angeles in 2011.[76] He was found incompetent to stand trial in December 2012. He was committed to Porterville Developmental Center, the state of California's treatment facility for individuals with I/DD who are found incompetent. Despite the order of commitment, A had to wait eight months to be admitted to Porterville, despite his attorney's and the court's repeated attempts. While in jail for those eight months, A was housed in the general population where other inmates preyed upon him. A was raped multiple times by another inmate. He was traumatized by the repeated assaults and was not provided any counseling or treatment while in jail.

Unfortunately, A's story is not uncommon. Wait times for competency evaluations and competency restoration programs have skyrocketed over the past ten years.[77] This trend has left many I/DD individuals deprived of their constitutional right to a speedy trial, resulting in a total deprivation of liberty. In response, disability advocacy organizations across the country have begun to file class action lawsuits in order to rectify this injustice to individuals with I/DD and mental illness. This section will detail four recent cases on the issue, including the status and impact of these cases while comparing the different solutions that states are using to attempt to correct this injustice.

75 Nastassia Walsh, *When Treatment is Punishment: The Effects of Maryland's Incompetency to Stand Trial Policies and Practices*, Justice Policy Institute (Oct. 2011), *available at* http://www.justicepolicy.org/research/8161.
76 In court documents and this section, the Plaintiff's son is referred to as "A" to protect his privacy. Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, *Stiavetti v. Ahlin*, Case No. RG 15778731, 6-7 (Superior Court of California County of Alameda, July 29, 2015).
77 *See*, Walsh, *When Treatment is Punishment*.

## *Competency Litigation Related to I/DD Across the Country*




Two states, Pennsylvania and Washington, have settled litigation on the topic with vastly different solutions. In Pennsylvania, the American Civil Liberties Union (ACLU) filed a class action lawsuit that resulted in a settlement creating solutions to the problem of long wait times in competency evaluations and treatment.[78] The class included hundreds of defendants with severe mental illness who had been ordered by the court to receive evaluation or treatment at one of the two state forensic hospitals, but due to a lack of available treatment options, have been waiting in county jails for months and in some cases, years. As of January 2016, the two hospitals had a wait list of 220 people for 190 spots.[79] The approved settlement agreement mandates that Pennsylvania create 120 new treatment options for the individuals with mental disabilities, half of which must be created within the first 120 days and the remainder to be completed within 180 days.[80] Treatment options include placement for people on the waiting list. No new forensic beds are being added, however.[81] The idea is that beds will free up when placements are achieved. Additionally, the state must provide $1 million to fund supportive housing opportunities within the city of Philadelphia, and evaluate every person on the current (as of January 2016) waiting list within 60 days in order to determine if they are receiving appropriate services.[82] The plaintiffs' attorneys, their expert, and the state agreed to work together to develop a strategic plan to reduce wait times.[83] No maximum waiting time was included in the settlement.[84]

In *Trueblood v. Washington State Department of Social and Health Services*, the court issued a permanent injunction against the state department requiring the provision of competency services within seven days.[85] In 2014, Disability Rights Washington and the ACLU filed a class action lawsuit on behalf of individuals charged with a crime who were awaiting services in city and county jails. The class consisted of all who are were, or would be in the future, charged with a crime in the state of Washington, and were ordered by a court to receive competency evaluation or restoration services through the Washington State Department of Social and Health Services (DSHS), are waiting in jail for those services,

78 Zoe Kirsch, *Lawsuit: PA Denying Timely Treatment and Trial for Mentally Ill Defendants*, Philadelphia Magazine (Oct. 23, 2015), *available at* http://www.phillymag.com/citified/2015/10/23/mental-illness-criminal-justice/.
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id.*
83 *Id.*
84 *Id.*
85 *Trueblood v. Washington State Dep't of Social and Health Services*, Case No. C14-1178 MJP (Western District of Washington 2015).

and for whom DSHS receives the court order.[86] It is the policy in the state of Washington that evaluations and admission to a hospital should each occur within seven days.[87] With average number of waiting days ranging from 14.7 to 56.3 in some cases, the court issued its permanent injunction to force DSHS to conform to the seven-day deadline.[88]

> *The court order stated, "Jails are not hospitals, they are not designed as therapeutic environments, and they are not equipped to manage mental illness or keep those with mental illness from being victimized by the general population of inmates."* [89]

The court gave no direct solutions to the state department as to how to accomplish this mandate. It simply refused to accept the defense of lack of funds as an excuse for deprivation of constitutional rights.[90]

A year later, the same judge held the mental health services agency in contempt for not complying with the order to bring wait times to no more than 7 days.[91] Only 20% of defendants with mental illness had been admitted within 7 days, and in one case, a defendant had waited for 97 days.[92] To force the state to comply, the judge ordered sanctions of $500 to $1,000 for each person who waits more than a week for services.[93] The fines collected will be placed into the state's registry and will be used to benefit defendants with mental illness, partially by creating diversion programs designed to alleviate dependence on state hospitals.[94] Since then, the 9th Circuit Court of Appeals has reversed the requirement for a seven-day time line.[95] The appellate court did, however, agree that competency evaluations must be conducted within a reasonable time following a court order.[96]

There are several states currently in the litigation process on the issue, while others anxiously try to correct the problem in anticipation of more litigation. In California, the ACLU of Northern California filed a lawsuit on behalf of the families of criminal defendants with I/DD and mental illness whose constitutional rights have been violated by being left in jail environments that are detrimental to their health and well-being while waiting for competency evaluation or restoration.[97] Despite being declared incompetent by a court and ordered to treatment, these defendants were left in jails for several months, sometimes over a year.

In addition to A (whose story is described above), plaintiffs Kellie and Kimberly Bock's son, who was also found incompetent to stand trial, became unstable and erratic due to the amount of time that he had to wait to receive treatment.[98] The Bocks' son openly experienced a number of troubling psychological symptoms, but due to the ill-equipped jail, did not receive treatment and hanged himself.[99] The case is currently being litigated and has thus far survived a demurrer and motion to dismiss by the defendants.[100]

In 2007, Disability Rights Texas (DRT) filed a lawsuit against the Texas Department of State Health Services.[101] DRT alleged that putting criminal defendants on a waiting list for forensic hospital beds for an unreasonable period of time violated their due process rights.[102] The judge agreed with DRT and held that twenty-one days was the maximum amount of time that a criminal defendant could be held in a jail while waiting for a forensic bed.[103] Texas ranks last among the states in funding per capita for mental health.[104] The judge did not instruct the state as to how it would fund more beds in order to comply with the new 21 day time frame.[105]

Following the decision, the state brought down its wait time through a series of small changes. It added

86 *Id.*
87 *Id.*
88 *Id.*
89 *Id.*
90 Andy Jones, *Court Orders State Agency To Reduce Wait Times To 7 Days For Competency Evaluations, Restoration Services*, Rooted in Rights Litigation News (2015), *retrieved from* http://www.rootedinrights.org/court-orders-state-agency-to-reduce-wait-times-to-7-days-for-competency-evaluations-restoration-services/.
91 Martha Bellisle, *Judge Holds Washington State In Contempt Over Mental-Health Care*, The Associated Press (2016), *retrieved from* http://www.seattletimes.com/seattle-news/health/judge-holds-washington-state-in-contempt-over-mental-health-care/.
92 *Id.*
93 *Id.*
94 *Id.*
95 *Trueblood v. Washington State Dep't. of Social & Health Services*, Case No. 15-35462 (9th Circuit 2016).
96 *Id.*
97 Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, *Stiavetti v. Ahlin*, Case No. RG 15778731, (Superior Court of California County of Alameda, July 29, 2015).
98 *Id.*
99 *Id.*
100 *Id.*
101 Brandi Grissom, *With State Hospitals Packed, Mentally Ill Inmates Wait In County Jails That Aren't Equipped For Them*, The Dallas Morning News (2016), *available at* http://trailblazersblog.dallasnews.com/2016/04/with-state-hospitals-packed-mentally-ill-inmates-wait-in-county-jails-that-arent-equipped-for-them.html/.
102 *Id.*
103 *Id.*
104 *Id.*
105 *Id.*

beds in current hospitals and contracted out to other facilities.[106] In May of 2014, an appeals court overruled the judge's 21 day wait time ruling due to a legal technicality.[107] Since then, the number of incompetent criminal defendants waiting for beds in state hospitals has continued to rise.[108] The average wait time for a bed is currently 122 days, way above the maximum 21day limit.[109] The state health services department is on record stating that it is looking for solutions while it anticipates the new competency wait times lawsuit that is most likely coming its way.[110]

Several important policy considerations can be inferred from recent litigation. While it is important to mandate a waiting time that does not violate the constitutional rights of those with I/DD who find themselves defendants in the criminal justice system, simply giving a court ordered maximum waiting time appears to be an inconsistent and temporary fix for a problem that requires a more complex and permanent solution. Eliminating long wait times for competency evaluations and restoration programs requires additional funding for mental health screening/assessment and treatment and for the criminal justice system's response to individuals with I/DD, accompanied by better and larger treatment facilities that have not only more room but more resources for treating people with I/DD in the most efficient manner possible.

Competency wait times could also be reduced by creating an overhaul of the criminal justice system that takes seriously the role that mental disabilities play in crimes committed and the over-incarceration of nonviolent offenders. Policies and procedures that ensure the rights of individuals need to be put in place, and diversion programs should be supported and expanded. Many individuals, like A, who spend months awaiting competency treatment to stand trial, are not violent offenders who pose a risk to society or themselves. The release of those individuals to the care of family members, friends, or private treatment facilities could alleviate the burden on the criminal justice system and make room for those violent offenders who do need treatment within the system.

The current competency framework in place in most jurisdictions is woefully underfunded and ignored, leading to worsening conditions in jails across America. As the number of lawsuits continues to rise across the country to urge states to address the problem, states struggle to come up with different solutions to best serve the needs of those with I/DD and mental illness. More creative short- and long-term solutions are needed to ensure that the rights of individuals with I/DD are respected throughout the competency determination and evaluation process to prevent litigation and ensure justice.

106 *Id.*
107 Grissom, *With State Hospitals Packed*.
108 *Id.*
109 *Id.*
110 *Id.*

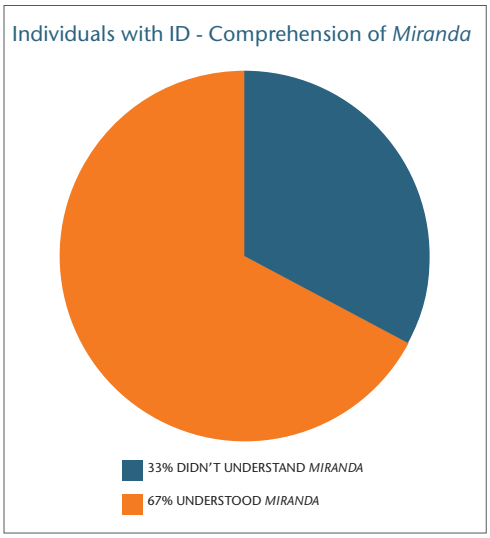
# Interrogation & Interview Reform for People with Intellectual Disabilities: A Social Marketing Approach

*Vivek Tata, Stanford University School of Law*

Although U.S. law protects the rights of suspects, most famously through the *Miranda* warnings, people with intellectual disabilities are significantly less likely to benefit from these protections leading to two possible outcomes: (1) the increased risk of false confessions; and (2) a similarly increased risk of *partially* false confessions—that is, if a person with a disability confesses to something he or she did, but does not explain that there were mitigating circumstances or other people involved.

## Miranda *and Waiver*

There is a wealth of research showing that the interrogation process is likely to compromise the defendant's trial when the defendant has an intellectual disability. In one study, sixty-seven percent of participants with an intellectual disability did not understand at least one of the four statements in the instrument testing comprehension of *Miranda* rights.[111] The study's authors conclude that "[i]ndividuals with mental retardation[112] frequently make confessions during police interrogations without fully understanding their rights," and that "there is a high likelihood that individuals with mental retardation may not understand the notion of self-incrimination nor the advising role of an attorney in the interrogation process."[113]




## *Interrogation*

There are several structural problems within the interrogation framework that can make confessions from people with intellectual disabilities unreliable. First, people with intellectual disabilities "display 'outerdirected' behavior," that is, they rely more on social and linguistic cues provided by others than their own abilities.[114] There is a "bias towards providing a 'socially desirable' response" in which an individual may give a factually inaccurate response because of a "desire to please others, particularly those in authority."[115] This is especially an issue with yes/no questions and leading questions, perhaps in part because as concluded in earlier research, people with intellectual disabilities are more suggestible.[116]

These issues are further compounded throughout the criminal justice process because people with intellectual disabilities "may try to mask their cognitive limitations."[117] As a result of these findings, "it is easier to elicit a

111 Caroline Everington and Solomon Fulero, *Competence To Confess: Measuring Understanding And Suggestibility Of Defendants With Mental Retardation*, 37 Mental Retardation 212, 216 (1999).
112 Mental retardation is an outdated and unacceptable term for what is now referred to as intellectual disability. It is being used here in the context of a quote from the study.
113 Everington and Fulero at 212.
114 *Id.* at 535; Joan Petersilia, *Doing Justice? The Criminal Justice System and Offenders With Developmental Disabilities*, California Policy Research Center (2000), *available at* http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.113.6433&rep=rep1&type=pdf, at 12.
115 Everington and Fulero at 213; Petersilia at 53.
116 Everington and Fulero at 213; Petersilia at 23; Gisli Gudjonsson, *A New Scale of Interrogative Suggestibility*, 5 Personality and Individual Difference 303, 304 (1984); Gisli Gudjonsson, The Psychology of Interrogations and Confessions: A Handbook 382 (2003).
117 Petersilia at 10.

confession from a person with mental retardation than from an individual without mental retardation."[118]

## *Legal Backdrop*

In general, the competency to stand trial standard is the same as the competency required to plead guilty.[119] This is of most concern in the context of confessions, where constitutional rights also provide only minimal protections. The Supreme Court limited the inquiry into voluntariness of confessions in the case of *Colorado v. Connelly*.[120] In that case, a suspect with mental illness felt compelled to confess to a crime because of "command hallucinations" telling him to do so. The Supreme Court held that the confession was "voluntary," because there was no state coercion.[121] On one reading of *Connelly*, a statement by a person with an intellectual disability may therefore be admissible if it was not objectively coerced, even if there was subjective coercion due to the suspect's intellectual disability.

In the years after *Connelly*, one survey suggested that most circuit courts ignored the subjective characteristics of a suspect (such as intellectual disability) in determining whether there was coercion.[122] However, these characteristics cannot be ignored. Although non-coercive, police techniques may result in confessions or waivers that are not "voluntary," as that term is generally meant, in cases where the suspect has I/DD. This is because the voluntariness inquiry traditionally encompasses "knowing" comprehension of the right being waived and, as one study explained, "waivers...by this population are not 'knowing' or 'intelligent' in any meaningful sense of those words."[123]

## *Policy Proposals*

Some jurisdictions require at least some police training related to people with intellectual disabilities, but this training is hardly extensive and focused on narrower problems, such as treatment of people with autism or crisis management. Ultimately, as a general statement, it can be said that neither police nor lawyers are well trained to address the needs of people with intellectual disabilities,[124] and that police departments do not offer sufficient accommodation.[125] There has been little change on this issue for at least three decades.[126] Police are therefore less likely to detect when a witness, victim, or suspect may need accommodations. Increased training—both pre-service and in-service, as Devoy suggests—will help ensure that the rest of the reforms proposed can be implemented correctly.[127]

The choice of how the protected group is identified can be as important as the choice of which groups to protect. A review of the literature suggests several options. A state could require official documentation (for example, Florida's new law permitting people with disabilities to get a "D" marking on their identification cards).[128] However, this approach creates multiple problems. First, the marking is applied to an identification, so this information would be visible to anyone—from work supervisors to grocery clerks—who have a reason to see identification. This creates a significant risk of stigma. Second, there is a potentially negative signaling effect. A reviewing court might consider the decision not to seek a "D" marking as a factor in deciding whether or not the individual's confession was reliable—reasoning that because the individual chose not to get such a designation, they must view themselves as reliable or competent.

Rather than placing a marking on official identification, one option might be to create separate identification cards—perhaps even informal cards developed by an advocacy organization—that include a list of what to do in the event of a police interaction.[129] Police interviewed on the subject suggested using business

118 Everington and Fulero at 213; Robert Perske, *Thoughts On The Police Interrogation of Individuals With Mental Retardation*, 32 Mental Retardation 377 (1994).
119 See *Godinez v. Moran*, 509 U.S. 389 (1993).
120 479 U.S. 157, 161 (1986).
121 *Id.* at 161.
122 Paul Hourihan, *Earl Washington's Confession: Mental Retardation And The Law Of Confessions*, 81 Vanderbilt L. Rev. 4771, 1483 (1995).
123 Morgan Cloud, et al., *Words Without Meaning: The Constitution, Confessions, And Mentally Retarded Suspects*. 69 Chicago L. Rev. 495, 501-2 (2002).
124 Petersilia; James McAfee, et al., *Police Reactions To Crimes Involving People With Mental Retardation: A Cross-Cultural Experimental Study*, 36 Education and Training in Mental Retardation and Developmental Disabilities 160 (2001); Danielle Maya Eadens, et al., *Police Officer Perspectives On Intellectual Disability*, 39 Policing 222, 222 (2016).
125 Debra Brucker, *Perceptions, Behaviors, And Satisfaction Related To Public Safety For Persons With Disabilities In The United States*, 40 Criminal Justice Rev. 431 (2015).
126 McAfee et al. at 170.
127 Patricia Devoy, *The Trouble With Protecting The Vulnerable: Proposals To Prevent Developmentally Disabled Individuals From Giving Involuntary Waivers And False Confessions*. 37 Hamline L. Rev. 253 (2014).
128 Florida's recent Wes Kleinert Fair Interview Act requires that at the request of the individual or the individual's parent or guardian, the state issue "an identification card exhibiting a capital 'D'" for individuals who have "[p]roof... of a diagnosis by a licensed physician of a developmental disability" (Ch. 2016-175, Laws of Fla. (2016)).
129 See, for example, the sort of information provided in by Disability Rights North Carolina in its pamphlet "Interacting with Law Enforcement."

cards from the Regional Centers for people with disabilities.[130] A suspect in possession of such a card would be an obvious candidate for special interrogation procedures, and it would be easy to distribute such cards. A card-based system is useful but incomplete. A more complete process would require police-initiated screening procedures at the outset of an interrogation. Since the "marketability" of the proposal to police officers is extremely important, an easier-to-use simple screening tool for police is more likely to be adopted and supported by police than a more intensive universal process. Of course, the success of this less intrusive approach is contingent on the success of the training requirement.

Simplifying the language used in giving the *Miranda* warnings, and ensuring the presence of a qualified professional during interviews of a person with an intellectual disability, is an area of policy on which there appears to be significant agreement.[131] These procedures should not be split—officers should not be permitted to use simplifying language in lieu of getting a qualified professional to sit in on the interview; the protections are intended to reinforce each other. Reform proposals must clearly articulate the role of the professional who would be called to sit in on the interview. For example, recent Florida legislation does not clearly state the role the professional is to play.[132] The professionals' role should be to ensure that any statements are *knowing and voluntary*, and if there is any question on either front, to call for the presence of an attorney. This permits people with intellectual disabilities who *are* competent to make statements to do so, while protecting those who are not from confessing or otherwise harming their own interests.

The final component of a successful policy on interrogations is that it must encourage the suppression of confessions given by people with intellectual disabilities. A strong suppression remedy is necessary. Suppression should be the norm when the state cannot show that the proper accommodations were given—that is, a *Miranda* warning and interrogation conducted by a (1) trained officer (2) with a professional present whose role it is to confirm understanding and call for a lawyer if necessary (3) using simplified language (4) on tape. This is not a per se rule, because there may be suspects whose statements are made knowingly and voluntarily, and these would be admissible. The normal burden should therefore be shifted in cases involving a confession by a person whom the defense asserts has an intellectual disability. Once the defense has introduced some evidence that the defendant has an intellectual disability—for example some biographical evidence of the disability from childhood—the burden should shift to the state to show that any confession was in conformity with the process outlined above. After identifying the reforms needed, the next step would be to "sell" the reform using a marketing approach.

## *Using a Social Marketing Perspective to "Sell" the Reform*

Marketers use the "four Ps" to describe marketing problems—product, price, place, and promotion.[133] To these, Seymore Fine has suggested adding three more—"producer," the "purchasers" or target audience, and "probing," or evaluation of the proposed change. For the purposes of this paper, I discuss the "producer" or "change agent" in the context of a brand.

How the product, here, the interrogation reform, is branded is important. Florida did not just pass Senate Bill 0936—it passed the "Wes Kleinert Fair Interview Act," which is a far more evocative title. A model proposal to improve interrogation processes for people with intellectual disabilities could be branded as a "False Confession Prevention Act" or something similar—focusing and highlighting the harm it seeks to prevent. This sort of negative focus is more successful than positive messaging for solutions to social problems.[134] Having a single brand for criminal justice reform efforts can be helpful, because it reinforces the message that each individual policy proposal is simply part of a need

130 Petersilia at 45.
131 Petersilia; Devoy; Resolution on Interrogations of Criminal Suspects, America Psych. Ass'n. (2014), *available at* http://www.apa.org/about/policy/interrogations.aspx.
132 Ashley Brompton, *New Florida Law Seeks Protection For People With I/DD Questioned By Law Enforcement: A Positive Step, But Needs Improvement*, The Arc Blog (2016), *available at* http://blog.thearc.org/2016/04/11/new-florida-law-seeks-protection-people-idd-questioned-lawenforcement-positive-step-needs-improvement/.

133 Seymour Fine, Ed. Marketing the Public Sector, Promoting the Causes of Public and Nonprofit Agencies 4 (1990).
134 Philip Kotler and Eduardo Roberto, Social Marketing 197 (1989).

for systemic change. Thus, in promoting any proposal, some reference should be made back to a broader, creatively branded concept, so that policy makers and police officials become familiar with the advocacy movement and recognize how each initiative fits together.

A key audience of the interrogation policy changes is people with intellectual disabilities and their allies. Their role is to advocate for adoption of the policy and broad reforms. There is reason to believe they would be receptive and eager for change: at least one study has shown that people with intellectual disabilities are more likely to be dissatisfied with police than people without disabilities.[135] Additionally, promotion and messaging to a broad group of voters can rely on correcting popular misconceptions and stigma, unfortunately fed by the media, about people with autism and people with intellectual disabilities more generally. An additional angle is to focus on the long list of false confessions, such as Perske's list.[136] A media campaign by disability advocates highlighting well-known cases and the issues they raise would likely have strong and broad appeal; one recent example is the Brendan Dassey case from the show "How to Make a Murderer," which has captivated public attention, including articles in outlets as varied as Rolling Stone, The New Yorker, and Reason.

Another audience is law enforcement officers. Police will perceive the "price" of interrogation reform to have several elements, starting with the simple up-front costs that training might involve. Advocates for change can address these concerns proactively, by ensuring that all proposals are fully funded, so there is no need for police departments to find budget room for additional resources. Other costs may be harder to address, such as the fear that individual officers will bear the burden of delays to ongoing investigations. As a result, they may have an incentive to skip the trainings, or not take procedure seriously. This problem is one reason why a broad-based, "branded" approach to systemic change is so important. Rather than simply becoming an undesirable part of procedure, to be avoided or ignored, branding reform under a single, powerful theme helps reinforce the need for change. For example, if the branding theme is focused on avoiding false confessions, the need for additional procedures is framed not as a procedural hoop but rather as an important way to ensure that the right perpetrator is being apprehended. This approach also shifts the focus away from police misconduct—something that departments are likely to be highly sensitive to in the current environment—and to procedural changes that improve policing outcomes and can only benefit, not harm, investigations.

Proposals to reform some portion of the criminal justice system do not exist in a vacuum. Over the past five years, a surge of frustration and anger has shaped the way the United States views its police forces. The role of various types of disabilities in this conversation has largely been ignored by the media.[137] Some states are beginning to engage in a meaningful dialogue about the issues of interrogation for individuals with I/DD. In addition to

> *For people with intellectual disabilities, this is an opportune moment to push for change if their voices can be heard as part of that call for change.*

Florida's Wes Kleinert Fair Interview Act, Massachusetts' "[a]n Act relative to criminal justice training regarding autistic persons," and Connecticut's "An act concerning mental health training in state and local police training programs and the availability of providers of mental health services on an on-call basis" are under consideration. All of these are examples of states beginning the process of addressing these concerns. These bills show how this is both a time of promise and danger. They help create awareness on issues facing people with intellectual disabilities, but are narrow and reinforce, rather than combat, negative stereotypes. A careful discussion, with the input of all the key stakeholders, is vital to ensure that interrogation reform is instituted in a way that encourages competency in interrogation and confession contexts while protecting the positions of all involved.

135 Brucker at 431.
136 Robert Perske, *Perske's List: False Confessions From 75 Persons With Intellectual Disabilities*, 49 Intellectual and Developmental Disabilities 468 (2011).
137 David Perry and Lawrence Carter-Long, The Ruderman White Paper on Media Coverage of Law Enforcement Use of Force and Disability: A Media Study (2013-2015) and Overview (2016), *available at* http://www.rudermanfoundation.org/wp-content/uploads/2016/03/MediaStudy-PoliceDisability_final-final1.pdf.

# Clients Under Guardianship: Best Practices for Criminal Defense Attorneys

*Claudia Center, American Civil Liberties Union Disability Rights Program*

Criminal defense attorneys are often uncertain about how their representation is affected by a client who is under guardianship or conservatorship. This section clarifies that a client under guardianship remains presumptively competent to stand trial and outlines best practices for attorneys to respect the rights and abilities of clients under guardianship.

## *Clients Under Guardianship Are Not Automatically Incompetent To Stand Trial*

A person who has been found incapacitated in a guardianship context is not necessarily also incompetent to stand trial. Competency for guardianship and capacity to stand trial are assessed differently, and a person who has been found incompetent in one context is not necessarily incompetent in the other.

The definition of "incapacity" for guardianship purposes varies state by state, but typically focuses on the person's ability to provide for basic daily needs. The Uniform Adult Guardianship and Protective Proceedings Act defines incapacity as lacking the ability "to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance."[138]

By contrast, capacity to stand trial focuses on the specific ability to participate in one's own defense. New York, for example, has a standard definition of a person who is incompetent to stand trial as a person who "lacks capacity to understand the proceedings against him or to assist in his own defense."[139] One of the few cases discussing the distinction between incompetency in criminal proceedings and incompetency for guardianship proceedings noted that these two processes "are unrelated and have different purposes."[140]

## *Lawyers Should Assume That Clients Under Guardianship Can Participate in the Lawyer-Client Relationship*

Lawyers representing clients under guardianship should not assume that a guardianship is necessary or was imposed with the kind of process and careful analysis that should be expected, given the language contained in most guardianship statutes. Further, because guardianships tend to be easy to get into and almost impossible to get out of, many people with intellectual and developmental disabilities remain under guardianships indefinitely.

People with disabilities can find themselves under guardianship for a wide range of reasons. Many people are placed under guardianships because school officials—incorrectly—told parents that they must seek guardianship as soon as their child turned 18, without ever informing the parents of alternatives, or assessing whether the person in fact needed such a restrictive intervention. It is documented that some individuals under guardianships felt deprived of their rights because their court-appointed attorneys felt the guardianship was "in their best interest" and then failed to voice the person's objections in court, essentially foreclosing a fair hearing. We know people who were placed

138 Uniform Guardianship and Protective Proceedings Act, § 102(5).
139 N.Y. Crim. Proc. Law §730.10(1).
140 *Valdes-Fuerte v. State*, 892 S.W.2d 103, 107 (Tex. App. 1994).

under guardianships because their parents thought they were making bad choices about dating or sex.

This is important in the context of the shortcomings of guardianship systems, which strip many people of their rights unnecessarily. The presumption of competence is also endorsed by the Model Rules of Professional Conduct.

*Lawyers should approach clients under guardianship with an open mind and an assumption of competence.*

The Model Rules of Professional Conduct direct attorneys to communicate directly with the client as much as possible, even where the client has a guardian. Rule 1.14 of the American Bar Association (ABA) Model Rules of Professional Conduct instructs lawyers to, "as far as reasonably possible, maintain a normal client-lawyer relationship" with a client with a mental disability. The ABA comment on this rule specifies further that, "[e]ven if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication."

## *Simple Tools and Strategies Can Help Clients With Disabilities—Including Those Under Guardianship—Participate More Fully in the Justice System*

In the overwhelming majority of guardianship cases, people are found to be entirely "incapacitated," and a guardian is appointed to make all decisions for the person. The guardianship system also falsely imagines that competency is static: what a person can do at this moment is all they will ever be able to do. This problem is especially devastating when guardianship is imposed on people who are only 18 years old and have decades of learning still ahead.

In reality, of course, competency is not an all-or-nothing proposition, and capacity changes over time. Most people are more capable, and make better choices when they are 30 than when they are 18, and most people of any age are more capable making some kinds of choices than others. Even though the guardianship systems do not (yet) recognize these realities, attorneys working with clients under guardianship can and should recognize them.

The ACLU Disability Rights Program has found that three key strategies can support people with disabilities in understanding, making, and communicating their own choices. We have developed these strategies as a way to avoid guardianship altogether. These same strategies can be used by attorneys representing clients already under guardianship—or any clients with intellectual or developmental disabilities—to maximize clients' participation in the criminal justice process.

- *Accessible information:* Many clients with I/DD would struggle to follow a fast-paced, jargon-laced meeting with an attorney, but may be able to understand the substance of the meeting if it is provided in simple, accessible language. Lawyers working with clients with I/DD should ensure that the information they are giving their client is as accessible as possible. This can mean providing written materials in plain language, repeating important information, or providing information in multiple formats (in writing, in a telephone conversation, and in person, for example). Even complex legal concepts can typically be simplified considerably by using short, declarative sentences and replacing "legalese" terms with explanations using more familiar terms. Lawyers may find that plain language materials are also useful for clients without disabilities, especially non-native speakers of English.
- *Including supporters:* Lawyers can and should make use of any existing support network that a client with a disability may already have. The Model Rules of Professional Conduct note that the presence of family or other supporters in meetings does not generally affect attorney-client privilege if their presence is necessary to assist in representation.[141] Supporters who already know the person well can be invaluable in assisting lawyer-client communication: their presence can put the client at ease; they can explain the best way to communicate and interact with

141 Model Rules of Professional Conduct, Rule 1.14, cmt. 3.

the client; and supporters can help ensure that the client understands information. As discussed above, even if the client has a guardian, the lawyer should still involve the client, with the help of his or her supporters, as much as possible in her own case.

- *Flexibility and time:* Clients with disabilities may need extra time to understand, consider, and communicate their choices and preferences. Some people may prefer many short meetings if they are easily fatigued or have difficulty concentrating for long periods. Some clients may feel more comfortable meeting in a familiar setting if possible. By accommodating clients' needs, abilities, and preferences, clients can more effectively communicate and participate in their own cases.

# Supported Decision Making and Competency in the Criminal Justice System

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At bottom, issues of competency in the criminal justice system relate to the extent to which an individual, whether defendant or witness, understands the proceedings, can work with others, can make relevant choices, and can communicate those choices to others. Competency, and its correlative concept of capacity, is contextual and dynamic. One can be competent for certain purposes and not others, or can be competent at certain times and not others. One can learn skills or concepts that enhance one's competency, and one can lose competency after once having achieved it. This fluidity applies to people with intellectual and developmental disabilities just as it does to others with conditions—dementia, psychosocial disabilities, people with traumatic brain injuries—that raise issues of a person's understanding of legal matters and decisions.

*Supported decision-making can be defined as a series of relationships, practices, arrangements and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life.*[142]

Notwithstanding the above, society has tended to view capacity as an all-or-nothing affair. For those deemed to lack capacity, plenary guardianship has been seen as the vehicle through which capacity limitations can be addressed. Under guardianship, the guardian replaces the individual whose capacity is in question as the decision-maker in all aspects of that person's life. Limited guardianship is a less restrictive alternative to plenary guardianship, identifying those areas in which the person needs decision-making assistance from a guardian, with the person retaining decision-making rights in those areas where the guardian is not necessary. But under either form of guardianship, the person loses a substantial measure and possibly all of his or her autonomy.

Because of the massive intrusion on individual liberty represented by guardianship, as well as exposure of numerous abuses (financial, physical, other) that can and have occurred in the guardianship relationship, advocates, law- and policy-makers, academics, and people with disabilities have advocated for an alternative to it—supported decision-making.

Unlike the case with guardianship, the person who uses supported decision-making retains full power and authority to make decisions. But the person in a supported decision-making arrangement recognizes that he or she may need assistance from one or more others (of the person's choosing) in making and communicating decisions. In this sense, supported decision-making is not that different from what people without disabilities do in their lives every day: they call on others to advise them in areas

of life where they believe the advisor's knowledge or relationship to them can provide needed assistance. Decisions made in the context of a supported decision-making arrangement may not be "better" than those made by a guardian on behalf of a person, but they are more likely to reflect to a greater degree the person's will and preferences.

Supported decision-making has been gaining increasing acceptance in the international community, spurred on by the United Nations' adoption of the Convention on the Rights of Persons with Disabilities (CRPD).[143] Article 12 of the CRPD, Equal recognition before the law, recognizes that all people have legal capacity but that some persons with disabilities may need "support...in exercising their legal capacity."[144] The United Nations' Committee on the Rights of Persons with Disabilities, in its consideration of the reports of individual States as well as in its General Comment No. 1,[145] has interpreted Article 12 to require that States replace their guardianship laws with supported decision-making regimes. While no country has yet gone that far, many countries (some before the adoption of the CRPD in 2006) have undertaken reforms, at the national or regional/provincial level, to increase the availability of supported decision-making for people with disabilities.[146]

How then do or might principles of supported decision-making apply in the criminal justice system, and, in particular, with regard to competency? Although there are not yet a lot of examples on which to draw, it is not difficult to see how supported decision-making might operate in this arena. It may be useful to distinguish how supported decision-making might work for victims, witnesses, and defendants.

## *Victims*

Individuals with I/DD who are victims of alleged crimes may have difficulties in participating in the criminal process. They may need the assistance of supporters to process the crime that was committed against them, to understand what occurred, and to communicate important aspects of the experience. For example, if the victim were a person with I/DD who did not communicate verbally, a supporter who understood the victim's physical movements or actions (*e.g.*, through a non-standard form of sign language) might be able to communicate the victim's observations to investigating authorities, the prosecutor, and the judge or jury. Or the victim might need a person to provide emotional support to enable him or her to recount the experience to which he or she had been exposed. The victim would retain his or agency, but the supporter might be needed to allow the victim to understand and communicate in

*Defendants with I/DD may need the same kinds of supports as do victims and witnesses. The difference is that the defendant's ability to understand the proceedings and participate in his or her defense has constitutional dimensions under the Sixth Amendment.*

142 Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, 19 Hum. Rts. Brief 8-9 (2012).
143 G.A. Res. 61/106, U.N. Doc. A/61/611, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006) [hereinafter, "CRPD"]. As of July 5, 2016, 165 countries have ratified the CRPD. The US signed the treaty in 2009, but has not yet ratified it, two efforts at Senate ratification having failed thus far.
144 CRPD, Article 12 (3).
145 *See* http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5 for the list of Concluding Observations the Committee has issued thus far. Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014), Article 12: Equal recognition before the law. UN Doc. CRPD/C/GC/1 (adopted April 11, 2014) is *available at* https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement.

146 See Robert Dinerstein, Esme Grant Grewal, & Jonathan Martinis, *Emerging International Trends and Practices in Guardianship Law for People with Disabilities*, 22 ILSA J. Int'l & Comparative L. 435, 442-43 (Winter 2016).

a manner that others would be able to interpret. The CRPD, in Article 16, provides that States Parties shall take measures to protect persons with disabilities from "all forms of exploitation, violence and abuse," including by providing them and their families "appropriate forms of...support."[147]

## Witnesses

Not all witnesses are victims, of course, but both sets of participants may not only need support to participate in the investigative portion of the criminal justice process, but also to testify at hearings in the case or at trial. A person with a supported decision-making agreement may need a supporter to interpret his or her testimony for the court or the trier of fact. Or the witness may need a supporter to interpret the meaning of questions posed to him or her. Note that a witness may not testify in a case unless he or she is deemed "competent,"[148] but competency need not be seen as a status that only resides in the person. That is, if a person, with support, can understand the importance of an oath and give truthful, albeit aided testimony, the witness should not be precluded from testifying because of his or her need for support.

147 CRPD, Article 16(2).
148 *See* Federal Rules of Evidence, Rule 601; Robert D. Dinerstein & Michelle Buescher, "Capacity and the Courts," Ch. 7 in A Guide to Consent 104-06 (Robert D. Dinerstein, Stanley S. Herr & Joan L. O'Sullivan, eds., AAMR, 1999). Editor's note: This definition of competency is different from the offender competency issues that this white paper is focusing on; it is a measure of their capacity to testify.

## Defendants

Some of the supports that a defendant with I/DD might require could well dovetail with the requirement under the Americans with Disabilities Act that the defendant receive reasonable accommodations or modifications to participate in the court proceedings. An example of this kind of overlap can be found in a recent civil case, *Reed v. State of Illinois*,[149] in which the Court of Appeals for the Seventh Circuit reversed the district court's entry of summary judgment for the state where the trial court had denied the request of the *pro se* plaintiff, who had tardive dyskinesia, to be allowed among other things to have an interpreter "to articulate her thoughts when she could not express them clearly herself."[150] Although not described as an example of supported decision-making, the use of this kind of support is an example of the concept in that the individual (in this case the *pro se* plaintiff) remains the actor or decision-maker but needs to rely on someone else to provide her with assistance to participate effectively in her case. Other examples might include the use of plain language interpretation of concepts that are difficult for the defendant to understand, or presentation of a witness who can testify to the defendant's manner of behavior or expression to assist the trier of fact to understand the context of the defendant's testimony or affect.

149 808 F. 3d 1103 (7th Cir. 2015).
150 *Id.* at 1105.

# An Advocate's Guide to Legal Competency

*Laura Johnson, NCCJD Legal Intern and Parent Advocate*

This guide is designed to be used by advocates to learn about the competency process and begin to have a conversation with self-advocates with I/DD about how the process works.

## Competency Standards

Individuals are considered "competent" when they have the present ability to make their own decisions, understand legal processes, and assist an attorney in their own defense. Competency can be in question for those who have an intellectual and/or developmental disability (I/DD). A person's competency must be considered throughout the criminal justice process. While each state has its own rules,[151] some general competency standards to keep in mind are:

## 1. Competency to Waive Miranda Rights

A person can waive certain rights during police interviews and questioning. These are known as *Miranda* rights or warnings and include: the right to remain silent, as anything said by the accused can be used against the accused; the right to an attorney; and the appointment of an attorney if the accused cannot afford one.

To be competent to waive *Miranda* rights, a person must knowingly and intelligently give up these rights. That means the person being interviewed must understand what it means to speak with police. For example, anything said must be voluntary, so the police cannot force an individual to speak by threatening the person.

The decision to waive *Miranda* rights can have serious consequences, particularly if a person has difficulty communicating or is easily misunderstood. Individuals with I/DD have made false confessions simply to please an authority figure or to stop the interrogation process. People with I/DD should be advised not to waive their rights and to ask to speak to an attorney.

## 2. Competency to Plead Guilty

When pleading guilty, an individual agrees to be convicted of the crime charged without going to trial. To be competent to plead guilty, an individual must make the agreement voluntarily, with an understanding of the circumstances, and an understanding of the likely consequences.

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151 Go to NCCJD's Criminal Justice and Disability Legislative Database at http://www.thearc.org/what-we-do/programs-and-services/national-initiatives/nccjd/legislative-resources-landing to see what the competency law is in your state.

Just as the police cannot force a person to give up their rights, the prosecutor cannot force a person to take a plea deal. This decision should not be taken lightly, as the plea may not spell out all of the possible consequences. Even if a sentence is suspended with no jail time, an individual could still end up with a felony record that could compromise disability benefits or have other collateral consequences. An attorney should be consulted to explain all of the potential consequences involved in a plea agreement.

## 3. Competency to Waive Counsel

To waive the right to counsel, a person must make an intelligent decision to give up an attorney at trial. This does not mean that a person claims the ability to represent him or herself. The individual must be made aware of the dangers in being his or her own attorney. This choice is likely to be honored by the court, even if it ends in a poor result. However, if an individual cannot adequately express themselves or question witnesses, the court can insist that an attorney step in. Each court evaluates these situations differently and this is a highly fact-specific inquiry.

## 4. Competency to Stand Trial

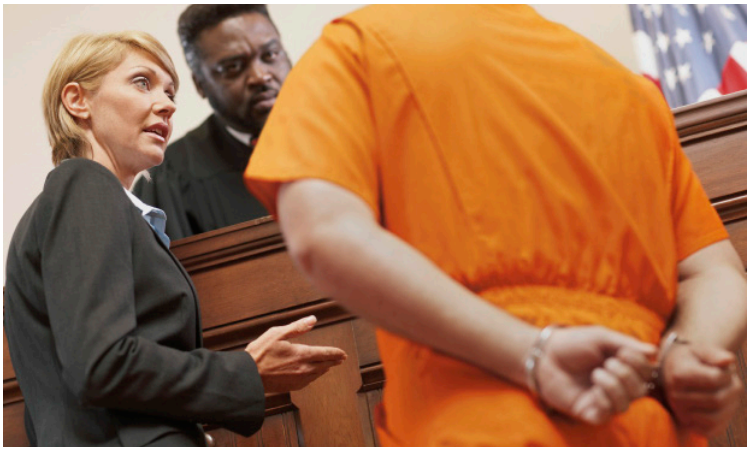
At any time before or during a trial the judge, the defense attorney, or the prosecution can question a person's competency to stand trial. A person is competent to stand trial if he or she has "sufficient present ability" to consult with an attorney, can understand why he or she is in court, and can assist in his or her defense. It is unconstitutional to go to trial if a person does not have these abilities, and they are entitled to a hearing to make that determination.

To decide competency to stand trial, the court will order an evaluation. The judge will also look at many other factors such as:

- the ability to understand general information,
- the ability to make decisions,
- environmental and cultural factors, including upbringing, and/or
- the number of previous interactions with the criminal justice system

A psychologist or other professional often performs a competency evaluation. Each state has its own competency evaluation rules, but the basic job of the evaluator is to provide an unbiased report to the court concerning the individual's current:

- behavior,
- intellectual functioning, and
- task performance



Evaluators should conduct a personal interview, but may also administer tests, such as IQ and formal competency assessments. They will also review collateral sources of information including court documents, medical reports, and school records. They will typically ask about the individual's background, including family relationships, his or her living situation, and work history. While doing this, they will assess the individual's ability to communicate, to learn new things or to remember events. They may also evaluate the individual's understanding of court processes and the roles of different criminal justice professionals. An important role of an advocate is to request that the evaluator have experience assessing individuals with I/DD. Even criminal justice professionals may not understand that other types of experience, such as evaluations involving those with mental illness, may not be appropriate for those with I/DD.

The judge has discretion and can find a person

competent even when an evaluator finds otherwise. Likewise, the judge can find a person incompetent even when the evaluator says he or she is. If an individual is found competent to stand trial, then the criminal case will proceed.

## A Finding of Incompetency

When a person is found incompetent it means that the criminal case cannot go forward because it would be unconstitutional. Depending on the nature and seriousness of the crime, an individual could receive outpatient treatment designed to restore the person's competency. More likely, the person will be held in a hospital facility until the court finds him or her competent or until the maximum holding time expires. In some states, there is no maximum holding time. This becomes a problem for individuals who will never become competent because of their I/DD. Even so, a person has the right to treatment to help restore competency and to have their progress measured during their hospital stay.

If a person cannot be restored to competency, the court will typically hold a hearing and either drop the charges or institute civil commitment proceedings. Civil commitment procedures vary from state to state, but typically involve a determination that a person is a danger to themselves or others and is in need of mental health treatment. An attorney can provide additional details concerning civil commitment procedures.

## Restoration of Competency

A person can be restored to competency through education about court processes and treatment of mental illness, either by medication or behavioral therapies. Competency is restored once the court decides an individual has attained both a rational and factual understanding of the case against him or her, can consult with his or her attorney "with a reasonable degree of rational understanding," and can assist in his or her defense.

For those with I/DD, "restoration" is controversial, because there is no treatment that can change the underlying condition. Rather than being reinstated, competence must be created through education or habilitation efforts. Yet, those with I/DD, who also have considerable difficulty understanding information during their competency evaluations, have statistically been shown to have below average success in becoming competent.

If the physician determines a person has become competent then he or she will inform the court. A special hearing is held then to decide if the individual is currently competent to proceed to trial. The individual's defense attorney can also request this hearing. If deemed competent, the individual can post bail (if it is available) and will be released until the case continues. If the individual cannot post bail, then he or she will be transferred to jail until the case resumes.

## Sources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# A Call to Action: Policy Recommendations

The National Center on Criminal Justice and Disability® is concerned about the protection of the rights of people with I/DD whose competency is in question during their criminal cases. As evidenced in this white paper, various findings of competency are required throughout the criminal justice process, and individuals with I/DD are especially at risk of being discriminated against for not having the capacity required to meet the definition of "competence." Without accommodations, individuals with I/DD are more likely to waive their *Miranda* rights without understanding, delays in trial are more common, and uninformed pleas are more likely.

*However, with changes to current procedures the system can be optimized to meet the specific needs of individuals with I/DD, and ensure that these needs are addressed by the criminal justice system whenever competency is in question.*

The following policy recommendations hold potential for positive reform.

**1.** Ensure appropriate testing for competency of individuals with I/DD (for example, using CAST-MR or another scientifically validated test), with the understanding that tests cannot be a "be all, end all" for competency determinations. Further inquiry into each individual's specific circumstances is warranted to ensure fair and equal justice to those with I/DD.

**2.** Competency evaluations should only be given by individuals who are qualified to perform them, are familiar with I/DD, and have expertise in the area.

**3.** Appropriate locations for competency evaluation and restoration must be provided.

- Outpatient competency evaluation and restoration is optimal for individuals with I/DD who are not considered a danger to themselves or others and have community-based supports in place. Such placements should take priority over inpatient placement.
- Dedicated beds should be provided in psychiatric hospitals for defendants waiting for competency evaluations, ensuring a shorter wait time in jail. Competency evaluations should only occur in a clinical setting (either inpatient or outpatient), not in jails.

**4.** Because many people with I/DD have difficulty understanding the nuances of the *Miranda* warnings, the warning should be thoroughly explained in simple, concrete terms. Interviewers must check for understanding by asking the interviewee to explain the concepts of the *Miranda* warnings in his or her own words. The presence of a support person should be allowed as an accommodation in order to protect the rights of the individuals with I/DD who are being read their rights.

**5.** Competency restoration programs should be created that are tailored to individuals with I/DD and specifically recognize that individuals with I/DD may be learning information for the first time. The Slater method should be further studied and, if continuing to show promising results, be implemented in cases with I/DD. Outpatient restoration programs are preferred.

**6.** Hearings should be held quickly upon determination that competency cannot be restored. Individuals should be released and charges dropped if the individual is non-restorable – civil commitment proceedings may be legally

begun if there is a danger to the defendant or others. This is an acceptable alternative to lengthy stays in jail but only when it is necessary for the safety of the individual or the community. If civil commitment is required, outpatient commitment is always preferred.

7. Attorneys should work under the assumption that their clients are competent to aid in their own defense; simply having an I/DD is not sufficient to assume incompetence. However, attorneys should also seek assistance from disability professionals or advocates who can ensure communication is clear between both parties.
8. Criminal justice professionals must be educated about I/DD so they are able to recognize it in suspects or defendants. Without being able to recognize I/DD, criminal justice professionals are unable to properly address the disability or provide much needed accommodations as required by the Americans with Disabilities Act.
9. Attorneys need to be cognizant of the collateral consequences of a guilty verdict or plea as well as a finding of incompetency and make an educated decision based on the best outcome for their clients.

People with disabilities are particularly vulnerable in the criminal justice system with regard to issues of competency. Rules and laws that may work for the majority of the population fail people with I/DD. Criminal justice professionals must work to ensure that the capacity of individuals with I/DD throughout the process is determined in fair and effective competency hearings. Additionally, there needs to be a basic level of understanding of I/DD within the court system to ensure adequate consideration of the unique concerns I/DD presents.

To learn more about competency and other issues related to individuals with I/DD in the criminal justice system, criminal justice and disability professionals can:

- Learn more about competency and I/DD by watching a free archived webinar on the topic.
- Use NCCJD's information and referral service, and refer others.
- Refer to NCCJD's state-by-state map or look up resources by profession (law enforcement, victim service provider, or legal professionals)
- Refer to NCCJD's Criminal Justice and Disability Legislative Database to find out the competency laws in their states.
- Stay current on criminal justice and disability issues by following NCCJD's Facebook page and subscribing to NCCJD's Bulletin, our quarterly e-newsletter.