

Everything you always wanted to
know about
Criminal Law and Psychiatry*

*BUT WERE AFRAID TO ASK

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Agenda

- Competence to Stand Trial
- Other Criminal Competencies
- Insanity Defense
- Civil Commitment
- Juvenile Competency
- Mitigation
- Involuntary Treatment
- Mental Health Courts
- Assisted Outpatient Treatment
- Attacking Mental Health Expert Testimony

Pre-Test 1

A defendant who is Incompetent to Stand Trial for Aggravated Murder may have the charges dropped, based on his incompetency.

- A. True
- B. False

Pre-Test 2

A psychotic defendant who is Incompetent to Stand Trial for Aggravated Murder may refuse antipsychotic medication.

- A. True
- B. False

Pre-Test 3

A defendant who is Incompetent to Stand Trial and fails competency restoration may still proceed to a trial.

- A. True
- B. False

Pre-Test 4

Defendants acquitted by reason of insanity for Murder are released into society.

- A. True
- B. False

Pre-Test 5

John was found NGRI twenty years ago on a Murder charge. John can only be committed if he is presently mentally ill and dangerous.

- A. True
- B. False

Pre-Test 6

A defendant found NGRI on a Grand Theft Motor Vehicle charge will remain under the jurisdiction of the trial court for the remainder of his life.

- A. True
- B. False

Competence to Stand TrialGeneric Definition of Competence

- The *capacity* to understand a concept and rationally proceed through a decision-making process
- Competence is the quality of the thought process involved, not just the eventual decision

Generic Definition of Competence

- Competence is a present-state evaluation
- Mental illness does not necessarily = Incompetence

United States Constitution

Competence to stand trial guaranteed by:

- Fourteenth Amendment – Substantive Due Process
- Sixth Amendment

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Dusky v. United States (1960)

Test for Competence to Stand Trial is:

“[W]hether defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him.”

Ohio Revised Code

Section 2945.37 - “A defendant is presumed competent to stand trial, unless it is proved by a preponderance of the evidence in a hearing...that because of his present mental condition he is incapable of understanding the nature and objectives of the proceedings against him, or of presently assisting in his defense.”

Ohio Revised Code Summarized

- **Presumption of competence to stand trial**
- **Incompetence to stand trial proven by preponderance of the evidence**
- **Competence to stand trial addressed in competence hearing**
- **Incompetence must be due to a present mental condition**

Ohio Revised Code Summarized

Due to present mental condition, defendant lacks capacity to:

1. Understand the nature and objectives of proceedings,
- OR**
2. Assist in defense

Competency vs. Sanity

Competency

- present state assessment
- triability

Sanity

- assessment at time of offense
- responsibility

Progression of Competency to Stand Trial Evaluation

1. Arrest/Arraignment
2. Competence issue raised
3. Competence evaluation at local forensic center (or inpatient evaluation)

Evaluating Competence to Stand Trial

- Record review
- Discussion with referring attorney (possible)
 - History of mental illness
 - Bizarre nature of offense
 - Difficulty working with client
 - Irrational refusal of plea bargain

Evaluating Competence to Stand Trial

- Interview defendant – standard psychiatric interview with:
 - Chief complaint/history of present illness
 - Background histories
 - Past psychiatric history
 - Mental Status Examination
- Diagnosis
- Competence Evaluation
- Competence to Stand Trial Assessment tool (optional)

Evaluating Competence to Stand Trial

- Formulate opinion on competence to stand trial
- Written report/opinion

Ohio Revised Code Summarized

Due to present mental condition, defendant lacks capacity:

1. To understand the nature and objectives of proceedings,
- OR**
2. To assist in defense

Nature and Objectives of Proceedings

- Charge
- Severity of charge
- Appreciate situation as defendant
- Possible sentence
- Pleas
- Roles of courtroom personnel
- Adversarial nature of trial

Ability to Assist in Defense

- Ability to work with defense attorney
- Plea bargain
- Ability to give rational/coherent account of offense
- Testify relevantly on own behalf
- Willingness to consider mental illness defense

Ability to Assist in Defense

- Sufficient memory and concentration to understand events at trial
- Understand appropriate courtroom behavior
- Absence of self-defeating behavior
- Evaluate evidence
- Estimate chances of conviction
- Develop plan of defense
- Make reasonable defense decisions

What to do with a defendant who is unable/unwilling to trust his attorney?

Distrust of attorneys

- **45% of pro se defendants: "Lawyers are more concerned with their own self-promotion than their client's best interest."**
- **Many habitual offenders:**
 - do not regard court appointed attorneys as trustworthy
 - view the system as unfair and stacked against them
- **Experience-based and not delusional**

Reasons for Incompetency

- Low intelligence or dementia - impairs the defendant's factual understanding of the charge; pleas; trial process; etc.
- Depression and self-defeating behavior - limit the defendant's motivation for the best outcome at trial.

Reasons for Incompetency

- Mania - impairs the defendant's ability to act appropriately in the courtroom.
- Paranoid delusions - impair the defendant's ability to work with their defense counsel.
- Disorganized thinking - impairs the defendant's concentration and attention

Reasons for Incompetency

- Irrational decision-making about their defense – due to delusions, disorganized thinking, low intellect or dementia.
- Hallucinations - distract the defendant from attending to the trial.

Incompetency

- Incompetence: Males = females
- Reason for Incompetence
 - Elderly - dementia
 - Young adults - psychosis, mood disorder, low IQ
 - Teens - low IQ

Incompetency

- Psychotic Disorders – 45-65% found incompetent
- Mood Disorders – 23-41% found incompetent
- Intellectual Disability– 12.5-36% found incompetent

Progression of Competency to Stand Trial Evaluation

1. Arrest/Arraignment
2. Competence issue raised
3. Competence evaluation at local forensic center (or inpatient evaluation)

Progression of Competency to Stand Trial Evaluation

4. Competence hearing - if competent = trial
5. If incompetent - opinion on whether there is a substantial probability of Restoration to Competence within one year if treated.

Progression of Competency to Stand Trial Evaluation

6. If Incompetent and Restorable - opinion on least restrictive treatment setting for restoration to competence to stand trial.

If Incompetent, Unrestorable, go to #10

Progression of Competency to Stand Trial Evaluation

7. Restoration to Competence program
outpatient vs. inpatient (civil vs. max)
8. Updates to court due:
 - a. when restored
 - b. six month interval
 - c. expiration of statutory time limit for restoration

Restoration to Competence to Stand Trial

- Treatment of mental illness
- Education

Statutory Time Limits for Restoration to Competence

M3-M4: 30 days

M1-M2 – 60 days

F3, F4, F5: 6 months

F1- F2: 12 months

Progression of Competency to Stand Trial Evaluation

9. If restored = trial
10. If unrestorable (Incompetent to Stand Trial, Unrestorable)
 - a. charges dropped - no criminal court jurisdiction
 - b. possible civil commitment - probate court
 - c. possible reindictment

Confidentiality and Competence Evaluation

- Evaluation shared with defense, prosecution and court.
- ORC - no information gathered in competence evaluation can be used to prove guilt.

Legal Regulation

of

Competence to Stand Trial

Jackson v. Indiana

- United States Supreme Court 1972
- “Due process requires that the nature and duration of commitment bear some reasonable relation to the purpose of the commitment.”
- Required “substantial probability” of restoration to justify commitment

Wilson v. United States

- US Court of Appeals, 1968
- Competence for amnesic defendants decided on a case-by-case basis, based on extent that:
 1. amnesia effected ability to consult/assist attorney
 2. amnesia effected ability to testify

Wilson v. United States

3. evidence could be extrinsically reconstructed
4. government assisted in reconstruction
5. strength of prosecution’s case
6. any other facts regarding fairness of trial

Drope v. Missouri

- US Supreme Court 1975
- Question – what events should trigger competency evaluation?
- Holding:
 - Defense, prosecution or judge can raise competence as an issue
 - Defendant’s strange behavior at trial, suicide attempt and psychiatric testimony should have triggered competence evaluation.

Cooper v. Oklahoma

- US Supreme Court 1996
- Issue – what is the standard of proof required to prove incompetence to stand trial?
- Holding – Preponderance of the evidence

Indiana v. Edwards

- 554 U.S. 164 (2008)
- US Supreme Court
- Issue
- Facts

Competence to Represent Oneself
(Pro se)

- **Godinez v. Moran (1993)**
Same standard applied to competence to stand trial and competence to represent oneself.
- **Indiana v. Edwards (2008)**
A different standard allowed (but not defined) for competence to represent oneself.

Indiana v. Edwards

- Holding - a state may require an otherwise competent criminal defendant to proceed to trial with the assistance of counsel.

ISTU-CJ

- Incompetent to Stand Trial
- Unrestorable
- Court Jurisdiction

ISTU-CJ

- Violent Felony 1 or Felony 2 charges
- If defendant Incompetent to Stand Trial, Unrestorable
- Prosecutor files motion requesting ISTU-CJ status
- Court determines if clear and convincing evidence defendant committed the offense

ISTU-CJ

- If ISTU-CJ – commitment remains in Court of Common Pleas, not transferred to Probate Court
- Court retains jurisdiction over issues such as commitment, privilege levels
- Conditional Release, not discharge from hospital

ISTU-CJ

- Upheld by Supreme Court of Ohio 2011
- State v. Williams

Top 20 Errors in Competence
Evaluations

20. Equating knowledge deficit with incompetency.
19. Minimizing impact of single delusion on competency.
18. Equate mental illness with incompetency.
17. Giving ultimate issue opinion.

Top 20 Errors in Competence
Evaluations

16. Equating incompetence in one area with incompetence in other areas.
15. Not knowing competence to stand trial standard.
14. Not conducting a specific competence to stand trial assessment.
13. Confusing sanity with competency.

Top 20 Errors in Competence
Evaluations

12. Not reviewing medical records.
11. Confusing various types of competencies.
10. Failing to address restorability
9. Making up your own competence to stand trial standard.

Top 20 Errors in Competence
Evaluations

8. Failing to consider that deficits are not due to a present mental condition (ignorance, personality, "Freeman" beliefs, etc.).
7. Failing to perform a Mental Status Exam (missing delusions, cognitive deficits, etc.).
6. Overly rigid knowledge requirements (charges, sentence, pleas, etc.).
5. Failure to evaluate decision-making capacity.

Top 20 Errors in Competence
Evaluations

4. Failure to consider malingering potential.
3. Equating amnesia with incompetence.
2. Failure to frame opinion in language of the competence standard.
1. Not explaining rationale for opinion that defendant is competent/incompetent.

Other Criminal Competencies

Competence to Confess

- Whether the defendant knowingly, intelligently (*Johnson v. Zerbst, 1938*) and voluntarily waived the right.

Competence to Confess

- Voluntariness -
- Intelligently -
- Knowingly -

Voluntary, Intelligent and Knowing

- Confess
- Plead Guilty
- Waive Counsel

Competence to be Sentenced

- Defendant's understanding:
 - convicted of a crime
 - reason for the conviction
 - reasons that a sentence will be imposed
- Rationally participate in a pre-sentence investigation
- Assist defense attorney:
 - minimize negative impact of conviction
 - offer mitigating factors

Competence to Waive Appeals

Current symptoms impair defendant's ability to:

- Rationally make a decision whether to pursue appeals; and
- Assist defense counsel in that pursuit

Competence to be Executed

- The general concept of punishment
- The nature of the death penalty
- The nature of death row
- The personnel present at the execution
- The role of the defense attorney
- What will happen when their execution is carried out
- The reason that the death sentence has been imposed
- Symptoms that may impact their perception of reality

Juvenile Competencies

Juveniles have right to competence:

- Bindover hearing
- Trial

O.R.C. 2152.51

“...A child is incompetent if due to mental illness, due to developmental disability, or otherwise due to a lack of mental capacity, the child is presently incapable of understanding the nature and objective of proceedings against the child, or of assisting in the child’s defense.” (2011)

Not Guilty by Reason of Insanity

Affirmative Defense

- Defendant affirms they committed the *actus reus*
- Asserts not criminally liable, **OR**
- Asks for acquittal due to special circumstances
- Burden of proof shifts to defendant to prove affirmative defense

Affirmative Defenses

Justification

- Self defense
- Defense of others
- Defense of property
- Necessity (choice of evils)
- Consent
- Use of force to make arrest
- Use of force by public authority

Affirmative Defenses

Excuse

- *Not guilty by reason of insanity*
- Duress
- Infancy
- Involuntary intoxication
- Entrapment

Not Guilty by Reason of Insanity

- Raised in 1% of all felony cases
- 25% overall success rate
 - 5% - jury trials
 - 35-40% bench trials
- NGRI is infrequently successful when medical opinions conflict

Insanity Standard Trends

- Right/Wrong test (global)
- Wild Beast
- Irresistible Impulse
- Offspring of a Delusion
- Specific Wrongfulness

Trial of Earl Ferrers

- 1760
- First example of psychiatric expert testimony
- Unsuccessfully used irresistible impulse test for insanity

McNaughten Trial

- 1843
- McNaughten had paranoid delusions
- Stalked Prime Minister Peel, shot and killed Drummond
- Every psychiatrist thought McNaughten was insane
- Found insane by jury after brief deliberation

McNaughten Trial

- Public outrage led to appellate review
- McNaughten Rules led to new McNaughten standard for insanity
- Combination of wild beast test and Spigurnel's right/wrong test

McNaughten standard

"...it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as to not know the nature and quality of the act, or if he did know it that he did not know he was doing what was wrong...and whether the accused at the time of the doing the act knew the difference between right and wrong...in respect to the very act with which he is charged."

Insanity in America

- Isaac Ray - Treatise on Medical Jurisprudence of Insanity - 1838
- New Hampshire Doctrine 1869
- Durham Test 1954
- American Law Institute 1955

Federal Insanity Defense Reform Act of 1984

- Reaction to John Hinckley
- “It is an affirmative defense to a prosecution under any federal statute that at the time of the commission of the acts...the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts.”

Present-Day American Insanity Standards

- Several states have abolished NGRI
- Of states with NGRI statutes:
 - 2/3 states have strict McNaughten
 - 1/3 have irresistible impulse arm, in addition to McNaughten

Ohio Revised Code 2945.39

- Presumption of sanity
- Insanity proven by preponderance of evidence by defense
- Standard is at time of act a:
 1. severe mental disease or defect that causes actor
 2. to not know wrongfulness of act

Sanity Evaluations

- Focus on:
 - mental state at time of offense
 - criminal responsibility for offense
- Present mental state not the issue

Procedures for Obtaining NGRI Evaluation

- Defense enters NGRI plea
- Court orders NGRI evaluation at forensic center
- Possible other NGRI independent evaluations by defense and/or prosecution

Procedures for Obtaining NGRI Evaluation

- “Sound Discretion” used in determining number of NGRI evaluations (State v. Hix).
- “Abuse of Discretion” is standard by which failing to order NGRI evaluation is reviewed on appeal (State v. Nelson).

Procedures for Conducting NGRI Evaluation

- Determine exact NGRI standard in jurisdiction
- Determine facts of case
- Apply NGRI standard to facts and formulate opinion on NGRI

NGRI Evaluation

Determine facts of case by:

- Review past medical/psychiatric records
- Review psychiatric records around time of act
- Witness/victim/police observations of defendant at time of offense
- Personal interview of defendant, including defendant’s account of act

Ohio Revised Code 2945.39

- Presumption of sanity
- Insanity proven by preponderance of evidence by defense
- Standard is at time of act a:
 1. severe mental disease or defect that causes actor
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Which Mental Illnesses Qualify as Severe Mental Disease or Defect?

Mental Disease

- psychotic disorders
- mood disorders
- dementia, delirium
- possibly PTSD, MPD
- not personality disorders, voluntary intoxication, paraphilias

Mental Defect

- mental retardation

Ohio Revised Code 2945.39

- Presumption of sanity
- Insanity proven by preponderance of evidence by defense
- Standard is at time of act a:
 1. severe mental disease or defect that causes actor
 2. to not know wrongfulness of act

Three Types of Wrongfulness

- Legal Wrongfulness standard - knowledge of illegality
- Subjective Moral standard - personal belief acts were morally justified, despite knowledge of illegality
- Objective Moral standard - lack capacity to know society considers acts are wrong

Evaluating Knowledge of Wrongfulness at Time of Act

Look at

- Defendant's statements/behavior at time of act
- Defendant's later account of act
- Attempts to hide/discard evidence
- Attempts to evade detection or capture

Knowledge of Wrongfulness

- Lying about offense
- Refusing to cooperate with investigation
- Calling police vs. calling for help
- If delusion were true, would act be right
- Rational alternative motive versus overriding moral justification

NGRI and Premeditation

Is premeditation relevant to NGRI defense?

NGRI Appeals

- State v. Thompson
- Ohio Court of Appeals, 3rd District (1994)
- Appellate court should defer to the trier of fact's interpretation of the evidence in deciding insanity
- Insanity verdict will be reversed only where overwhelming and uncontradicted evidence to the contrary is arbitrarily ignored

NGRI Release in Ohio

- Finding of NGRI results in civil commitment hearing through original trial court, not probate court.
- Trial court retains jurisdiction of defendant.
- 98% of NGRI acquittees civilly committed
- Issue of Least Restrictive Alternative of Treatment
- Majority of NGRI acquittees placed in state hospital

Hospitalization of Insanity Acquittees

Purpose:

- Treatment of mental illness
- Public protection
- Continual violence risk assessment
- Minimize risk of future offenses

- No Conviction = NO PUNISHMENT

Ohio Commitment Standard 5122.01

Threshold of mental illness, defined as “A substantial disorder of thought, mood, orientation, perception or memory that grossly impairs:

- judgment
- behavior
- capacity to recognize reality
- ability to meet ordinary demands of life

Ohio Commitment Standard 5122.01

Mental illness causes:

1. Substantial risk of physical harm to self
2. Substantial risk of physical harm to others
3. Unable to provide for needs AND hospitalization is least restrictive placement
4. Benefit from hospitalization AND infringe on rights of self/others

In re Burton

- Ohio Supreme Court 1984
- Issue
- Facts
- Holding
- Rationale

Burton Criteria

1. Substantial risk of physical harm to self/ others
2. Present mental/physical state.
3. Person’s insight into his condition so that he will continue treatment.
4. Grounds upon which the state relies for the proposed commitment.

Burton Criteria

5. Person’s history of conforming to laws and values of society
6. If person’s mental illness is in remission, consider the cause and degree of remission and the probability the person will continue treatment to maintain the remission.

Levels of Care

- Maximum security state hospital
- Civil hospital
- Conditional Release

Maximum Security State Hospital

- Twin Valley Behavioral Healthcare - Columbus
- High staff/patient ratio discourages physical violence
- Environment discourages escape

Civil State Psychiatric Hospital

Five Levels of Movement:

- Level 1 - restricted to unit
- Level 2 - supervised on grounds
- Level 3 - unsupervised on grounds, for programs, work and free time
- Level 4 - supervised off grounds
- Level 5 - unsupervised off grounds

Privilege Increases

Evaluation, violence risk assessment or review:

- Treatment Team/HCR-20
- Forensic Review Team
- Chief of Forensic Services (review)
- Forensic Center (L5 or CR)
- Trial Court

Conditional Release

- Release into community, with conditions
- Similar to probation/parole
- Conditional release revoked if conditions violated, in effort to prevent reoffense
- Frequent conditions include compliance with medications/treatment, abstinence from drugs/alcohol, living arrangements

State v. Mahaffey

- Ohio Court of Appeals, 4th District
- November 2000
- State has the burden of establishing by clear and convincing evidence that increased privilege level should not be granted due to threat to public safety or safety of any person.

Mitigation

O.R.C. 2947.06

Trial court may hear testimony in mitigation:

- Psychiatric Factors in Offense
- Psychiatric Recommendations

Informed Consent

&

Involuntary Treatment

Components of Informed
Consent

1. Information
2. Voluntariness
3. Competency

Information and Informed
Consent

How much information about the proposed treatment must be disclosed?

Models of Information
Disclosure in Informed Consent

- Nathanson v. Kline (1960)
(reasonable medical practitioner standard)
- Canterbury v. Spence (1972)
(materiality of information standard)

Components of Informed Consent

1. Information
2. Voluntariness
3. Competency

Voluntariness

- Patient must be free of coercion
- Cannot link acceptance/decline of treatment with privileges, food, clothing, discharge, etc.
- Can link acceptance/decline of treatment with medical or risk issues

Components of Informed Consent

1. Information
2. Voluntariness
3. Competency

Competency and Informed Consent

Competency is

- present state evaluation
- assessment of patient's decision-making process, not their consent or refusal
- quality of patient's thought process and ability to rationally manipulate information

Right to Refuse Treatment

- Justice Cardozo (1914) - "Every human of adult years and sound mind has a right to determine what shall be done with his own body."

Right to Refuse Treatment

- Treatment without consent = battery
- Competent patients can refuse live-saving treatment
- Mind control via psychiatry (Thomas Szasz) has always been a fear

Arguments For Right to Refuse Treatment

Constitutional Arguments:

- Right to privacy (1st, 5th and 14th)
- Right to freedom of thought (1st)
- Cruel and unusual punishment (8th)
- Due process (14th)

Arguments Against Right to Refuse Treatment

- *Parens Patriae*
- Police Powers

Right to Refuse Treatment

- Voluntary patients have always had right to refuse treatment
- Involuntary patients
 - 1960s - need for treatment is basis of hospitalization
 - 1970s - commitment based on danger

Separate Liberty Interests

Civil Commitment

- Right to freedom
- Right to not be arbitrarily or erroneously detained

Right to Refuse Treatment

- Right to body integrity
- Right to privacy, freedom of speech/thought, etc.

Right to Refuse Treatment

Commitment vs medication

- separate liberty interests
- separate standard for competence:
 - to make hospitalization decisions vs.
 - medication decisions

Psychiatric Emergencies

- Require actual or threatened danger to self or others.
- No actual violence to self or others is required, but danger or threat of violence must be imminent.

Psychiatric Emergencies

- Emergency treatment measures are used in psychiatric emergency, unless lesser intrusive means are available, and feasible.
- Emergency measures include forced medications, seclusion and/or restraint.

Steele v. Hamilton County Mental Health Board

- Ohio Supreme Court, 2000
- Facts
- Question - Must a mentally ill person be imminently dangerous for a court to order forced medication?

Steele v. Hamilton County Mental Health Board

Forced medication may be administered in an emergency, which is a medical decision that requires:

- Imminent dangerousness to self or others
- No less intrusive means of avoiding harm
- Medication is appropriate for patient

Steele v. Hamilton County Mental Health Board

Holding - A court may authorize forced medications without a finding of dangerousness, when clear and convincing evidence exists that:

- The patient lacks the capacity to give or withhold informed consent regarding treatment;
- The proposed medication is in the patient's best interest, and;
- No less intrusive treatment will be as effective in treating the mental illness.

Steele v. Hamilton County Mental Health Board

Two different procedures for forced medication:

1. Non-emergency - judicially based, evaluation of competence, best interests model
2. Emergency - professional judgment and dangerousness required

Procedures for Evaluating Competence to Make Treatment Decisions

- Interview patient
- Review current medical record
- Perform Mental Status Examination
- Competency (capacity) evaluation
- Develop opinion

Assessment of Competency to Make Medical Decisions

Patient must understand:

- nature of illness
- reason for treatment
- risks and benefits of proposed treatment
- treatment alternatives
- prognosis if treated
- prognosis if not treated

Competency and Informed Consent

Competency is

- present state evaluation
- assessment of patient's decision-making process, not their consent or refusal
- quality of patient's thought process and ability to rationally manipulate information

Steele v. Hamilton County Mental Health Board

Due Process requirements:

- Attorney representation
- Independent 2nd opinion
 - capacity
 - appropriateness of treatment
- Notice of all hearings

Steele v. Hamilton County Mental Health Board

- Patient attends hearings
- Right to present witnesses
- Right to cross examine witnesses

Sell v. United States

- United States Supreme Court (2003)
- Question - Is Due Process violated by involuntarily administering antipsychotic medication to render a criminal defendant competent to stand trial?
- Facts -

Sell v. United States

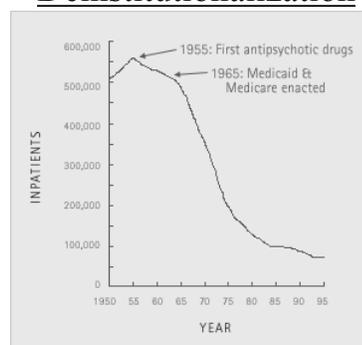
Holding - Due Process allows for forced antipsychotic medications solely to restore competence to stand trial, but only under narrow circumstances.

Sell v. United States

- *Important* governmental interests are at stake.
- Involuntary medication will *significantly further* the important governmental interests and be substantially likely to render the defendant competent to stand trial.

Sell v. United States

- Involuntary medication is *necessary* to further the important governmental interests.
 - Administration of the drugs is *medically appropriate*
- Preferred to pursue involuntary treatment based on lack of capacity

Mental Health CourtsDeinstitutionalizationMental Illness

- Overrepresented in jail and prison population
- Serious Mental Illness:
 - General population = 5%
 - Corrections population = 17%

Seriously Mentally Ill

- Higher arrest rates
- Longer periods of incarceration
- Higher recidivism rates
- Limited access to healthcare

Mental Health Courts

- Intercept 3 from Sequential Intercept Model
- Limited docket
- Specially assigned judge
- Problem-solving
 - Expanded scope of non-legal issues
 - Hope for outcomes beyond law's application
 - Foster collaboration among many parties
- New roles for judge, attorneys, and treatment system (Petrie & Poythress, 2002)

Mental Health Courts

- 1st goal = treatment (medications)
- Chance to voluntarily comply with treatment
- Move defendant to treatment setting from jail
- Once stable, return to court
- Enter Mental Health Court program

Mental Health Courts

- Akron (1st in Ohio)
- 2-year intensive outpatient treatment-based program
- Goals:
 - Compliance with treatment
 - Prevent recidivism
 - Sobriety (if issue)
 - Housing
 - Employment

Mental Health Courts

- Methods:
 - Case management
 - Probation officers
 - Medication management
 - Regular appearances in court

Mental Health Courts

- Results:
 - Use fewer jail bed days
 - Use fewer hospital bed days
 - Lower costs
 - Better treatment outcomes
 - Lower rates of reoffense

Assisted Outpatient Treatment

- Effective 9/17/14 via SB 43
- Expands definition of “mentally ill person subject to court order” via O.R.C. 5122.01(B)
- Allows for court-ordered outpatient treatment

Ohio Commitment Standard5122.01

Threshold of mental illness, defined as “A substantial disorder of thought, mood, orientation, perception or memory that grossly impairs:

- judgment
- behavior
- capacity to recognize reality
- ability to meet ordinary demands of life

Ohio Commitment Standard5122.01

Mental illness causes:

1. Substantial risk of physical harm to self
2. Substantial risk of physical harm to others
3. Unable to provide for needs AND hospitalization is least restrictive placement
4. Benefit from hospitalization AND infringe on rights of self/others

Ohio Commitment Standard5122.01

5. a. Would benefit from treatment as manifested by evidence of behavior that indicates all of the following:
 - i. The person has a history of a lack of compliance without supervision, based on a clinical determination.
 - ii. The person has a history of lack of compliance with treatment for mental illness and one of the following applies:

Ohio Commitment Standard5122.01

- I. At least twice within the thirty-six months prior to the filing of an affidavit seeking court-ordered treatment of the person under section 5122.111 of the Revised Code, the lack of compliance has been a significant factor in necessitating hospitalization in a hospital or receipt of services in a forensic or other mental health unit of a correctional facility, provided that the thirty-six-month period shall be extended by the length of any hospitalization or incarceration of the person that occurred within the thirty-six-month period.

Ohio Commitment Standard5122.01

- II. Within the forty-eight months prior to the filing of an affidavit seeking court-ordered treatment of the person under section 5122.111 of the Revised Code, the lack of compliance resulted in one or more acts of serious violent behavior toward self or others or threats of, or attempts at, serious physical harm to self or others, provided that the forty-eight-month period shall be extended by the length of any hospitalization or incarceration of the person that occurred within the forty-eight-month period.

Ohio Commitment Standard5122.01

- iii. The person, as a result of the person's mental illness, is unlikely to voluntarily participate in necessary treatment.
- iv. In view of the person's treatment history and current behavior, the person is in need of treatment in order to prevent a relapse or deterioration that would be likely to result in substantial risk of serious harm to the person or others.

Ohio Commitment Standard5122.01

5. b. An individual who meets only the criteria described in division (B)(5)(a) of this section is not subject to hospitalization

Dealing
with
Forensic Mental Health
Professional Expert Testimony

Direct Examination

- Qualifications of Examiner
- Sources of Information reviewed
- Summary of offense accounts given by defendant, victim, witnesses, police
- Opinion on diagnosis at time of act
- Opinion on severe mental disease/defect
- Opinion on knowledge of wrongfulness

Qualification Challenges

Issues with:

- Licensure
- Board certification
- Forensic fellowship
- Training in specific issue
- Experience in specific issue
- Publications/Research/Teaching
- Honors/Awards

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Methodology Challenges

- Inadequate sources of data
- Lack of collateral data
- Accept subject self-report at face value
- Ignorance of legal standard

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Methodology Challenges

- Lack of/wrong psychological test measure
- Ignored conflicting data
- Fail to consider critical evidence
- Fail to investigate plausible alternative theory

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Opinion Challenges

- Facts don't support opinion
- Leaps in logic
- Speculation
- Faulty reasoning
- Applying incorrect legal standard
- Level of certainty of opinion

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Objectivity Challenges

- Defense or plaintiff bias
- Defense or plaintiff referral pattern
- Personal interest in outcome
- Financial interest in outcome
- Frequent referrals from attorney
- Promise of future referrals
- "Hired Gun"

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Content of Cross Examination

Scope of Cross Examination:

Eight Impeachment Points:

1. Perceptions
2. Memory & psychiatric issues
3. Distortions caused by communication
4. **Bias, interest, prejudice, emotional traits**
5. Prior criminal convictions
6. Prior misconduct/dishonesty
7. **Prior inconsistent statements**
8. **Bad reputation for truth and veracity**

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QUESTIONS?