Chapter 12

Representing Clients Who Are Mentally Ill or Intellectually Disabled

Part A. Overview: Stages at Which the Respondent's Mental Problems May Be Relevant

§ 12.01 THE INITIAL INTERVIEW AND SUBSEQUENT CLIENT COUNSELING

As explained in § 5.03 *supra,* the initial interview of the child should be conducted outside the presence of the child's parents, siblings, or other relatives. There is far too great a chance that the child will shape his or her account of the events to please a parent or relative or that the family member will intrude his or her own personality and biases into the interview. The same is true of all subsequent meetings with the client for the purposes of explaining the case, preparing the client's testimony, or counseling the client on fundamental issues such as whether to plead guilty or go to trial.

This general rule may need to be modified in the case of some severely mentally ill or intellectually disabled clients. If the client's mental problems are causing problems in attorney-client communications (either because of the client's language problems or comprehension difficulties), it may aid communication to bring in a relative or a friend who has had longtime dealings with the client. In these circumstances counsel will need to balance the potential benefits of such a procedure against the risks of biasing the results of the interview or client counseling session.

An alternative to a family member is a mental health professional of some sort – a psychiatrist, psychologist, neurologist, psychiatric social worker, and so forth. When the child has a previous relationship with such a professional, counsel should consult that professional and consider bringing the professional into some of the meetings between the client and counsel. In any event, counsel should seek the professional's assistance in understanding the client and the professional's advice concerning problems and the best techniques for communicating with the client. If the client has no previous relationship with a professional, counsel should consider retaining a professional specially to assist counsel in understanding and communicating with the client as well as for other purposes in the case. Difficulties and possible adverse consequences of the decision to bring a new mental health professional into a case are discussed in §§ 12.08-12.10 *infra.*

Whether or not a family member or a mental health professional is brought in to assist, counsel who is representing a client with mental problems will obviously need to take special pains and precautions in evaluating the client's perceptions, recollections, and interpretations of pertinent facts, in eliciting those facts through interviewing, in preparing the client to testify or for other court proceedings and for interviews with court personnel, and in explaining and talking through with the client all of the matters that bear on decisions that the client must make (such as whether to plead guilty or contest guilt) and decisions in which the client and counsel both

participate (such as whether certain witnesses should be called to testify). Mental illness and mental limitations potentially affect every aspect of the client's comprehension and behavior, often in subtle and nonobvious ways, and so potentially affect every aspect of the client's interaction with counsel. In the initial interview and subsequent meetings with a mentally ill or intellectually disabled client, counsel should be constantly attentive to the areas and dimensions of the client's impairment. *See* Christopher Slobogin, *The American Bar Association's Criminal Justice Mental Health Standards: Revisions for the Twenty-First Century*, 44 HASTINGS CONST. L. Q. 1, 4 (2016) ("Defense attorneys may fail to adjust their style of communication to take into account impairments of their clients, . . . or may focus solely on narrow legal issues when a more holistic approach might prove both more beneficial to their clients and less likely to miss key aspects of the relevant legal or psychological problems."); W. Bradley Wendel, *Autonomy Isn't Everything: Some Cautionary Notes on* McCoy v. Louisiana, 9 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 92 (2018). If counsel decides at some point to apply for court funds for retention of a psychiatrist or psychologist (see § 12.09 *infra*), counsel's previous observations may provide the facts necessary to support the application. *See generally* Slobogin, *supra* at 4, 8, 19-20, 21-22, 27-28, 33-34.

§ 12.02 THE INITIAL HEARING

In some jurisdictions judges can order a mental examination of the client at the Initial Hearing. See § 12.11 *infra.* As explained in § 12.12 *infra,* counsel should ordinarily oppose such examinations.

If an examination is held, counsel may find that the results are being used against the respondent at the detention hearing. The respondent's psychiatric disorders may be cited by the prosecutor, probation officer, or judge as one of the bases for finding that pretrial detention is warranted by a danger to self or others. See § 4.17 *supra.* Conversely, a respondent's mental problems may provide counsel with arguments against detention – or against detention in particular facilities – especially if those problems would make the respondent highly vulnerable to physical or emotional abuse in the facility or if detention would interrupt or adversely affect an ongoing course of therapy in a community-based program.

Counsel also must be cognizant of the fact that some clients will prefer a hospital setting to a juvenile detention facility or will benefit more from detention in the former than from detention in the latter. Thus in cases in which the court decides to order secure detention because of the nature of the offense or the respondent's prior record, a client with mental problems may direct counsel to seek a court-ordered mental examination on an in-patient basis. Occasionally, counsel may want to give independent consideration to this possibility, although it will very seldom be a wise course of action except in the case of a client with a substantial history of prior hospitalizations or state mental examinations, because the cost of the examination in disclosure of potentially damaging information will usually outweigh its benefit in improving the conditions of the client's detention. See § 12.12 *infra.*

§ 12.03 THE INVESTIGATIVE STAGE

As explained in §§ 12.08-12.09 *infra,* counsel should arrange a mental examination of the respondent by a defense psychiatrist or psychologist if it appears that the respondent is suffering from mental problems. This should be done early in the investigative stage. See § 12.08 *infra.*

Counsel should also begin immediately to gather any institutional or agency records concerning the mental health of the respondent. These include school records (particularly special education records); prior psychiatric or psychological reports contained in a court file or in probation or other agency files if the client was charged in any prior juvenile delinquency or PINS cases or if s/he was the subject of a child protective case; hospital records generated by emergency or out-patient treatment or periods of hospitalization; and records compiled by private psychiatrists or psychologists or community mental health centers where the respondent was evaluated or had therapy. *See* DAVID FREEDMAN, COGNITIVE AND FUNCTIONAL ASSESSMENT: A PRACTITIONER'S GUIDE TO TESTING (March 2019), referenced in § 12.10 *infra*. In order to obtain these records, counsel will need release forms signed by the client and the client's parent or guardian, authorizing the release of these confidential records to counsel or his or her investigator. See § 5.11 *supra.*

Counsel should also proceed promptly to obtain the services of a defense expert to examine the respondent (see §§ 12.08-12.10 *infra*), and should provide the expert with all available records and background information bearing on the respondent's mental state. *See Jacobs v. Horn*, 395 F.3d 92 (3d Cir. 2005) (finding defense counsel ineffective for failing to provide a psychiatric consultant with adequate background information, failing to "question any of . . . [the defendant's] family members or friends regarding his childhood, background, or mental health history, . . . [failing] to obtain any medical records demonstrating mental deficiencies," and failing to inform the consultant that the prosecution was seeking the death penalty (*id*. at 103), with the consequence that the defendant's potential diminished-capacity defense was critically impaired); *Wilson v. Sirmons*, 536 F.3d 1064, 1085 (10th Cir. 2008) finding defense counsel ineffective where he hired a mental health expert "only three weeks prior to trial and met with him only two days before he testified," so that the expert "did not have time to conduct additional testing to confirm a diagnosis of schizophrenia, nor could the defense team gather collateral evidence that might provide insight into Mr. Wilson's psychology"); *Jones v. Ryan*, 52 F.4th 1104, 1118-19 (9th Cir. 2022) ("Counsel should have obtained a defense mental health expert well before the start of the guilt phase of Jones's [capital] trial, but instead, he waited to make this request until after Jones had already been convicted. . . . ¶ Obtaining the court-appointed, independent expert's short and cursory evaluation did not satisfy this duty."); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE MONITORS AND MONITORING, DEFENSE FUNCTION (4th ed. 2017), Standard 4-4.1(d), (e), *Duty to Investigate and Engage Investigators* ("(d) Defense counsel should determine whether the client's interests would be served by engaging . . . forensic. . . experts, or other professional witnesses . . . , and if so, consider, in consultation with the client, whether to engage them. Counsel should regularly re-evaluate the need for such services throughout the representation. ¶ (e) If the client lacks

sufficient resources to pay for necessary investigation, counsel should seek resources from the court, the government, or donors.").

§ 12.04 PRETRIAL MOTIONS AND OTHER PRETRIAL PLEADINGS

There are a number of pretrial motions and other pleadings that may be required by the client's mental problems. As already indicated, counsel may need to file a motion with the court seeking court funds for retention of a defense expert. See § 12.09 *infra.* Depending upon the results of the examination and the facts of the case, counsel also may be able to file the following defense motions:

(a) a motion for diversion on the grounds that the client's primary social problem, the mental illness or intellectual disability, is already being dealt with by a community-based program that counsel has arranged (see Chapter 19);

(b) a motion to suppress a confession or other incriminating statement (i) on the due process ground that it was not """the product of a rational intellect and a free will""" (*Mincey v. Arizona*, 437 U.S. 437 U.S. 385, 398 (1978); see § 24.05(b) *infra*) or (ii) on cognate state-law grounds (see § 24.16 *infra*), or (iii) on the ground that the respondent's capacity to make a "knowing and intelligent" waiver of *Miranda* rights was critically impaired (see § 24.10(b) *infra*); or (iv) on the ground that the respondent's waiver of *Miranda* rights was involuntary because interrogators overbore his or her limited powers of resistance (see § 24.10(a) *infra*). *See generally* William C. Follette, Richard A. Leo, & Deborah Davis, *Mental Health and False Confessions*, in ELIZABETH KELLEY (ed.), REPRESENTING PEOPLE WITH MENTAL DISABILITIES 95 (2017).

(c) A suppression motion challenging the seizure of tangible evidence through a purportedly consensual search, on the ground that the respondent's mental problems were exploited in obtaining the consent (see § 23.18(a) *infra*).

In those rare cases in which counsel intends to pursue an insanity defense at trial (see § 12.23 *infra*), s/he will need to check local requirements for giving notice of such a defense. Many jurisdictions require that the defense be specially pleaded, or that written notification of intention to raise it be filed within a specified period (usually 30 days) after arraignment. On the equally rare occasions on which counsel decides to raise an incompetency claim (see § 12.19 *infra*), there will also be local rules governing the manner and timing of the claim.

§ 12.05 PLEA NEGOTIATIONS WITH THE PROSECUTOR

As explained in § 14.16 *infra,* some prosecutors are motivated by a desire to aid children to receive rehabilitative services for whatever problems led them to become involved in the juvenile justice system. In engaging in plea negotiations with these prosecutors, counsel may be

able to persuade the prosecutor to agree to diversion (or, if the prosecutor is intent upon a conviction, to agree to a sentence of probation) by telling the prosecutor about the child's mental problems and about the programs that counsel has arranged to deal with those mental problems.

§ 12.06 TRIAL

The insanity defense, although not advisable (see § 12.23 *infra*), is available as a defense at trial in most jurisdictions. See § 12.21 *infra.* Psychiatric evidence also may be relevant to a defense of infancy. See § 17.04(b) *infra.* Some jurisdictions recognize a defense of "diminished capacity," which permits the respondent to use evidence of impaired mental capacity to show that s/he was incapable of forming the requisite *mens rea* for the charged offense(s). See § 33.21 *infra*. In a smaller number of jurisdictions, expert testimony is admissible to show that the respondent's psychological proclivities make it unlikely that s/he would commit a crime of the kind charged. See *id*. When the prosecution's case includes confessions or other incriminating statements, the "defendant may introduce evidence of mental retardation, defect, and/or diminished capacity at the guilt stage of trial as part of the circumstances surrounding the making of a confession for jurors to consider in determining the weight or probative value given the statement" (*State v. Doyle*, 56 So.3d 948, 949 (La. 2011).

§ 12.07 DISPOSITION

Counsel can sometimes use the respondent's mental problems as a mitigating factor at disposition. It is especially persuasive to be able to show that the respondent has been successfully attending a community-based program arranged by counsel to deal with the mental problems. This evidence may be the decisive factor in inducing the judge to grant probation. See § 38.14 *infra.* In cases in which the judge is intent upon ordering placement in a secure facility, the evidence of the respondent's mental problems and successful adjustment to the community-based program may persuade the judge to place the respondent in a therapeutic facility with psychiatric services rather than a juvenile correctional facility. Potential uses of neuroscientific evidence at sentencing are discussed in Christopher Slobogin, *Neuroscience Nuance: Dissecting the Relevance of Neuroscience in Adjudicating Criminal Culpability*, 4 JOURNAL OF LAW & THE BIOSCIENCES 577 (December 2017); John H. Blume & Emily C. Paavola, *Life, Death, and Neuroimaging: The Advantages and Disadvantages of the Defense's Use of Neuroimages in Capital Cases – Lessons from the Front*, 62 MERCER L. REV. 909 (2011); Deborah W. Denno, *The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases*, 56 BOSTON COLLEGE L. REV. 493 (2015); Deborah W. Denno, *How Courts in Criminal Cases Respond to Childhood Trauma,* 103 MARQUETTE L. REV. 301 (2019). *And see generally Symposium*, *Criminal Behavior and the Brain: When Law and Neuroscience Collide,* 85 FORDHAM L. REV. 399 (2016); Deborah W. Denno, *Neuroscience and the Personalization of Criminal Law*, 86 U. CHI. L. REV. 359 (2019); Owen D. Jones, *The Future of Law and Neuroscience*, 63 WILLIAM & MARY L. REV. 1317 (2022); Jane Campbell Moriarty, *Neuroimaging in US Courts*, *available at* https://ssrn.com/abstract=4150892. Mental disorders and their symptoms are catalogued in AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND

STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) [DSM-5]; *see also* DAVID FREEDMAN, COGNITIVE AND FUNCTIONAL ASSESSMENT: A PRACTITIONER'S GUIDE TO TESTING (March 2019), referenced in § 16.4 *infra*. Concerning intellectual disability, *see* AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, DIAGNOSIS, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 131 (12th ed. 2021); James W. Ellis, Caroline Everington & Ann M. Delpha, *Evaluating Intellectual Disability: Clinical Assessments in* Atkins *Cases,* 46 HOFSTRA L. REV. 1305, 1359 (2018). Concerning Traumatic Brain Injury, *see* Alison J. Lynch, Michael L. Perlin & Heather Cucolo, *"My Bewildering Brain Toils in Vain": Traumatic Brain Injury, the Criminal Trial Process, and the Case of Lisa Montgomery*, 74 RUTGERS U. L. REV. 215 (2021).

Part B. Retention of a Defense Psychiatrist or Psychologist

§ 12.08 REASONS FOR RETAINING A MENTAL HEALTH EXPERT: THE MANY FUNCTIONS A DEFENSE EXPERT CAN PERFORM IN A DELINQUENCY CASE

§ 12.08(a) Using a Mental Health Expert as a Witness at a Pretrial Hearing or Trial

In any case in which counsel presents a mental defense at trial (see § 12.06 *supra;* §§ 12.21-23, 33.21 *infra*), counsel will probably need to call a mental health professional to testify as an expert witness. Counsel also may need to call a mental health expert as a witness at a suppression hearing in which the client's mental problem bears upon a ground for suppressing a statement or tangible evidence (see § 12.04 *supra*).

In most cases in which a mental health expert serves as a testifying witness, s/he will be crucial in ways that go beyond presenting factual information based on his or her examination of the respondent and explaining its medical and psychological significance in light of his or her specialized knowledge of a scientific field. S/he can make the respondent's mental life accessible to the fact-finder (whether that is a judge at a suppression hearing, a jury at trial, or a judge at a bench trial), organizing and presenting the respondent's perceptions and actions as a comprehensible and coherent story and "pedigreeing" that story by showing that it has an extensive scientific foundation and wasn't made up to order. *See United States v. Laureys*, 866 F.3d 432 (D.C. Cir. 2017) (finding defense counsel constitutionally ineffective for failing to obtain expert mental health testimony in a case in which the defendant was convicted by a jury of attempted coercion and enticement of a minor and travel with intent to engage in illicit sexual conduct, arising from an online encounter with an undercover detective with whom Laureys enthusiastically envisioned sexual encounters with a nine year-old girl: "Laureys has steadfastly maintained his innocence, despite the existence of a chat transcript in which he discussed child sex in graphic detail, because he insists that he was only engaging in fantasy and that his actual intent was to engage in an adult sexual encounter while fantasizing about a child. Such a defense might seem unimaginable to the average juror absent a clinical presentation regarding, for instance, the prevalence of fantasy in internet chat rooms, or the use of fantasy chat as a coping mechanism to deal with inappropriate or unlawful sexual urges."). S/he can provide concepts and

contexts to frame information – ways of thinking about mental disorders, their manifestations, their predisposing and precipitating factors, and their prognosis. Where predictions are needed (for example, regarding the respondent's likely response to treatment), s/he can make them; but s/he can also provide the basis for predictions without speaking to them explicitly (*e.g.*, by testifying about the availability of treatment sources and inspiring confidence in them). She can present information obtained from third parties that would otherwise be inadmissible hearsay – and information from records that lack sufficient authentication for admission as independent exhibits – by testifying that s/he relied on these sources of information in forming his or her opinion, and then relating the information in detail. See § 33.13 *infra*.

§ 12.08(b) Potential Functions of a Mental Health Expert Other Than Testifying at a Pretrial Hearing or Trial

Beyond the functions that a mental health professional can perform as an expert witness, s/he can assist the defense in a wide range of ways to prepare a delinquency case for trial or disposition.

One such function has already been mentioned: If counsel is experiencing difficulties in communicating with the client, a mental health professional can serve as a facilitator. See § 12.01 *supra*. A mental health professional can help counsel understand what the client is saying, thinking, and feeling. S/he can help counsel to understand the client's sensitivities, resistances, and motivations. If there are matters the client finds it difficult to hear or consider, a mental health professional will usually be better able than counsel to talk with the client about these matters. For example, in what is likely to be a flashpoint for some clients in cases involving mental defenses, a mental health professional can help the client get a fix on what terms like "mental defenses" and "being mentally ill" do and don't imply, and to accept the implications of using a defense of this sort to seek a favorable outcome in the case. If there are subjects that the client is blocked against discussing – or simply too embarrassed to discuss – with counsel, a mental health professional is trained and experienced in cutting through precisely those barriers. Sometimes it is only with the professional's assistance that – even after the client has been gotten to open up to counsel about closeted thoughts, feelings, experiences and events – the client can be persuaded to testify about these intensely disturbing matters in open court.

During the pretrial investigation of the case, a mental health expert can help counsel to identify what records might be available to document the client's history of mental problems (e.g., hospital records, school records, other institutional records, see § 12.03 *supra*) and how to find them. Once those records have been obtained, the expert can help counsel to understand the records (*see, e.g.*, *McWilliams v. Dunn*, 582 U.S. 183, 198-99 (2017)): – the abbreviations and partial illegibilities; what recorded observations and events mean; how commonplace or rare those observations and events are; the implications of those observations and events; the implications of material in the records as potential evidence or potential investigative leads; the presence of potential analytic pitfalls in relying on those implications; and – often most important – what the *absence* of particular events or information from the records may signify. (*See* Sir

Arthur Conan Doyle, *Silver Blaze*, in 1 SHERLOCK HOLMES, THE COMPLETE NOVELS AND STORIES 455, 472 (Bantam Classic edition 1986):

> [The inspector]: "Is there any point to which you would wish to draw my attention?"
> [Sherlock Holmes]: "To the curious incident of the dog in the night-time."
> [The inspector]: "The dog did nothing in the night-time."
> [Sherlock Holmes]: "That was the curious incident. . . .")

As counsel develops a theory of the case (see § 6.02 *supra*) and considers possible story lines to present in a pretrial suppression hearing or a trial or at sentencing (see § 6.06 *supra*), an expert can help to identify narratives that explain and connect events. S/he can provide a sounding board for trying out the plausibility of logical inferences and gauging whether a story line is plausible, given the information already known, the information that the expert predicts can be gathered, the realities of life for individuals with a mental condition like the client's, and the practices and practical constraints of the mental health system. S/he can also provide a different angle of vision – a different interpretive perspective – on people, events, and other aspects of the case. *Cf. United States v. Laureys*, 866 F.3d 432, 438 (D.C. Cir. 2017) (defense counsel deprived his client of effective assistance of counsel by leading a potential mental health expert "to believe that counsel was interested in establishing only . . . [a] diminished capacity defense" – which "counsel had arrived at through his own online research" but which the expert did not support – and thereby causing the expert to "bow[ ] out of the proceeding altogether, leaving . . . [the defendant] without the benefit of the clinical testimony that . . . [the expert] could have offered, which . . . would have informed the jury's assessment of . . . [a defense that the defendant "lacked the requisite intent" rather than that he was incapable of forming such an intent] and helped buttress . . . [the defendant's] own testimony"; "[C]ounsel focused . . . [the expert] on an *invalid* diminished capacity defense *to the exclusion of all other possible defenses.*").

Even if the expert is not going to testify, s/he can help counsel to prepare a case for a suppression hearing or trial. S/he can recommend, identify, and enlist other professionals, including other potential testifying experts. S/he can help counsel anticipate and prepare to answer the prosecution's case by predicting what experts (or what kinds of experts) the prosecutor might recruit and what they are likely to say on the witness stand. S/he can educate counsel about possible lines of attack on prosecution experts and their credentials, theories, analyses, and conclusions (including writings by the prosecution experts, and authoritative texts with which the experts or their writings might be impeached). At the hearing or trial, the expert can observe the testimony of prosecution experts and advise counsel on what subjects to cover in cross-examination and how to handle them. *See, e.g.*, *McWilliams v. Dunn*, 582 U.S. at 198-99; and see § 31.09 *infra*.

If the case is a high-profile one that is being covered by the media, the expert can help counsel to present or defend the case in any media forum that is expected or desired. If the media

are not yet paying attention to the case and if counsel wishes them to, the expert can help counsel strategize about how to accomplish that goal. If, as is usually the case, counsel would like to deflect or defuse media attention, the expert can help counsel figure out how best to do so.

The expert can assist counsel's plea bargaining efforts by providing information about the client or available programs that counsel can cite when trying to persuade the prosecutor to divert the case or to agree to a favorable plea and sentence. See § 12.05 *supra*. If the prosecutor seems open to these options but wants more reassurance, counsel might arrange for the expert to meet with the prosecutor.

Finally, the expert can help counsel to prepare for disposition by identifying appropriate community-based therapeutic programs for the client and perhaps arranging for the client's admission to a particular program.

§ 12.09 RETAINING A MENTAL HEALTH EXPERT

Ordinarily, counsel should begin the task of finding a psychiatrist or psychologist as soon as counsel detects any indications that the client has significant mental problems. *See*, *e.g.*, *Sasser v. Kelley*, 321 F. Supp. 3d 900 (W.D. Ark. 2018). As explained in §§ 12.01-12.05 and 12.08(b) *supra*, the expert may be able to play an invaluable role at even the earliest stages of the case. Also, psychiatrists and psychologists often have such crowded schedules that appointments for evaluations must be scheduled several weeks in advance.

Counsel cannot arrange a mental health evaluation without the client's agreement. Unless the client is obviously incompetent, s/he should have the final say on whether s/he will be subjected to an evaluation. Counsel can attempt to be persuasive, however, and may be most effective if s/he can get the client to understand that psychiatrists work with "sane" people and not just with people who have "mental illnesses"; that psychiatrists are very useful in helping "well" people with adjustment problems; and that many people who are not at all "sick" see psychiatrists.

There are essentially four ways of obtaining a mental evaluation of the respondent: (i) retaining a private psychiatrist or psychologist at his or her regular rate of compensation (which is usually billed on an hourly basis); (ii) arranging for a private examination on an informal basis, either *pro bono* or for a sliding-scale fee adjusted to the income of the respondent's parent or guardian (and/or any other family members who are willing to provide financial assistance); (iii) requesting that the court appoint a state-paid psychiatrist or psychologist for the defense; and (iv) invoking statutory provisions that authorize or trigger a respondent's examination by a state psychiatrist or psychologist or other purportedly "neutral" expert, on either an in-patient or out-patient basis. Since the cost of a private examination at the usual rates charged by a psychiatrist or psychologist is prohibitive for most clients and their families, counsel usually will need to consider one of the other alternatives.

The major problem with requesting a court-ordered mental examination by a state-employed or "neutral" expert is that the resulting report will be provided not only to defense counsel but also to the judge and the prosecutor. If the report contains aggravating facts about the respondent's psychic make-up or background, it may afford a basis for pretrial detention, refutation of the defense position on mental issues raised at motions hearings or at trial, and a harsher sentence than the respondent otherwise would have received. See § 12.12 *infra.* In addition, in some jurisdictions and depending upon subsequent developments in the case, the court may rule that the respondent's statements about the offense, made during the defense-requested examination and recounted in the report, can be used by the prosecution as evidence of guilt at trial (see § 12.15 *infra*) or can be used to impeach the respondent's inconsistent trial testimony (see § 33.09(a) *infra*).

A request for court funds to hire a defense expert may also be problematic, although less so. First of all, unless the judge permits counsel to make the request on an *ex parte* basis, the very act of seeking court funds for a mental health expert will tip off the prosecution to the fact that the respondent has mental problems and may lead to the prosecutor's seeking a court-ordered examination, directing its own investigative efforts into troubling aspects of the respondent's background, opposing pretrial release or community-based disposition because s/he does not want "a possible nut wandering around loose" or doing all of these things. Even when applications for state-paid expert assistance are received *ex parte*, it is difficult to keep the prosecutor from learning that the respondent is being attended by a mental-health expert: if the respondent is detained, the expert's visits to the detention facility will be logged; discussions among counsel and the court about scheduling are likely to reveal that court dates are being set in ways that accommodate the client's evaluation by a mental health expert; the local low-cost forensic-science community may well be small, close-knit, and loose-lipped. In addition, in some jurisdictions judges will not grant a defense motion for court funds until after a court-ordered examination has shown that the respondent does indeed have mental problems warranting the appointment or retainer of a defense expert. In such jurisdictions the request for the defense expert will activate an order for a mental examination by a state-employed or "neutral" expert, with all of the problems described in the preceding paragraph.

Thus when the respondent's family is unable to afford the cost of a private examination, it is generally wise for counsel to investigate the resources available in the community for nonofficial, cost-free or *pro bono* examination. These include: hospital clinics (which often offer individual or group therapy as well as evaluation at nominal or no cost); hospitals with psychiatric residencies; community mental health centers; the county medical society; social welfare agencies; the psychiatry and psychology departments of private universities and of the local branches of the State University, as well as private universities; and private psychiatrists and psychologists who have been involved in the past with the juvenile justice system or whose speciality is child psychology and who might welcome the chance to render service or obtain experience in a delinquency case. ACLU chapters often have substantial numbers of mental-health professionals among their members; the chapter chairperson may be able to provide useful referrals or leads.

If counsel is unable to arrange for the informal examination of an indigent client by a private psychiatrist or psychologist, then counsel will have to apply for state funds to hire a defense expert. Counsel should move the court *ex parte* for funds to retain, or for court appointment of, a psychiatrist or psychologist as a defense consultant to examine the respondent and advise counsel regarding the respondent's mental state for purposes of assisting counsel to prepare the defense (see § 11.03 *supra*). This form of retainer or appointment will assure that information revealed by the client to the expert and information conveyed between counsel and the expert is shielded by attorney-client privilege (*see, e.g., People v. Lines,* 13 Cal. 3d 500, 507-16, 531 P.2d 793, 797-804, 119 Cal. Rptr. 225, 229-36 (1975); *United States v. Alvarez,* 519 F.2d 1036, 1045-47 (3d Cir. 1975); *Neuman v. State*, 297 Ga. 501, 503-09, 773 S.E.2d 716, 719-23 (2015); *see also Elijah W. v. Superior Court*, 216 Cal. App. 4th 140, 146, 150-60, 156 Cal. Rptr. 3d 592, 595, 599-606 (2013)) and the work-product privilege (see § 9.10(b) *supra*). If the motion is denied, counsel should file whatever objections may be necessary to preserve a claim of error, including federal constitutional error (see § 11.03 *supra*), in its denial. *See Stephen A. Saltzburg, The Duty to Investigate and the Availability of Expert Witnesses*, 86 FORDHAM L. REV. 1709 (2018).

If all of the previously described methods for obtaining a defense mental health expert have failed, then counsel must weigh the potential benefits of a court-ordered examination against all of the risks that that process entails. If the benefits clearly outweigh the risks, then counsel should request the court-ordered examination, stating on the record that (1) s/he is making this request only because the court has denied the respondent's application for state funds for a defense expert, and (2) the respondent is preserving his or her objections to that denial notwithstanding counsel's subsequent motion for a court-ordered examination.

§ 12.10 SELECTING THE MENTAL HEALTH EXPERT: CHOOSING BETWEEN PSYCHIATRISTS AND PSYCHOLOGISTS; CHOOSING AMONG SPECIALTIES

This section sets forth some very rough generalizations about the suitability of various types of mental health experts for juvenile delinquency cases. In selecting an expert for a particular case, counsel is well advised to consult other defense lawyers who have retained a mental health expert in a similar type of case. If other lawyers are unable to make a recommendation, counsel should ask a faculty member of a university psychiatry or psychology department or a reputable local psychiatrist or psychologist to list experts with the specialized qualifications necessary to handle the case effectively.

In the rare case in which counsel raises an incompetency claim (see § 12.19 *infra*) or an insanity defense (see § 12.23 *infra*), it is advisable to retain a psychiatrist, preferably one who has a speciality in working with children.

If counsel's primary goal is to obtain a report about the child's mental or emotional problems for use in a motion for diversion or for use at disposition, counsel should usually turn to a psychologist, preferably one with experience in working with children. As a general rule,

psychologists tend to go deeper into the child's family history, social background, and emotional problems than many psychiatrists, and the objective tests employed by psychologists are particularly well suited to an assessment of the effects of the child's mental and emotional problems upon his or her adjustment at school and home. There are two exceptions to this general rule, however. Counsel will need to retain a psychiatrist in any case in which the child is presently taking or appears to require psychotropic medication: psychiatrists have the medical training necessary to calculate and prescribe psychotropic drugs. A psychiatrist also should be retained in cases in which counsel's dispositional proposal will recommend admission to a residential mental health facility: Most facilities of this sort will be more swayed by a psychiatrist's recommendation than a psychologist's.

In cases involving intellectually disabled children, counsel should almost invariably retain a psychologist. An assessment of the respondent's comprehension and functioning levels will necessitate the I.Q. tests that psychologists administer. For this same reason, in any case in which counsel intends to challenge the respondent's comprehension of *Miranda* rights, counsel should usually retain a psychologist, preferably one with some expertise in the specialized area of comprehension of *Miranda* rights.

In some cases counsel will need to obtain a neurological evaluation of the respondent, which can be conducted by either a neurologist or a psychiatrist with a speciality in neurology. (There are also some psychologists specializing in neurological matters who have the requisite qualifications but these are not common, and counsel should have a recommendation for the particular psychologist from a trusted source before choosing this alternative.) The neurological evaluation is necessary to ascertain whether a child's disturbed behavior is due to brain damage caused by prenatal problems, birth trauma, or childhood head injuries. Such an explanation of the child's behavior, especially when coupled with an assessment that the malady is treatable through medication (as it often is), can be highly persuasive in a motion for diversion or in a dispositional argument. *See United States v. Fields,* 949 F.3d 1240, 1256 (10th Cir. 2019) ("we have noted 'that evidence of mental impairments "is exactly the sort of evidence that garners the most sympathy from jurors,"' . . . and that '[o]rganic brain damage is so compelling . . . because "the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action"'").

In cases involving sex offenses, counsel should seek out an expert in assessment and treatment of sex offenders. Frequently, behavioral psychologists are especially skilled in developing modes of treatment for sex offenders.

In cases involving children under the age of 12, counsel will need to find a mental health expert with experience in working with such young children. Some psychologists have developed expertise in "play therapy" for very young children and employ versions of the standard psychological tests that are specially modified for use with very young children.

There is a comprehensive discussion of the kinds of evaluations that may be useful in

particular categories of cases, and of the ways to prepare and arrange for them, in DAVID FREEDMAN, COGNITIVE AND FUNCTIONAL ASSESSMENT: A PRACTITIONER'S GUIDE TO TESTING (March 2019), *available at* https://fdprc.capdefnet.org/litigation-guides/mental-health. To access this useful resource, counsel will have to obtain access to the password-protected private side of the Federal Death Penalty Resource Counsel sector of the CapDefNet website.

Part C. *Mental Health Examinations*

§ 12.11 THE JUDICIAL POWER TO ORDER A MENTAL HEALTH EXAMINATION

In most jurisdictions a statute confers upon the juvenile court the power to order a mental health examination of a child who is brought before the court on a delinquency charge. *See, e.g.,* D.C. CODE § 16-2315 (2023); NEB. REV. STAT. § 43-258 (2023); N.Y FAM. CT. ACT §§ 322.1-322.2 (2023); TEX. FAM. CODE ANN. § 55.11(a) (2023). Although statutes of this sort often specify that the precise purpose of the examination is to determine the child's competency to stand trial, *see, e.g.,* D.C. CODE § 16-2315(c)(1) & (2) (2023); N.Y. FAM. CT. ACT § 322.1(3) (2023), many judges order these examinations whenever there are indications of suicidal tendencies or other self-destructive behavior, in order to determine whether the court must take immediate action to prevent the child from harming himself or herself. Some judges employ an even looser practice of ordering mental examinations whenever the respondent is unusually young or there are indications of significant aberrations in the child's behavior. Finally, as a practical matter, even when the examination is ordered for a narrow purpose, the examining psychiatrist or psychologist may uncover other mental problems in the course of the examination and will then report those problems to the court.

In a number of jurisdictions mental health examinations can be ordered at Initial Hearing. *See, e.g.,* D.C. CODE § 16-2315(a) (2023); MINN. RULE JUV. DELINQUENCY PROC. 20.01 (2023). The issue usually arises as a result of a probation officer noticing, during his or her pre-hearing interview of the child, that the respondent is answering questions in a disjointed fashion suggestive of some type of mental problem. The probation officer reports that fact to the judge at Initial Hearing, and the judge then invites the prosecution and defense counsel to address the question whether a mental health examination should be ordered.

If an examination is not ordered at Initial Hearing, the authorizing statutes usually permit the judge to order an examination at any later stage of the case at which it becomes apparent that the child has mental problems. *See, e.g.,* N.Y. FAM. CT. ACT § 322.1(1) (2023) ("[a]t any proceeding . . . when [the court] is of the opinion that the respondent may be an incapacitated person").

§ 12.12 WHY DEFENSE COUNSEL SHOULD ORDINARILY OPPOSE A MENTAL HEALTH EXAMINATION

As a general rule, it is advisable for counsel to oppose the ordering of a mental health

examination. First of all, there are detrimental consequences if the examination reveals that the respondent is, in fact, incompetent or so mentally ill as to be dangerous to self or others. Such a finding can lead to civil commitment and result in the child's institutionalization in a mental hospital for many years. For this reason a defense attorney in juvenile court should rarely, if ever, contemplate raising a claim of incompetency or interposing a defense of insanity. See §§ 12.19, 12.23 *infra.* Second, there are potential ancillary consequences of a mental health examination even when the respondent is not found to be mentally ill. During the course of the examination, the client may tell the examining psychiatrist or psychologist incriminating facts – either about the charged offense or about other uncharged crimes – that will be recounted in the examiner's report. That report will be given not only to the judge and to defense counsel but also to the prosecutor. The prosecutor can usually use the incriminating information in securing an order of pretrial detention and, depending upon local statutes and caselaw, may be able to use it in securing a conviction at trial, a severe sentence, or both. See § 12.15 *infra.* In the rare case in which defense counsel decides to pursue a mental defense, the report may provide the prosecutor with information usable to refute that defense.

Of course, in cases in which counsel does consider employing a mental defense, s/he will need to have the child examined by a psychiatrist or psychologist. In addition, counsel should have the child evaluated in any case in which the child's apparent mental problems could be affirmatively helpful to the defense in pretrial motions, plea negotiations, or disposition. See §§ 12.04-12.07 *supra.* However, counsel should attempt to arrange such an evaluation through a private examination or through retention of a defense expert rather than through a court-ordered mental examination. See § 12.09 *supra.*

The strategic reasons for opposing the examination must, of course, give way to a client's express desire for an in-patient mental examination. In cases in which the judge has already ordered detention in a secure facility (or inevitably will do so because of the client's prior record or history of failures to appear), a client whose mental problems qualify him or her for hospitalization may prefer to spend the pretrial detention period in a hospital setting rather than a detention facility. In this, as in all decisions involving "the objectives of representation" (AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule l.2(a) (2023)), counsel must defer to the client's wishes. *Id.;* AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980); see generally § 2.03 *supra.* Even when the client is mentally ill or intellectually disabled (as will often be the situation in cases in which the judge is seriously considering a mental examination), the attorney's ethical obligations dictate that s/he "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." MODEL RULES, Rule 1.14(a); CODE, *supra*, EC 7-12. It is only in those rare cases in which the mental impairment so severely "diminish[es]" the client's "capacity to make adequately considered decisions in connection with the representation . . . [that] a normal client-lawyer relationship with the client" cannot be maintained and in which counsel "reasonably believes" that the client "is at risk of substantial physical, financial or other harm unless action is taken and [that the client] cannot adequately act in the client's own interest," that counsel may take "reasonably necessary protective action, including consulting with individuals or entities

that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." MODEL RULES, Rule 1.14(b). See § 2.03 *supra*; § 12.19(b) *infra*.

§ 12.13 ARGUMENTS THAT CAN BE USED IN OPPOSING A MENTAL HEALTH EXAMINATION

Statutes and rules authorizing mental health examinations sometimes specify the factual circumstances under which a competency examination may be ordered (for example, the existence of reasonable grounds for believing that the respondent is incompetent). In these jurisdictions, counsel can defeat an examination order by contesting the sufficiency of the requisite evidentiary showing. *See, e.g., United States v. Rinaldi*, 351 F.3d 285 (7th Cir. 2003); *United States v. Lapi*, 458 F.3d 555 (7th Cir. 2006); *United States v. Visinaiz*, 96 Fed. Appx. 594 (10th Cir. 2004).

In other jurisdictions, statutes, rules or established practice give trial judges discretion to order an examination whenever they deem it appropriate. *See, e.g.,* N.Y. FAM. CT. ACT § 251(a) (2023) ("when such an examination will serve the purposes of this act"). Counsel can argue that such discretion is not unrestricted: that the authorization for an examination is logically limited by the examination's function (*see United States v. Taveras*, 233 F.R.D. 318 (E.D.N.Y. 2006)) and therefore comes into play only when there is a substantial factual showing that the respondent may be incompetent.

In the absence of any statutory or other doctrinal standards that can be invoked, counsel will have to rely on commonsense arguments to persuade the judge that there simply is no need for a court-ordered examination. If counsel is able to arrange an examination through some other means (see § 12.09 *supra*), s/he can argue to the court that this is a better way of proceeding. If counsel is able to arrange a private mental health evaluation, she can point out that this will save the state the expense of a period of commitment and a state-conducted evaluation. In cases of this sort as well as those in which counsel seeks state funds to retain a defense mental health expert to evaluate the respondent, counsel can argue that providing for the respondent's evaluation by a defense consultant *before* any court-ordered commitment or examination would spare the state potentially needless costs and complications. In any case in which the court is inclined to have the respondent evaluated at all, it will be because there is some indication of significant mental disorder. And "when the defendant's mental condition is seriously in question," *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985), requires the appointment of a *defense* mental-health expert for defendants and juvenile respondents who cannot afford to retain one. *Ake*'s command cannot be satisfied through examination by a court-appointed neutral expert; what is required is that the accused be afforded "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Id*. at 83. *See, e.g.*, *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985); *Powell v. Collins*, 332 F.3d 376, 392 (6th Cir. 2003) ("Today, we join with those circuits that have held that an indigent criminal defendant's constitutional right to psychiatric assistance in preparing an insanity defense is not

satisfied by court appointment of a 'neutral' psychiatrist – *i.e.*, one whose report is available to both the defense and the prosecution."); *Moore v. State*, 390 Md. 343, 379-83, 889 A.2d 325, 346-48 (2005); *De Freece v. State*, 848 S.W.2d 150 (Tex. Crim App. 1993); *State v. Sharrow*, 2017 VT 25, 205 Vt. 300, 303, 306, 175 A.3d 504, 505, 507 (2017) ("a defendant whose competency has been called into question has a constitutionally based right to hire, with state funding, a defense-retained mental health expert to assist in his or her defense in order to guard against the possibility of an erroneous determination of competency"; in contrast, the prosecution does not have either a constitutional or state statutory right to an evaluation of the defendant by a "mental health expert of the State's choosing, following a court-ordered competency evaluation by a neutral mental health expert"). *See also McWilliams v. Dunn*, 582 U.S. 183 (2017) (explaining that the Court "need not, and do[es] not" reach the question whether "*Ake* clearly established that a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties" (*id*. at 197) because, even if "[w]e . . . assume that Alabama met the *examination* portion of . . . [*Ake*'s] requirement by providing for [State Department of Mental Health neuropsychologist] Dr. Goff's examination of McWilliams" (*id*. at 198-99), "[n]either Dr. Goff nor any other expert helped the defense evaluate Goff's report or McWilliams' extensive medical records and translate these data into a legal strategy. Neither Dr. Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that McWilliams' purported malingering was not necessarily inconsistent with mental illness (as an expert later testified in postconviction proceedings . . .). Neither Dr. Goff nor any other expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself." (*id*. at 199); the Court observes that "language in *Ake* . . . seems to foresee th[e] . . . consequence" that "a neutral expert available to both parties" would not suffice (*see id*. at 197), and the Court notes that "[a]s a practical matter, the simplest way for a State to meet th[e] . . . [*Ake*] standard may be to provide a qualified expert retained specifically for the defense team," which "appears to be the approach that the overwhelming majority of jurisdictions have adopted." (*id*.)). For a fuller discussion of *McWilliams*, see § 11.03(a) *supra*. Thus, the court's initiation of a court-ordered examination will almost certainly lead to the need for appointment of a defense expert as well. It would be more economical and orderly to have the defense expert examine the respondent initially, so that the whole process of a court-ordered examination can be avoided unless the defense decides to raise mental health issues in the first instance.

§ 12.14 ARGUMENTS THAT CAN BE USED IN OPPOSING AN ORDER THAT A MENTAL HEALTH EXAMINATION BE CONDUCTED ON AN IN-PATIENT BASIS

In the event that the judge orders a mental health examination over counsel's objections, the judge then has to determine whether that examination shall be conducted on an in-patient or out-patient basis. In-patient examinations are conducted at a State Hospital, with the child committed to the institution for a statutorily designated period of time to allow for the examination. The length of time permitted by statute varies substantially among jurisdictions, with some jurisdictions permitting 10 days (N.Y. FAM. CT. ACT § 322.1(2) (2023)) and other jurisdictions allowing a somewhat longer period of time (D.C. CODE § 16-2315(b) (2023) (initial

period of 21 days which can be extended up to 21 more days)). When the examination is ordered on an out-patient basis, the child lives at home and has to report on one (or possibly two or three) occasions to a community mental health center for the evaluation.

The statute or common-law rules usually permit in-patient status only upon medical affidavits, upon a *prima facie* showing of the respondent's incompetency, or when "there is reason to believe" that the respondent is incompetent. Counsel should scrutinize the affidavits or other evidence mounted in favor of the preliminary determination of incompetency, pointing out any favorable evidence as well as any reasons for doubting the evidence (for example, when the affidavits contain multiple hearsay). In jurisdictions whose statutes or court rules expressly state a presumption in favor of out-patient examinations (*see, e.g.,* D.C. CODE § 2315(b) (2023)), counsel should stress the legal effect of that presumption, arguing that the professed preliminary showing of incompetency is insufficient to rebut the presumption.

Even if the evidence satisfies the requisite initial showing of incompetency, the judge usually possesses discretion not to commit the respondent for an in-patient examination. Thus counsel can argue that it would be an inappropriate exercise of judicial discretion to commit a respondent involuntarily to a mental hospital because there are community mental health facilities available for the respondent's diagnosis on an out-patient basis. *Cf. State v. Page,* 11 Ohio Misc. 31, 228 N.E.2d 686 (C.P., Cuyahoga Cty. 1967).

In those cases in which the court announces its intention to order an in-patient examination, counsel can insist upon a hearing that satisfies the requirements of procedural due process. *Cf. Vitek v. Jones,* 445 U.S. 480, 491-94 (1980); *Jones v. United States,* 463 U.S. 354, 361-62 (1983) (dictum). This would appear to include both a full adversary hearing on whatever issues of fact are decisive of the propriety of a commitment order under state law (*Vitek v. Jones,* 445 U.S. at 494-96) and a right to challenge the findings supporting such an order on the ground that there is "no basis" for them in fact (*see Schware v. Board of Bar Examiners,* 353 U.S. 232, 239 (1957)).

In some jurisdictions, orders committing the respondent for an in-patient examination are reviewable by interlocutory appeal (*see*, *e.g.*, *United States v. Rinaldi*, 351 F.3d 285 (7th Cir. 2003); *United States v. Visinaiz*, 96 Fed. Appx. 594 (10th Cir. 2004)); in others, they may be challenged by prerogative writs such as prohibition or mandamus (see Chapter 26 *infra*). The committing court should be requested to stay its commitment order pending review by the writs. If it refuses to do so, a stay should be sought from the appellate court in which the application for the writ is filed. When no other form of review of commitment orders is recognized by local practice, *habeas corpus* should be used, and the *habeas* court should be asked to stay the respondent's commitment *pendente lite.*

In most jurisdictions it is settled that a court may raise the issue of the respondent's competency to stand trial *sua sponte* or on the suggestion of the prosecution if there is a sufficient factual foundation to doubt that s/he is competent. *See*, *e.g.*, *In re Davis*, 8 Cal. 3d 798,

505 P.2d 1018, 106 Cal. Rptr. 178 (1973); *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000) (alternative ground); *Sibug v. State*, 445 Md. 265, 126 A.3d 86 (2015); *Pate v. Robinson*, 383 U.S. 375, 385 (1966) (under Illinois statutory law, "[w]here the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing"); *Speedy v. Wyrick,* 702 F.2d 723 (8th Cir. 1983). In such cases, the same procedures follow that apply when the defense raises the issue. If the respondent's competency is not called into question by the court or any party, the prosecution can ordinarily not obtain a court-ordered exam. *See*, *e.g.*, *Caruthers v. Wexler-Horn*, 592 S.W.3d 328 (Mo. 2019) (the defendant's intention to present a diminished-capacity defense (revealed when defense counsel listed a mental health expert as a trial witness) did not authorize the trial court to order the defendant to submit to an examination at the State's instance); *but see* FED. RULE CRIM. PRO. 12.2, explicitly providing that "[i]f a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on either (1) the issue of guilt or (2) the issue of punishment in a capital case," s/he must give pretrial notice to this effect (Rule 12.2(b), and the court then "may, upon the government's motion, order the defendant to be examined under procedures ordered by the court" (Rule 12.2(c)(1)(B). The rule goes on to provide that: " No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant . . . has introduced evidence . . . requiring notice. . . ."

§ 12.15 PROCEDURAL PROTECTIONS AT A MENTAL HEALTH EXAMINATION

§ 12.15(a) Fifth and Sixth Amendment Protections

In *Estelle v. Smith,* 451 U.S. 454 (1981), the Court held that the Fifth Amendment Privilege Against Self-Incrimination is applicable to a criminal defendant's "statements . . . uttered in the context of a psychiatric examination," *id.* at 465. Specifically, *Smith* decided that a state defendant's Fifth Amendment rights were violated by the admission of opinion testimony of a psychiatrist called by the prosecution to prove the defendant's probable future dangerousness as the basis for a death sentence at the penalty stage of the defendant's capital trial, when the psychiatrist's opinion was based upon his questioning of the defendant during a pretrial competency examination ordered *sua sponte* by the trial court, without notice to the defendant and waiver by the defendant of his privilege against self-incrimination. *See Penry v. Johnson*, 532 U.S. 782, 793-94 (2001) (describing the ruling in *Smith*); *Petrocelli v. Baker*, 869 F.3d 710 (9th Cir. 2017). Because "[d]efense counsel . . . were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, . . . and . . . [the defendant] was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed," the Court also held that "the psychiatric examination on which . . . [the court-appointed psychiatrist] testified at the penalty phase proceeded in violation of . . . [the

defendant's] Sixth Amendment right to the assistance of counsel" (451 U.S. at 470-71). *See also People v. Guevara*, 37 N.Y.3d 1014, 174 N.E.3d 1240, 152 N.Y.S.3d 866 (2021) (reversing a conviction on the ground that the testimony of a prosecution expert psychologist who denied defense counsel admittance to a court-ordered examination of the defendant violated the Sixth Amendment).

Although the *Smith* case involved an adult defendant in a capital sentencing hearing, the rules it established are fully applicable to noncapital cases (*see, e.g., United States v. Chitty,* 760 F.2d 425, 430-32 (2d Cir. 1985); *Brown v. Butler*, 815 F.2d 1054 (5th Cir. 1987)), including juvenile court proceedings (*see, e.g., In the Matter of the Appeal in Pima County Juvenile Action No. J-77027-1,* 139 Ariz. 446, 679 P.2d 92 (Ariz. App. 1984); *In the Matter of J.J.S.*, 20 S.W.3d 837 (Tex. App. 2000); *State v. Diaz-Cardona*, 123 Wash. App. 477, 98 P.3d 136 (2004)). Moreover, the rules are not limited to evidence used at sentencing: they also apply to prosecution evidence offered on the issue of guilt. *See Estelle v. Smith,* 451 U.S. at 462-63 (Court observes that it could "discern no basis to distinguish between the guilt and penalty phases of [a] . . . capital murder trial so far as the protection of the Fifth Amendment privilege is concerned"). *See, e.g.*, *People v. Pokovich*, 39 Cal. 4th 1240, 1246, 1253, 141 P.3d 267, 271, 276, 48 Cal. Rptr. 158, 163, 169 (2006); *United States v. Garcia*, 739 F.2d 440 (9th Cir. 1984); *People v. Branch*, 805 P.2d 1075, 1082-83 (Colo. 1991) ("To be sure, *Smith* involved a prosecution for a capital offense, but its rationale, we believe, is equally applicable to those situations in which the trial court orders a competency examination when formal criminal charges are pending against a defendant. If a trial court is constitutionally required to employ adequate procedural safeguards to protect a defendant against the risk of making uncounseled inculpatory statements during a court-ordered competency examination before such statements may be used against him at the sentencing phase of a capital case, there is all the more reason to require a trial court to employ the same procedural safeguards in order to protect a defendant against the risk of making similarly uncounseled inculpatory statements that might be used against him at the guilt phase of a criminal prosecution. . . . ¶ A trial court, therefore, must provide a defendant with adequate procedural safeguards calculated to ensure protection not only of the defendant's privilege against self-incrimination in connection with a court-ordered competency examination but also of his right to counsel. Discharge of this responsibility requires a trial court to advise a defendant that he has the right not to say anything to the psychiatrist during the competency examination, that his statements to the psychiatrist can be used against him at the guilt phase of the trial as rebuttal or impeachment evidence, that he has the right to confer with counsel prior to submitting to the competency examination, and that the court will appoint an attorney for the defendant at state expense if the defendant is unable to retain counsel prior to the competency examination. A trial court's failure to adequately advise a defendant of his Fifth and Sixth Amendment rights and to provide him with the opportunity to confer with counsel prior to the commencement of the competency examination precludes the prosecution from using such statements as substantive evidence during its case-in-chief at the guilt phase of the trial. . . . These same procedural deficiencies will not prohibit the prosecution from utilizing such statements, so long as they are otherwise voluntary, either to rebut the defendant's evidence of lack of capacity to form the requisite culpable mental state or to impeach the defendant's testimony offered in defense of the

charges."). *See also State v. I.T.*, 4 N.E.3d 1139, 1141 (Ind. 2014) (state statute which "facilitate[d] [juveniles'] participation" in "a pilot project to screen and treat" "mental health or substance abuse problems" by "barring a child's statement to a mental health evaluator from being admitted into evidence to prove delinquency" had to be construed "to confer both use immunity and derivative use immunity, in order to avoid a likely violation of the constitutional privileges against self-incrimination under the Fifth Amendment and Article 1, Section 14 of the Indiana Constitution"). *See generally* LOURDES M. ROSADO & RIYA S. SHAH, PROTECTING YOUTH FROM SELF-INCRIMINATION WHEN UNDERGOING SCREENING, ASSESSMENT AND TREATMENT WITHIN THE JUVENILE JUSTICE SYSTEM (Juvenile Law Center 2007); Lourdes M. Rosado, *Outside the Police Station: Dealing with the Potential for Self-Incrimination in Juvenile Court*, 38 WASH. U. J. L. & POL'Y 177 (2012).

Smith therefore supports the respondent's right to claim the Fifth Amendment and refuse to talk to a psychiatrist in any court-ordered mental examination unless the order for the examination explicitly provides that nothing disclosed by the respondent during the examination and no results of the examination may subsequently be used against the respondent for any purpose except to determine competency to stand trial, *see* 451 U.S. at 468; *State v. Johnson*, 276 Ga. 78, 576 S.E.2d 831 (2003), and cases cited, and that the same restriction applies to "any evidence derived directly and indirectly" from the respondent's disclosures and examination results, *see Kastigar v. United States,* 406 U.S. 441, 453 (1972). Counsel should either insist upon the inclusion of such a provision in the judicial order for an examination or advise the respondent not to say a word to the examiner under any circumstances, whichever seems more appropriate to the needs of the particular situation.

A more difficult question is whether the respondent is entitled to such a restrictive order if the defense acquiesces in or affirmatively seeks the mental examination. For, although defense counsel will almost always oppose the ordering of such an examination (see § 12.12 *supra*), s/he may find it necessary to accept an examination in jurisdictions where a statute or court rule authorizes the court to order one, and s/he may even need to request an examination in situations in which the court has denied a motion for appointment of a defense mental health expert (see § 12.09 *supra*). The defendant in *Estelle v. Smith* had "neither initiate[d] a psychiatric evaluation nor attempt[ed] to introduce any psychiatric evidence" (451 U.S. at 468), and *Smith* was distinguished on this ground in *Buchanan v. Kentucky,* 483 U.S. 402 (1987), in which the Supreme Court held that when a defendant had *both* "joined in a motion for [a pretrial psychiatric] . . . examination" (*id.* at 423) *and* presented an expert witness at trial "to establish . . . a mental-status defense" (*id.* at 404), the prosecutor could constitutionally use the results of the examination to impeach this witness. *See also Penry v. Johnson*, 532 U.S. at 795 (discussing *Buchanan*); *Kansas v. Cheever*, 571 U.S. 87, 93-96 (2014) (discussing *Estelle v. Smith* and *Buchanan*). *Buchanan* poses the thorny problems: (i) whether *Smith*'s prohibition of prosecutorial use of pretrial psychiatric examination results continues to govern cases in which the examination was unopposed or sought by the respondent or was ordered in response to the respondent's raising of a claim of incompetency (in the very rare case in which s/he might do this, see § 12.19 *infra*) or some other psychiatric issue before trial *but the respondent presents no*

evidence in support of any psychiatric issue at the trial or dispositional hearing, and (ii) whether the exception to the *Smith* prohibition recognized by *Buchanan* is limited to the use of pretrial examination results *to rebut expert psychiatric evidence presented by the respondent at a trial or dispositional hearing,* or whether the respondent's raising of a psychiatric issue at the trial or hearing opens the door to the prosecutor's use of the results generally.

Regarding problem (i), the argument appears substantial that, unless and until the respondent actually presents evidence in support of a psychiatric plea or defense, *Smith* prohibits the prosecutor's use of any information produced by a pretrial psychiatric examination of the respondent, even one requested or invited by the defense. This is so because the logic of *Smith* was not that Smith's Fifth Amendment rights were violated by the competency examination conducted in that case – to the contrary, the Supreme Court acknowledged that the competency examination had been "validly ordered" by the trial judge *sua sponte,* 451 U.S. at 468 – but rather that the Fifth Amendment came into play "[w]hen [the psychiatrist] . . . went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of . . . future dangerousness, [so that] his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting" *(id.* at 467; *see id.* at 465); *Johnson v. Winstead*, 900 F.3d 428, 434 (7th Cir. 2018). *See also Allen v. Illinois,* 478 U.S. 364 (1986), upholding compulsory psychiatric examination of an individual subject to civil commitment proceedings so long as that individual "is protected from use of his [or her] compelled answers in any subsequent criminal case in which [s/]he is the defendant," *id.* at 368. Under this logic it should make no difference that the respondent originally moves for the examination or triggers it by a pretrial plea of incompetency unless such a motion or plea can properly be treated as a waiver of the Fifth Amendment Privilege. But it cannot. Under *Pate v. Robinson,* 383 U.S. 375 (1966), and *Drope v. Missouri,* 420 U.S. 162 (1975), every person accused of a crime has a federal constitutional right to an adequate psychiatric evaluation and judicial determination of competency to stand trial; and it would impermissibly place the respondent "'between the rock and the whirlpool'" (*Garrity v. New Jersey,* 385 U.S. 493, 498 (1967)) to treat the respondent's invocation of this right as a waiver of the Fifth Amendment Privilege. *See Simmons v. United States,* 390 U.S. 377, 389-94 (1968), reaffirmed in *United States v. Salvucci,* 448 U.S. 83, 89-90 (1980); *Brooks v. Tennessee,* 406 U.S. 605, 607-12 (1972); *Lefkowitz v. Cunningham,* 431 U.S. 801, 807-08 (1977); *State v. Melendez*, 240 N.J. 268, 282, 222 A.3d 639, 647 (2020) ("Like the defendants in *Garrity*, claimants in a civil forfeiture action who are defendants in a parallel criminal case also face an untenable choice: to forfeit their property or incriminate themselves. To defend against a forfeiture complaint, claimants who are also criminal defendants must file an answer that states their interest in the property. In other words, to assert their constitutional right not to be deprived of property without due process, they have to link themselves to alleged contraband and give up their constitutional right against self-incrimination. Alternatively, they can refuse to answer and lose their property. ¶ We need go no further than the reasoning in *Garrity* to find that a defendant's choice to file an answer under those circumstances is not freely made. It is fraught with coercion. A criminal defendant's statements in an answer to a civil forfeiture complaint thus cannot be considered voluntary. As a result, they cannot be introduced in the State's direct case

in a later criminal proceeding."); *cf. Jeffers v. United States,* 432 U.S. 137, 153 n.21 (1977) (plurality opinion); *United States v. Goodwin,* 457 U.S. 368, 372 (1982) (dictum); *Spaziano v. Florida,* 468 U.S. 447, 455 (1984) (dictum); *McDonough v. Smith*, 139 S. Ct. 2149, 2158 (2019); and *compare United States v. Jackson,* 390 U.S. 570, 581-83 (1968), *with Middendorf v. Henry,* 425 U.S. 25, 47-48 (1976), *and Corbitt v. New Jersey,* 439 U.S. 212, 218-20 & n.8 (1978); *compare Jackson v. Denno,* 378 U.S. 368, 387-89 & nn.15, 16 (1964), *with Spencer v. Texas,* 385 U.S. 554, 565 (1967), *and Jenkins v. Anderson,* 447 U.S. 231, 236-37 (1980). *And see Lacy v. Butts*, 922 F.3d 371 (7th Cir. 2019) (holding that an Indiana monitoring program which required incarcerated sex offenders to complete a questionnaire listing all of their sex crimes and to fill out workbooks describing those crimes – whether previously charged or uncharged – in detail violated the Fifth Amendment privilege because inmates who elected not to participate in the program were penalized by the denial of good-time credits: "[T]hrough its denial of the opportunity to earn good-time credits and its revocation of credits already earned, as a means of inducing participants to furnish information, [this program] *compels* self-incrimination in contravention of the Fifth Amendment." *Id*. at 377 (original emphasis).); *but see Chavez v. Robinson*, 12 F.4th 978 (9th Cir. 2021).

To treat the respondent's request for a psychiatric examination as a waiver of the Privilege is the more impermissible because the very purpose of the examination is to obtain information that is necessary to an intelligent judgment regarding the merit of potential psychiatric defenses and regarding the respondent's capability to participate in that judgment: A forced choice between forgoing such information and forgoing a constitutional right has none of the qualities of a valid waiver. *Compare Brooks v. Tennessee*, 406 U.S. 605, 607-12 (1972), *with Town of Newton v. Rumery*, 480 U.S. 386 (1987). In discussing *Smith* and *Buchanan,* the Supreme Court has suggested that the justification for finding a waiver of the Fifth Amendment "'[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony'" is that in this situation "'his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he has interjected into the case.'" *Powell v. Texas*, 492 U.S. 680, 684 (1989) (per curiam), quoting *Estelle v. Smith,* 451 U.S. at 465. *Accord*, *Kansas v. Cheever*, 571 U.S. at 94 ("The rule of *Buchanan*, which we reaffirm today, is that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal. . . . Any other rule would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime."; "When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him."). No similar justification exists for finding waiver when the defendant has merely sought a mental examination for the purpose of determining whether to interject psychiatric issues into the case and has then elected not to. *See Wilkens v. State*, 847 S.W.2d 547, 550 (Tex. Crim. App. 1992) ("The trial court ordered the examinations for competency and insanity at appellant's request. Appellant did not waive his Fifth Amendment privilege merely by requesting appointment of a court-appointed psychiatrist and psychologist

and submitting to a competency and sanity examination" although he did subsequently waive it under *Buchanan* by presenting evidence in support of an insanity defense.). So nothing in *Buchanan* undermines the trenchant analysis in *United States v. Alvarez*, 519 F.2d 1036, 1046-47 (3d Cir. 1975) ("The issue here is whether a defense counsel in a case involving a potential defense of insanity must run the risk that a psychiatric expert whom he hires to advise him with respect to the defendant's mental condition may be forced to be an involuntary government witness. The effect of such a rule would, we think, have the inevitable effect of depriving defendants of the effective assistance of counsel in such cases. A psychiatrist will of necessity make inquiry about the facts surrounding the alleged crime, just as the attorney will. Disclosures made to the attorney cannot be used to furnish proof in the government's case. Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness."). Thus *Smith*'s ban upon the use of evidence obtained from a pretrial psychiatric examination of a defendant to prove guilt or enhance penalty should apply "whether the defendant or the prosecutor requested the examination and whether it was had for the purpose of determining competence to stand trial or sanity" (*Gibson v. Zahradnick,* 581 F.2d 75, 80 (4th Cir. 1978); *State v. Berget*, 2013 S.D. 1, 826 N.W.2d 1, 28-37 (S.D. 2013)). *See Battie v. Estelle,* 655 F.2d 692, 700-03 (5th Cir. 1981); *and see Collins v. Auger,* 577 F.2d 1107, 1109-10 (8th Cir. 1978). It follows that orders for any of these sorts of examinations are required to contain a provision restricting the use of their products to the purposes for which the examination was ordered, and defense counsel should demand such a provision. *See*, *e.g.*, *Park v. Montana Sixth Judicial District Court, Park County,* 289 Mont. 367, 371, 374, 961 P.2d 1267, 1269-70, 1272 (1998) (approving a trial court order which required a defendant to submit to examination by a prosecution expert for possible use if the defendant presented expert testimony in support of an affirmative defense (acting under the influence of extreme mental or emotional stress for which there was a reasonable explanation or excuse) but "restricted the State's experts from disclosing to the State any incriminating statements made by Park during their examination, and stated that the experts could only testify regarding their conclusions in rebuttal to Park's expert testimony"); *State v. Goff*, 128 Ohio St. 3d 169, 170, 942 N.E.2d 1075, 1077 (2010) ("a court order compelling a defendant to submit to a psychiatric examination conducted by a state expert in response to the defendant raising a defense of self-defense supported by expert testimony on battered-woman syndrome . . . does not violate a defendant's right against self-incrimination. However, we . . . hold that to preserve a defendant's right against self-incrimination, the examination of the defendant and the subsequent testimony from the state's expert must be limited to information related to battered-woman syndrome and whether the defendant's actions were affected by the syndrome. Since the examination and testimony of the expert in this case were not so limited, we hold that the defendant's rights under Section 10, Article I of the Ohio Constitution and the Fifth Amendment to the United States Constitution were violated"); *State v. Jocumsen*, 148 Idaho 817, 229 P.3d 1179 (Idaho App. 2010) (finding an *Estelle v. Smith* violation when materials generated by a pretrial competency evaluation were included in a presentence investigation report considered by the sentencing judge after the defendant recovered competence and pleaded guilty); *In re Hernandez*, 143 Cal. App. 4th 459, 471-72, 49 Cal. Rptr. 3d 301, 309-10 (2006), discussing the

rule of *Tarantino v. Superior Court*, 48 Cal. App. 3d 465, 122 Cal. Rptr. 61 (1975), which requires that statements made by a defendant during a court-ordered competency examination be shielded by a "judicially declared immunity reasonably to be implied from the code provisions" (48 Cal. App. 3d at 469, 122 Cal. Rptr. at 63); *People v. Diaz*, 3 Misc.3d 686, 777 N.Y.S.2d 856 (N.Y. Sup. Ct., Kings Cty. 2004); *United States v. Beckford*, 962 F. Supp. 748, 765 (E.D. Va. 1997); *cf.* FED. RULE CRIM. PRO. 12.2 as applied in *United States v. Taveras*, 233 F.R.D. 318, 322 (E.D.N.Y. 2006).

Regarding problem (ii), it is noteworthy that *Buchanan* describes the "narrow" issue it decides as "whether the admission of findings from a psychiatric examination . . . profferred solely to rebut other psychological evidence presented by . . . [the defendant] violated his . . . [constitutional] rights," 483 U.S. at 404; *see also id.* at 424-25. It treats this issue as "one of the situations that we distinguished from the facts in *Smith.*" *Id.* at 423. *See also Kansas v. Cheever*, 571 U.S. at 93-94 (discussing *Buchanan*). The *Smith* opinion itself, in noting that the prosecution might be permitted to use evidence obtained by a pretrial psychiatric examination of the defendant in rebuttal, appeared to limit this possibility to cases in which the defense (i) presents expert psychiatric evidence and (ii) addresses the evidence to the specific issue on which the prosecution offers its rebuttal evidence. *Estelle v. Smith,* 451 U.S. at 466 n.10; *see also id.* at 465-66; *Powell v. Texas,* 492 U.S. at 683-84, 685 n.3; *Kansas v. Cheever*, 571 U.S. at 97; *Gholson v. Estelle,* 675 F.2d 734, 741 & n.6 (5th Cir. 1982); *Battie v. Estelle,* 655 F.2d at 701-02. There are pre-*Smith* cases allowing the prosecution greater latitude in rebuttal – for example, permitting the prosecution to use the defendant's statements made during the psychiatric examination to impeach the defendant's trial testimony, by analogy to *Harris v. New York,* 401 U.S. 222 (1971) (see § 24.23 *infra*). *People v. Brown,* 399 Mich. 350, 249 N.W.2d 693 (1976); *People v. White,* 401 Mich 482, 257 N.W.2d 912 (1977). But in the light of *Smith* these decisions are assailable under the settled principle that a defendant's statements obtained in disregard of the Fifth Amendment may not be used even to impeach the defendant's inconsistent testimony at trial (*Mincey v. Arizona,* 437 U.S. 385, 397-98 (1978); *New Jersey v. Portash,* 440 U.S. 450, 458-60 (1979); *Hemphill v. New York*, 142 S. Ct. 681, 692-93 (2022) (dictum); *United States v. Leonard,* 609 F.2d 1163 (5th Cir. 1980)). *See, e.g.*, *Wilkens v. State*, 847 S.W.2d at 553 ("a defendant has a separate Fifth Amendment privilege at the punishment phase of a capital murder case which is not waived by his testifying at guilt/innocence. Therefore, appellant's waiver of his Fifth Amendment privilege at the guilt/innocence phase concerning psychiatric testimony [by experts whom the trial court had appointed at defense counsel's request] on the issue of sanity did not carry over to the punishment phase. Under the dictates of *Smith* such psychiatric testimony would not have been admissible at the guilt/innocence phase absent appellant's waiver in that proceeding; likewise, it was not admissible at the punishment phase on the issue of future dangerousness absent some waiver by appellant."); *People v. Pokovich*, 39 Cal. 4th at 1253, 141 P.3d at 276, 48 Cal. Rptr. at 169 ("the Fifth Amendment's privilege against self-incrimination prohibits the prosecution from using at trial, for the purpose of impeachment, statements a defendant has made during a court-ordered mental competency examination"); *People v. Williams*, 197 Cal. App. 3d 1320, 1322, 1325, 243 Cal. Rptr. 480, at 480, 482 (1988) (alternative ground) ("when a court-appointed psychiatrist examines a defendant for the purpose of testifying

in the sanity phase of a bifurcated trial, defendant's constitutional privilege against self-incrimination is violated by allowing the psychiatrist to testify in the guilt phase that defendant confessed his guilt during the examination, when defendant has not placed his mental state at issue in the guilt phase of the trial"); *Gibbs v. Frank*, 387 F.3d 268 (3d Cir. 2004). Notably, the Federal Criminal Rules Advisory Committee has opted to preclude the government's use against a defendant of any information generated by court-ordered mental examinations for any purpose other than to rebut a mental health issue opened by the defense. *See* FED. RULE CRIM. PRO. 12.2(c)(4) ("No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant: ¶ (A) has introduced evidence of incompetency or evidence requiring notice [of intent to assert a defense of insanity or intent to adduce diminished-capacity evidence]. . . , or ¶ (B) has introduced expert evidence in a capital sentencing proceeding . . . .").

§ 12.15(b) State Law Prohibitions Against Using Statements Made During a Mental Health Examination as Proof of Guilt at Trial

Apart from the Fifth Amendment protections enunciated in *Estelle v. Smith,* there are statutes, court rules, and common-law decisions providing that statements made during a competency evaluation, during a sanity evaluation, or both cannot be used to prove the accused's guilt at trial. *See, e.g.,* FLA. RULE JUV. PROC. 8.095(b)(7) (2023); ILL. COMP. STAT. ANN. ch. 725, § 5/104-14 (2023); ME. REV. STAT. ANN. tit. 15, § 3318-A(9) (2023); MINN. RULE JUV. DELINQUENCY PROC. 20.01(9) (2023); *United States v. Alvarez,* 519 F.2d 1036 (3d Cir. 1975); *Lee v. County Court,* 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705 (1971). The scope of this prohibition varies from jurisdiction to jurisdiction and may depend, within any given jurisdiction, on: the nature of the examination (that is, whether it was ordered to determine the respondent's competence to stand trial or the respondent's sanity at the time of the offense); whether the examination was ordered on defense motion or on motion of the prosecution or by the court *sua sponte;* whether it was ordered before or after the respondent tendered a claim of incompetency or a plea raising some psychiatric defense, such as not guilty by reason of insanity; whether the respondent raises some such defense at trial; and whether, if s/he does, s/he calls defense psychiatric experts to support it. Compare the approaches taken in *Seng v. Commonwealth*, 445 Mass. 536, 839 N.E.2d 283 (2005); *People v. Spencer,* 60 Cal. 2d 64, 383 P.2d 134, 31 Cal. Rptr. 782 (1963); *In re Spencer,* 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965); *People v. Arcega,* 32 Cal. 3d 504, 651 P.2d 338, 186 Cal. Rptr. 94 (1982); *People v. Williams*, 197 Cal. App. 3d 1320, 243 Cal. Rptr. 480 (1988); *Parkin v. State,* 238 So.2d 817, 820 (Fla. 1970); *People v. Stevens,* 386 Mich. 579, 194 N.W.2d 370 (1972); *State v. Whitlow,* 45 N.J. 3, 210 A.2d 763 (1965); *State ex rel. LaFollette v. Raskin,* 34 Wis. 2d 607, 150 N.W.2d 318 (Wis. 1967).

Part D. Incompetency To Stand Trial

§ 12.16 APPLICABILITY OF THE DOCTRINE OF INCOMPETENCY IN JUVENILE DELINQUENCY PROCEEDINGS

The criminal procedure statutes of every State codify the common-law rule that a criminal defendant may not be tried for a crime while s/he is incompetent to stand trial. In many jurisdictions the juvenile statutes expressly adopt the same rule for delinquency proceedings. *See, e.g.,* D.C. CODE § 16-2315(c)(1) (2023); N.Y. FAM. CT. ACT §§ 322.1-322.2 (2023). *See generally* Kellie M. Johnson, Note, *Juvenile Competency Statutes: A Model for State Legislation*, 81 IND. L.J. 1067, 1081-88 (2006) (surveying juvenile competency statutes). However, even if the juvenile statutes do not specifically provide for a claim of incompetency, there is little doubt that a state court would recognize the viability of the claim. The Supreme Court has "repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Medina v. California*, 505 U.S. 437, 453 (1992)). *See also Drope v. Missouri,* 420 U.S. 162, 171-72 (1975); *Pate v. Robinson,* 383 U.S. 375, 385 (1966). Adhering to these decisions, the lower courts have consistently ruled on due process grounds that juvenile statutes must be construed so as to incorporate a prohibition against trial of a youth who is incompetent. *See, e.g., State ex rel. Dandoy v. Superior Court,* 127 Ariz. 184, 619 P.2d 12 (1980); *Golden v. State*, 341 Ark. 656, 660, 21 S.W.3d 801, 803 (2000); *In the Matter of K.G.*, 808 N.E.2d 631, 635, 639 (Ind. 2004); *Matter of S.W.T.,* 277 N.W.2d 507 (Minn. 1979); *State in the Interest of Causey,* 363 So.2d 472 (La. 1978); *In the Matter of Two Minor Children,* 95 Nev. 225, 592 P.2d 166 (1979); *People ex rel. Thorpe v. Clark,* 62 A.D.2d 216, 403 N.Y.S.2d 910 (N.Y. App. Div., 2d Dep't 1978); *In re Grimes*, 147 Ohio. App. 3d 192, 195, 769 N.E.2d 420, 422-23 (2002); *In the Interest of SWM*, 299 P.3d 673, 678 (Wyo. 2013).

§ 12.17 STANDARD FOR DETERMINING COMPETENCY

The prevailing test of incompetency in most jurisdictions is the relatively simple one whether the respondent (a) by reason of mental disease or disorder is (b) unable at the time of plea or trial to (i) understand the nature and purpose of the proceedings or (ii) consult and cooperate with counsel in preparing and presenting the defense. *E.g., Dusky v. United States,* 362 U.S. 402 (1960); *In the Matter of W.A.F.*, 573 A.2d 1264, 1265, 1267-68 (D.C. 1990); *In the Matter of Erick B.*, 4 Misc.3d 202, 206, 777 N.Y.S.2d 253, 257 (N.Y. Fam. Ct., Brooklyn Cty 2004); ME. REV. STAT. ANN. tit. 15, § 3318-A(2) (2023). *See generally* Linda A. Szymanski, *Juvenile Competency Procedures* (National Center for Juvenile Justice Oct. 2013). This is probably the federal constitutional test as well. *See Indiana v. Edwards*, 554 U.S. 164, 170 (2008); *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Pate v. Robinson,* 383 U.S. 375 (1966); *Drope v. Missouri,* 420 U.S. 162, 171-72 (1975); *see also, e.g.*, *In the Matter of Lopez v. Evans*, 25 N.Y.3d 199, 202, 206, 31 N.E.3d 1197, 1199, 1202, 9 N.Y.S.3d 601, 602, 605 (2015) (holding on state constitutional grounds that "when a parolee lacks mental competency to stand trial, it is a violation of his or her due process rights to conduct a parole revocation hearing" because "[a]n incompetent parolee is not in a position to exercise rights, such as the right to testify and the opportunity to confront adverse witnesses . . . that are directly related to ensuring

the accuracy of fact-finding"). *See also* Christopher Slobogin, *The American Bar Association's Criminal Justice Mental Health Standards: Revisions for the Twenty-First Century*, 44 HASTINGS CONST. L. Q. 1, 20-21 (2016) (explaining that the ABA's Criminal Justice Mental Health Standards concerning a defendant's "competence to proceed" employ "the test set out in the Supreme Court's decision in *Dusky v. United States*, [*supra*]").

"Where the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial, the judge on his own motion must . . . conduct a sanity hearing." *Pate v. Robinson*, *supra*, 383 U.S. at 385. Although this passage in the *Pate* opinion refers to Illinois law, it is now commonly understood as stating a federal due process requirement. *See*, *e.g.*, *Drope v. Missouri*, *supra,* 420 U.S. at 172-73; *Griffin v. Lockhart*, 935 F.2d 926 (8th Cir. 1991); *Maxwell v. Roe*, 606 F.3d 561 (9th Cir. 2010); *State v. Sides*, 376 N.C. 449, 852 S.E.2d 170 (2020); *People v. Wycoff*, 12 Cal. 5th 58, 493 P.3d 789, 283 Cal. Rptr. 3d 1 (2021); *Goad v. State*, 488 P.3d 646 (Nev. App. 2021); *and see Anderson v. Gipson*, 902 F.3d 1126, 1133 (9th Cir. 2018) ("[s]ince *Pate* courts, including the Ninth Circuit, have generally adopted the 'bona fide doubt' [regarding a defendant's competence] standard as to when a trial court is required to order a competency hearing before proceedings may continue").

In those States in which the adult criminal code or caselaw sets forth specific standards for assessing competency to stand trial but the juvenile code does not, the courts have differed as to the applicability of the adult standards to juvenile delinquency cases. *Compare In the Matter of K.G.*, 808 N.E.2d 631, 639 (Ind. 2004) ("juveniles alleged to be delinquent have the constitutional right to have their competency determined before they are subjected to delinquency proceedings" but "the adult competency statute is not applicable in making that determination"), *with In the Matter of the Welfare of D.D.N.*, 582 N.W.2d 278, 281 (Minn. App. 1998) (adult competency standards apply: "the level of competence required to permit a child's participation in juvenile court proceedings can be no less than the competence demanded for trial or sentencing of an adult"), *and with In the Matter of Carey*, 241 Mich. App. 222, 233-34, 615 N.W.2d 742, 748 (2000) (adult statutes apply but "competency evaluations should be made in light of juvenile, rather than adult, norms"), *and In re J.M.*, 172 Vt. 61, 68, 769 A.2d 656, 662 (2001) (similar to *Carey*, *supra*), *and In the Interest of SWM*, 299 P.3d 673, 678 (Wyo. 2013) (similar to *Carey*, *supra*). *See also In the Matter of W.A.F.*, 573 A.2d at 1265 & n.4, 1266, 1267-68 (D.C. juvenile statute establishing competency standard that differs from adult court rule failed to "adequately protect[ ]" juveniles' due process "right not to be tried while incompetent"; due process requires that "procedure followed in adult criminal prosecutions . . . be applied to juvenile delinquency proceedings"); *Timothy J. v. Superior Court*, 150 Cal. App. 4th 847, 860-62, 58 Cal. Rptr. 3d 746, 754-55 (2007) (juvenile can seek a finding of incompetency to stand trial based on "developmental immaturity" that does not constitute "a mental disorder or developmental disability"). Neurological and psychological research supporting the recognition that "the risk of incompetence is substantially elevated in early and mid-adolescence" and that it is important to take account of this phenomenon of "developmental incompetence" is reviewed in Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANNUAL REV. CLIN. PSYCHOL. 459, 477 (2009).

Under the conventional formulation of the competency standard, courts usually will not find a respondent incompetent unless s/he is floridly psychotic. However, in cases in which a finding of incompetency would be in the client's interest, counsel can argue that the second half of the incompetency standard – inability to confer and cooperate with counsel – should be extended to encompass:

(a) respondents whose mental disorder affects their ability to recall the events of the period when the offense is alleged to have been committed, *see Wilson v. United States,* 391 F.2d 460 (D.C. Cir. 1968); *State v. McIntosh*, 146 Wis. 2d 870, 433 N.W.2d 32 (Table), 1988 WL 126494 (Wis. App. 1988) ("We conclude that McIntosh did not receive a fair trial [on a charge of homicide by negligent use of a vehicle] because the critical evidence – whether his brakes failed – could not be extrinsically reconstructed without his testimony, [he had amnesia regarding the facts of the relevant time period,] and the strength of the state's case was not such as to negate his reasonable hypothesis of innocence."); *United States v. No Runner*, 590 F.3d 962, 965 n.2 (9th Cir. 2009) (dictum) ("courts have uniformly held that amnesia regarding the alleged crime does not constitute incompetence per se but may establish a basis for a finding of incompetence in a particular case."); *Commonwealth v. Lombardi*, 378 Mass. 612, 615-16, 393 N.E.2d 346, 348-49 (1979) ("[A] defendant's amnesia is a factor to be considered in dealing with the fundamental question whether the defendant can receive a fair trial. . . . ¶ The real question . . . is whether a trial of the defendant would be unfair in a due process sense because of his amnesia. Such a question of fundamental fairness can only be determined on a case by case basis. Where the amnesia appears to be temporary, an appropriate solution might be to defer trial for a reasonable period to see if the defendant's memory improves. That alternative appears to be foreclosed here because the defendant's amnesia has been found to be permanent. Where the amnesia is apparently permanent, the fairness of proceeding to trial must be assessed on the basis of the particular circumstances of the case. A variety of factors may be significant in determining whether the trial should proceed, including the nature of the crime, the extent to which the prosecution makes a full disclosure of its case and circumstances known to it, the degree to which the evidence establishes the defendant's guilt, the likelihood that an alibi or some other defense could be established but for the amnesia, and the extent and effect of the defendant's amnesia."); *cf. People v. Palmer*, 31 P.3d 863, 867-68 (Colo. 2001) (superseded by statute on an unrelated issue) ("[A] majority of courts have concluded that amnesia, in and of itself, does not constitute incompetency to stand trial. . . . ¶ . . . A more difficult question is whether the defendant's lack of memory is even relevant to a competency determination. Courts have split on this issue. One view holds that if the defendant has the present ability to understand the proceedings against him, to communicate with his lawyer, and generally to conduct his defense in a rational manner, then his loss of memory is irrelevant to a competency determination. . . . Another line of cases, in contrast, holds that amnesia is relevant to the issue of competency, but is only determinative if a defendant suffers a loss of memory so severe that it renders him unable to understand the proceedings against him or to assist in his own defense. . . . We find this latter approach more convincing.");

(b) respondents whose mental disorder impairs their ability to testify intelligibly in their

own defense (*see Lopez v. Evans*, 25 N.Y.3d 199, 202, 206, 31 N.E.3d 1197, 1199, 1202, 9 N.Y.S.3d 601, 602, 605 (2015) (holding on state constitutional grounds that "when a parolee lacks mental competency to stand trial, it is a violation of his or her due process rights to conduct a parole revocation hearing" because "[a]n incompetent parolee is not in a position to exercise rights, such as the right to testify and the opportunity to confront adverse witnesses . . . that are directly related to ensuring the accuracy of fact-finding");

(c) respondents whose mental disorder precludes their participation in a rational fashion in certain crucial decisions, such as whether to plead guilty in return for a bargained disposition or whether to invoke the defense of insanity at the time of the crime (see § 12.24 *infra*); and

(d) respondents whose physical disability prevents them from assisting in their own defense (*see, e.g.,* CAL. WELF. & INST. CODE § 709(a) (2023); HAW. REV. STAT. § 704-403 (2023); ILL. COMP. STAT. ANN. ch. 725, § 5/104-16(b) (2023); OR. REV. STAT.§ 419C.378(1) (2023)). *See generally* Marty Beyer, *What's Behind Behavior Matters: The Effects of Disabilities, Trauma and Immaturity on Juvenile Intent and Ability to Assist Counsel*, 58 GUILD PRACTITIONER 112 (2001); Thomas Riffin, *Competence to Stand Trial Evaluations with Juveniles*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 15 (2006); Melinda G. Schmidt, N. Dickon Reppucci & Jennifer L. Woodard, *Effectiveness of Participation as a Defendant: The Attorney-Client Relationship*, 21 BEHAV. SCI. & L. 175 (2003); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005).

Supreme Court decisions involving constitutional claims by condemned inmates that they are incompetent to be executed can be invoked to shed some light by analogy on what is required to satisfy the mental-disease-or-disorder component and the inability-to-understand component of the standard test for incompetency at the pretrial and trial stages. *Madison v. Alabama*, 139 S. Ct. 718 (2019), recognizes that questions of competency turn on the "particular effect" of any cognitive impairment – specifically, the individual's ability or "inability to rationally understand" whatever information is necessary to perform the respondent's task at any stage – not on the diagnostic label or etiology of the impairing condition. The "standard has no interest in establishing any precise cause: Psychosis or dementia, delusions or overall cognitive decline are all the same . . . so long as they produce the requisite lack of comprehension. . . . ¶ In evaluating competency to be executed, a judge must therefore look beyond any given diagnosis to a downstream consequence." (*Id*. at 728-29.) *See also State v. Linares*, 2017-NMSC-014, 393 P.3d 691, 697, 698 (N.M. 2017) ("A defendant may be incompetent to stand trial due to mental retardation . . . [although] mental retardation, in and of itself, is not conclusive evidence that a defendant is incompetent. . . . ¶ The evidence adduced at the mental retardation hearing supports the conclusion that Linares is incapable of consulting with her attorney with a reasonable degree of rational understanding, that she holds a fundamentally incoherent view of the nature of the proceedings that were to be brought against her, and that she would not comprehend the reasons for punishment if she were convicted. Accordingly, substantial evidence supports the district court's determination that Linares is incompetent."). *Madison* treats *Panetti v. Quarterman*, 551

U.S. 930 (2007), as the governing precedent and describes *Panetti* as holding that "the issue is whether a 'prisoner's concept of reality' is 'so impair[ed]' that he cannot grasp the . . . [relevant legal proceeding's] 'meaning and purpose' . . . . " (*Madison*, 139 S. Ct. at 723.). Both the facts and the reasoning in *Panetti* add some useful insight here. In challenging his competency for execution, Panetti claimed that he suffered from psychotic delusions that "recast . . . [his] execution as 'part of spiritual warfare . . . between the demons and the forces of the darkness and God and the angels and the forces of light . . .' . . . [and that] although . . . [he] claims to understand 'that the state is saying that [it wishes] to execute him for [his] murder[s],' he believes in earnest that the stated reason is a 'sham' and the State in truth wants to execute him 'to stop him from preaching'" (*Panetti*, 551 U.S. at 954-55). The lower federal courts found these delusions irrelevant because the "'test for competency to be executed requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution'" (*id*. at 942). The Supreme Court declared this test unconstitutionally narrow. Although it did "not attempt to set down a rule governing all competency determinations" (*id*. at 960-61), it did observe that in the seminal case of *Ford v. Wainwright*, 477 U.S. 399 (1986), "[w]riting for four Justices, Justice Marshall . . . indicat[ed] that the Eighth Amendment prohibits execution of 'one whose mental illness prevents him from comprehending the reasons for the penalty or its implications . . .' [whereas] Justice Powell, in his separate opinion, asserted that the Eighth Amendment 'forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it'" (*Panetti*, 551 U.S. at 957). The *Panetti* Court concluded that "the principles set forth in [each of these] *Ford* [opinions] are put at risk by a rule that deems delusions relevant only with respect to the State's announced reason for a punishment or the fact of an imminent execution . . . as opposed to the real interests the State seeks to vindicate" (*id*. at 959). "A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it." *Id*. The same conception of rational understanding plainly should apply at earlier stages of a criminal or delinquency case as well. *United States v. Nissen*, 550 F. Supp. 3d 1002, 1017 (D.N.M. 2021) ("In determining a defendant's competency, 'it is not enough . . . that the defendant is oriented to time and place and has some recollection of events.' *Dusky v. United States*, 362 U.S. [402] at 402 [(1960)]. Nor is it enough that 'the defendant can make a recitation of the charges . . . for proper assistance in the defense requires an understanding that is "rational as well as factual."' *United States v. Hemsi*, 901 F.2d 293, 295 (2d Cir. 1990) (quoting *Dusky v. United States*, 362 U.S. at 402)."). A respondent who knows that s/he is being haled into court to be prosecuted on a delinquency charge but who delusionally believes that the charge is the work of a conspiracy between the state and the devil will not make the cut for competence.

Useful information about competency evaluations can be found in John T. Philipsborn & Melissa Hamilton, Jill Molloy & Sarah L. Cooper, *Competence to Stand Trial Assessment: Practice-Based Views on the Role of Neuroscience*, 15 U. ST. THOMAS J. L. & PUBLIC POLICY 259 (2021).

§ 12.18 RESULTS OF A FINDING OF INCOMPETENCY

If a respondent is found to be incompetent to stand trial, s/he will be confined in a mental health facility (*see*, *e.g.*, *United States v. Shawar*, 865 F.2d 856 (7th Cir. 1989); *United States v. Brennan*, 928 F.3d 210 (2d Cir. 2019); *United States v. Quintero*, 995 F.3d 1044 (9th Cir. 2021); *cf. United States v. Ceasar*, 30 F.4th 497 (5th Cir. 2022) – usually a state hospital and, in cases of violent offenses, a secure ward of that hospital. In *Jackson v. Indiana,* 406 U.S. 715 (1972), the Court imposed the following due process restrictions upon the duration of the confinement:

> [A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal. (*Id.* at 738.)

Substantial delays in transferring an incompetent respondent from a detention facility to a mental health facility for evaluation of his or her prospects for restoration to competency are impermissible under *Jackson* (*see*, *e.g.*, *United States v. Donnelly*, 41 F.4th 1102 (9th Cir. 2022); *Stiavetti v. Clendenin*, 65 Cal. App. 5th 691, 280 Cal. Rptr. 3d 165 (2021); *cf. Medina v. Superior Court of Orange County*, 65 Cal. App. 5th 1197, 281 Cal. Rptr. 3d 1 (2021); *and see Carr v. State*, 303 Ga. 853, at 853, 815 S.E.2d 903, 906 (2018) (invalidating a statute that required automatic commitment of defendants charged with violent crimes and found incompetent to stand trial: "Because the nature of *automatic* commitment for all those defendants does not bear a reasonable relation to the State's purpose of accurately determining the restorability of individual defendants' competence to stand trial, that aspect of . . . [the statute] violates due process. . . . In such cases, the trial court should proceed as it does in determining how to evaluate mentally incompetent defendants accused of nonviolent offenses. To ensure that the nature of commitment to the department is appropriate for the particular defendant, the court should consider all relevant evidence and make a finding as to whether the evaluation . . . should be conducted on an inpatient or outpatient basis. A defendant who is not already lawfully detained should be committed to the department only if the court finds that such confinement is reasonably related to the purpose of accurately evaluating whether that particular defendant can attain competency. A hearing on this issue should be held at the same time or promptly after the court initially determines the defendant's competency to be tried.")): courts have rejected institutional claims that overcrowding of the only available facilities can justify protracted pre-commitment confinement (*see*, *e.g.*, *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003); *Disability Law Center v. Utah*, 180 F. Supp. 3d 998 (D. Utah 2016); *Advocacy Center for Elderly and Disabled v. Louisiana Department of Health and Hospitals*, 731 F. Supp. 2d 603 (E.D. La. 2010); *J.K. v. State*, 469 P.3d 434 (Alaska App. 2020); *State v. Hand*, 192 Wash. 2d 289, 295-99, 429 P.3d 502, 505-07 (2018)). If, upon evaluation, it appears that there is no substantial probability that the respondent will become competent to be tried in the foreseeable future and if s/he is not civilly committed, s/he must be released. *Harris v. Clay County*, 40 F.4th

266 (5th Cir. 2022); *State ex rel. Deisinger v. Treffert*, 85 Wis. 2d 257, 269, 270 N.W.2d 402, 408 (1978). *See also Sharris v. Commonwealth*, 480 Mass. 586, 106 N.E.3d 661 (2018), requiring the dismissal of criminal charges when a defendant found incompetent to be tried is released under *Jackson*; *accord*, *Gonzales v. State*, 15 So.3d 37 (Fla. App. 2009).

Thus in cases in which the hospital concludes that restoration to competency is not probable and in which the state refrains from seeking civil commitment, the child will be released. Usually, the second of these conditions occurs only in cases of minor property offenses and minor offenses against the person, and even then only if the respondent has no significant prior record. If the gravity of the present offense or if the prior record causes the prosecutor to fear further crimes by the respondent, the prosecutor is likely to seek civil commitment as a way of getting the respondent off the streets. Moreover, in some jurisdictions the statute mandates the initiation of civil commitment proceedings if a juvenile is found to be incompetent to stand trial. *See, e.g.,* ARK. CODE ANN. § 9-27-502(b)(9)(A) (2023); D.C. CODE § 16-2315(c)(1) (2023).

Of course, even when the state elects to seek civil commitment, it will not necessarily succeed in committing the child. Under typical civil commitment statutes, an individual is subject to commitment only if s/he is mentally ill or intellectually disabled *and* if these conditions render the individual dangerous to self or others. *See, e.g.,O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975) ("a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends"). And under *Addington v. Texas,* 441 U.S. 418, 425-33 (1979), a state bears the burden proving illness and dangerousness by "clear and convincing" evidence or an equivalent standard. *Id*. at 433. Individuals whose incompetency is based on factors other than mental disease or defect – such as amnesia or physical disability – will probably be deemed ineligible for civil commitment. And there are many mentally ill and intellectually disabled people who, although incompetent to stand trial, are not dangerous to self or others. However, counsel should be aware of the risk that a far less demanding standard for commitment – one that asks only whether the child is mentally or emotionally ill and whether s/he can "benefit from treatment" – may be applied in cases of so-called voluntary commitment of a child by his or her parent or of a ward of the State by the public agency exercising guardianship. *See Parham v. J.R.,* 442 U.S. 584 (1979); *Secretary of Public Welfare v. Institutionalized Juveniles,* 442 U.S. 640 (1979).

If the state seeks and succeeds in obtaining an order of involuntary civil commitment, the commitment will, as a practical matter, continue until such time as (a) the institutional psychiatrists believe that the respondent has recovered from his or her mental illness or at least has ceased to be physically dangerous to self or others, or (b) the institution runs out of beds and is glutted with inmates sicker than the respondent. In theory, "even if . . . involuntary confinement was initially permissible, it could not constitutionally continue after that [initial] basis [– illness plus dangerousness –] no longer existed." *O'Connor v. Donaldson,* 422 U.S. at 575; *see*, *e.g.*, *Van Orden v. Schafer*, 129 F. Supp. 3d 839, 867-70 (E.D. Mo. 2015). But, unless counsel monitors the hospital's continuing justification for confining a respondent, the child

could end up spending his or her childhood and even much of his or her adult life civilly committed to a mental institution. Indeed, the statistical evidence shows that "[c]hildren, on the average, are confined for longer periods than are adults." *Parham v. J.R.*, 442 U.S. at 628 (Brennan, J., concurring & dissenting).

In federal practice, 18 U.S.C. § 4246(e) authorizes the conditional discharge of persons involuntarily committed as incompetent to stand trial. The procedure to be followed in proceedings to revoke such a discharge under § 4246(f) is discussed in *United States v. Perkins*, 67 F.4th 583 (4th Cir. 2023), which, *inter alia*, holds that the government's burden of proof on the issues of failure to comply with a required treatment regimen and of dangerousness is a preponderance of the evidence.

§ 12.19 STRATEGIC CONSIDERATIONS IN DECIDING WHETHER TO RAISE A CLAIM OF INCOMPETENCY

§ 12.19(a) The General Inadvisability of Raising a Claim of Incompetency in a Juvenile Delinquency Case

Counsel should ordinarily be very hesitant to raise a claim of incompetency in a juvenile delinquency case. As explained in § 12.18 *supra,* the consequence of a finding of incompetency may be civil commitment to a mental hospital for much of the child's lifetime. In adult criminal court, where a serious felony may carry a penalty of 20 years or more, it will occasionally be in the defendant's interest to accept prolonged hospitalization to escape an even longer prison sentence. However, in juvenile court, a delinquency finding rarely exposes the respondent to more than one and a half years of placement. See § 38.03(c) *infra.* Quite clearly, it is not worth averting the risk of that one and a half years of placement at the cost of many years of institutionalization in a mental hospital.

There are also other adverse consequences that can flow from raising a claim of incompetency. *See, e.g.*, *United States v. Bergrin*, 885 F.3d 416, 420 (6th Cir. 2018) ("The 'collateral consequences of being adjudged mentally ill' include potential limits on the right to vote, serve on a jury, obtain a driver's license, and own a gun."). In the event that the respondent is found to be only temporarily incompetent, with the prospect of regaining capacity to stand trial, s/he may be held for several months in the mental hospital and then returned to court to face the original charge; then, if s/he is convicted and sentenced to a term of incarceration, the length of the sentence will not be proportionately reduced to give "credit" for the months s/he spent in the mental hospital. And in the event that the respondent is not found incompetent at all, the incompetency proceedings – the mental examination and the incompetency hearing – may provide the prosecution with information about the respondent's background and psychic make-up that the prosecutor can use: (i) at Initial Hearing, to secure an order of pretrial detention; (ii) to counter claims that defense counsel might make at a suppression hearing when challenging incriminating statements or tangible evidence seized by "consent" searches, on theories that rely in whole or part upon the respondent's vulnerable mental condition; (iii) at trial, to impeach the

respondent's credibility as a witness, refute defenses of diminished capacity or insanity, and sometimes affirmatively prove guilt; and (iv) at sentencing, to argue for a harsher sentence on the ground that the respondent's mental problems render him or her too dangerous to leave at large in the community. There are legal doctrines that the defense can invoke to ward off these consequences (see § 12.15(a) *supra*) but they are full of legal and practical wrinkles that may render their protection less than fully effective in any particular case.

Finally, counsel must be aware that competency proceedings can consume several months, since there will probably be at least two mental examinations (one by defense experts and one by prosecution experts), and the court proceedings will be repeatedly continued because the experts' reports are not ready or the attorneys or experts have scheduling conflicts. This delay is yet another factor rendering an incompetency claim inadvisable in cases in which a client is detained pending trial or is likely to be committed for an in-patient evaluation.

§ 12.19(b) The Limited Circumstances in Which an Incompetency Claim May Be Advisable or Necessary

The one instance in which a claim of incompetency may be advisable is when counsel is confident that the child faces little or no risk of civil commitment if found incompetent. This circumstance would arise when: (i) the finding of incompetency would rest upon some physical condition or non-organic mental problem (such as amnesia) that could not serve as a "mental disease or defect" rendering the child eligible for civil commitment under state statutory standards (see § 12.18 *supra*); or (ii) even though the finding of incompetency is based on a mental disease or defect, the defense psychiatrist or psychologist is certain that there is no basis for a finding that the respondent is so "dangerous" to self or others as to require civil commitment, and there is no risk that the child will be subjected to the less exacting standards applicable to third-party "voluntary" commitments of children (see § 12.18 *supra*). In these very rare circumstances counsel can feel reasonably safe that a finding of incompetency would spare the respondent from facing trial on the charged offenses without exposing him or her to the peril of civil commitment. However, even in these situations, the incompetency claim should not be pursued unless the defense psychiatrist or psychologist is confident that the respondent will not be classified as likely to regain capacity and thereby subjected to a period of hospitalization followed by return to court to face trial on the charges.

There may be some cases in which the respondent is functioning so poorly that s/he cannot communicate with counsel at all. In these unusual circumstances the ethical directives contemplate that the attorney will look to the incompetent person's "legal representative." *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14, Comment (2023); AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1980). Presumably, this would mean the child's parent or the adult relative or foster parent who serves as guardian of the child. *Cf. Parham v. J.R.,* 442 U.S. 584, 602-04 (1979). However, in cases in which the parent's or guardian's interests are adverse to the child's (see § 4.04 *supra*), counsel will be obliged to seek appointment of a guardian *ad litem* (*see, e.g.,* MINN. RULE JUV.

DELINQUENCY PROC. 24.01(A) (2023); *see also R.L.R. v. State,* 487 P.2d 27, 35 & n.46 (Alaska 1971)), even though the practical consequence will be that the judge and prosecutor are alerted to the respondent's competency problems and may raise the incompetency issue that defense counsel would prefer to avoid (*but see People v. Tortorici*, 92 N.Y.2d 757, 767, 709 N.E.2d 87, 93, 686 N.Y.S.2d 346, 352 (1999) (trial court properly exercised its discretion in declining to order a pretrial competency hearing *sua sponte*, given the circumstances of the case including the "conscious choice of defendant's lawyer not to request a hearing (or to request the court to order a hearing *sua sponte*) . . . [and that] a *sua sponte* competency hearing might well have been viewed by the defense as interfering with its strategy")).

§ 12.20 PROCEDURES FOR RAISING AND LITIGATING A CLAIM OF INCOMPETENCY

In the uncommon case in which counsel does believe that a claim of incompetency to be tried may be in the respondent's interest, s/he will need to develop sufficient evidence to convince the presiding judge that there is a *bona fide* doubt concerning the defendant's competence. This is often possible on the basis of a history of mental disorder shown through medical records or lay testimony, without having the respondent clinically examined for the purpose. However, because of the numerous problems and pitfalls involved in raising the issue of competency, it is ordinarily wise for counsel is to retain a psychiatrist or psychologist to examine the respondent and determine whether: (i) s/he is arguably incompetent under the applicable standard (see § 12.17 *supra*); and (ii) there is little or no risk that raising the claim of incompetency will result in the respondent's being civilly committed or deemed likely to regain capacity to stand trial (see §§ 12.18, 12.19 *supra*). *Cf. Blakeney v. United States*, 77 A.3d 328, 342-43, 345 (D.C. 2013) ("The test for determining when defense counsel is obligated to raise the issue of the defendant's competency with the court cannot be stated with precision. . . . That a defendant suffers from a severe mental disorder does not necessarily mean he is incompetent; the latter is a 'much narrower concept.' . . . [W]e hold that criminal defense counsel must raise the issue of the defendant's competency with the court if, considering all the circumstances, objectively reasonable counsel would have reason to doubt the defendant's competency. Failure to do so is constitutionally deficient performance."); *Humphrey v. Walker*, 294 Ga. 855, 874-75, 757 S.E.2d 68, 83 (2014). The procedures for obtaining a defense mental health expert are described in § 12.09 *supra.* For an overview of the relevant forensic-science materials, *see* John T. Philipsborn, *Lawyering Competence to Stand Trial with an Eye on Neuroscience*, 43-NOV THE CHAMPION 18 (2019).

Assuming that the examination results in a report attesting to the respondent's incompetency and assuming that counsel concludes that an incompetency claim is the proper strategy, counsel then will proffer the report to the court together with whatever written pleading, motion, or "suggestion" of present incompetency is required by local practice in order to raise the claim. In many jurisdictions the judge will, at this point, routinely grant a prosecutorial request that the respondent be ordered to submit to an examination by a prosecution psychiatrist or psychologist. *But see State v. Sharrow*, 205 Vt. 300, 175 A.3d 504, 505 (2017) ("This case

comes before the Court on interlocutory appeal. The sole issue is whether, under . . . [the applicable statute], the State may compel a defendant to submit to a competency evaluation conducted by a mental health expert of the State's choosing, following a court-ordered competency evaluation by a neutral mental health expert. We hold that the State may not compel such an evaluation. . . ." *Id*. at 302-03, 175 A.3d at 505. "[O]ur conclusion that the court lacks the authority to order a defendant to submit to a competency evaluation conducted by an expert retained by the State is consistent with underlying constitutional principles. . . . [W]here – as is the case here – an indigent defendant's mental health is at issue, 'due process requires that the State provide the defendant with the assistance of an independent psychiatrist.' . . . Additionally, in the context of a competency hearing, the U.S. Supreme Court has recognized that '[f]or the defendant, the consequences of an erroneous determination of competence are dire. . . .' ¶ . . . [A]s other courts that have addressed this issue have noted, '[t]he policy reasons behind prohibiting the [State] from obtaining its own competency evaluation are clear.'. . . Specifically, ordering 'an examination for the sole purpose of ascertaining competency, especially if ordered against a defendant's wishes,' creates the risk that the State 'would gain the inherent and possibly unfair advantage of gleaning insight as to the defense strategy.'" *Id*. at 306-08, 175 A.3d at 508-09.); *State v. Garcia*, 128 N.M. 721, 998 P.2d 186 (N.M. App. 2000) (holding that after a court has ordered a competency examination by a neutral ("court") expert, it may in its discretion refuse to order a follow-up examination by a prosecution expert.).

After all of the mental examinations are completed and the reports filed, the judge will convene an evidentiary hearing on the issue of competency. The defense has a due process right to an adversarial hearing unless the examinations have dispelled any significant doubt of incompetency. *Pate v. Robinson,* 383 U.S. 375 (1966); *Drope v. Missouri,* 420 U.S. 162 (1975). *See*, *e.g.*, *Taylor v. Davis*, 164 F. Supp. 3d 1147 (N.D. Cal. 2016), *postconviction relief granted in* 213 F. Supp. 3d 1232 (N.D. Cal. 2016), *aff'd*, 747 Fed. Appx. 577 (9th Cir. 2018) ("Due process requires a trial court to conduct a competency hearing if it has a 'bona fide doubt' concerning the defendant's competence. . . . ¶ . . . A good faith doubt about a defendant's competence arises 'if there is substantial evidence of incompetence.'"). State law may go further and require a hearing whenever the court has ordered a competency evaluation, whatever the results of that evaluation may be. *See Johnson v. State*, 254 So.3d 1035 (Fla. App. 2018). The jurisdictions differ as to who bears the burden of proof at the hearing, with some placing the burden upon the State once the issue has been raised, and others assigning the burden to the defense. *See Cooper v. Oklahoma*, 517 U.S. 348, 360-62 & nn.16-18 (1996) (citing state statutes and caselaw). In the latter jurisdictions, the quantum of the burden imposed on the defense is a "preponderance of the evidence." *See id*. at 361 n.17. The Supreme Court held in *Cooper* that imposing upon the accused the heavier burden of "clear and convincing evidence" would violate the Due Process Clause. *See id*. at 362-69. Although the Court has not yet addressed the distinct question of what burden must be placed upon the State when a finding of incompetency is sought against a respondent who opposes it and when the result is involuntary hospitalization, the reasoning of *Cooper* and the Court's decision in the civil commitment context in *Addington v. Texas*, 441 U.S. 418 (1979), strongly suggest that the burden must be placed upon the State to prove incompetency by "clear and convincing evidence." *See Jones v. United States*, 463 U.S.

354 (1983) (distinguishing *Addington* in cases in which a defendant has been found not guilty by reason of insanity because, in such cases, commitment is warranted by "the proof . . . [adduced at trial that the defendant] committed a criminal act as a result of mental illness," *id*. at 366-67 – a circumstance justifying "the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment," *id*. at 370); *and see Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

The prosecution may seek an order requiring that a mentally incompetent respondent be involuntarily medicated in order to render him or her capable to stand trial. In *Sell v. United States*, 539 U.S. 166, 179-80 (2003), the Supreme Court held that such orders are permissible consistently with Due Process if, "but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." The Court stated that "[t]his standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances," but cautioned that "those instances may be rare." *Id*. The prosecution "must establish the four [*Sell*] factors by clear and convincing evidence, and not just by a preponderance of the evidence" (*United States v. James*, 938 F.3d 719 (5th Cir. 2019)). The potential harm of forced medication and the high bar that a prosecutor must meet to obtain an involuntary-medication order under *Sell* are discussed in *United States v. Berry*, 911 F.3d 354 (6th Cir. 2018). Divergent lower-court interpretations of the *Sell* standard are discussed in Blake R. Hills, Sell v. United States: *Has the Split Between the Lower Courts Created a Substantial Likelihood of Injustice?,* 38 QUINNIPIAC L. REV. 83 (2019). In federal prosecutions, an involuntary-medication order can be challenged by an immediate interlocutory appeal (see § 26.01 *supra*); in state prosecutions, that may or may not be so, but the order may be challenged by an action in federal court. The federal filing should be captioned in the alternative as a petition for habeas corpus under 28 § U.S.C. 2241 and as a civil-rights action for injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343(3). *See Bean v. Matteucci*, 986 F.3d 1128 (9th Cir. 2021).

Part E. Insanity

§ 12.21 APPLICABILITY OF THE INSANITY DEFENSE TO JUVENILE DELINQUENCY PROCEEDINGS

In many States the insanity defense is just as applicable in juvenile court as it is in adult criminal court. *See, e.g., In re Ramon M.,* 22 Cal. 3d 419, 584 P.2d 524, 149 Cal. Rptr. 387 (1978) (intellectual disability); *State in the Interest of Causey,* 363 So.2d 472 (La. 1978); *In the Matter of Stapelkemper,* 172 Mont. 192, 562 P.2d 815 (1977); *In the Matter of L.J.,* 26 Or. App. 461, 552 P.2d 1322 (1976); *In the Interest of Winburn,* 32 Wis. 2d 152, 145 N.W.2d 178 (1966); *but see Golden v. State*, 341 Ark. 656, 660-62, 21 S.W.3d 801, 803-04 (2000) (state legislature has not provided for an insanity defense in juvenile court and the Constitution does not require it); *In the Matter of C.W.M.,* 407 A.2d 617 (D.C. 1979) (upholding the constitutionality of a D.C. statute that prohibits the use of an insanity defense in a juvenile trial but permits evidence of

insanity as a mitigating circumstance at sentencing); *Commonwealth v. Chatman*, 260 Va. 562, 564-65, 538 S.E.2d 304, 304-05 (2000) (same as *Golden v. State*, *supra*). *Compare State in the Interest of R.G.W.,* 135 N.J. Super. 125, 342 A.2d 869 (1975), *aff'd,* 70 N.J. 185, 358 A.2d 473 (1976) (holding that the earlier ruling in *State in the Interest of H.C.,* 106 N.J. Super. 583, 256 A.2d 322 (Juv. and Dom. Rel. Ct., Morris Co. 1969), restricting insanity claims to the sentencing stage of juvenile proceedings, was legislatively superseded by a statute that authorizes the insanity defense in a juvenile trial). *See generally* Emily S. Pollock, Note, *Those Crazy Kids: Providing the Insanity Defense in Juvenile Courts*, 85 MINN. L. REV. 2041, 2052-59 (2001) (surveying state standards for the insanity defense in juvenile court).

§ 12.22 THE STANDARD FOR ACQUITTING ON GROUNDS OF INSANITY AT THE TIME OF THE OFFENSE

The traditional *M'Naghten* rule, which is still employed in a number of States, provides "that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case,* 8 Eng. Rep. 718, 722 (1843). *See, e.g.,* N.Y. FAM. CT. ACT § 303.3 (2023) (incorporating the insanity standard of N.Y. Penal Law). *See also* Christopher Slobogin, *The American Bar Association's Criminal Justice Mental Health Standards: Revisions for the Twenty-First Century*, 44 HASTINGS CONST. L. Q. 1, 22-23 (2016) (explaining that the ABA's Criminal Justice Mental Health Standards "opt for a 'liberal' version of the *M'Naghten* test"). Other States employ the American Law Institute (ALI) test, which provides that "[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 4.01 (1962), 10 U.L.A. 490-91 (1974)). *See generally Kahler v. Kansas*, 140 S. Ct. 1021 (2020) (surveying varying formulations of the insanity defense and collecting an array of federal and state statutes and British and American caselaw); *Clark v. Arizona*, 548 U.S. 735, 749-52 & nn.12-22 (2006) (same); ABRAHAM S. GOLDSTEIN, THE INSANITY DEFENSE (1980 ed.); DONALD H. J. HERMANN, THE INSANITY DEFENSE: PHILOSOPHICAL, HISTORICAL, AND LEGAL PERSPECTIVES (1983); RITA J. SIMON AND DAVID E. AARONSON, THE INSANITY DEFENSE, at *2: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA (1988); Richard A. Wise & Denitsa R. Mavrova Heinrich, *Toward a More Scientific Jurisprudence of Insanity*, 95 TEMPLE L. REV. 45 (2022); Deborah W. Denno, *How Experts Have Dominated the Neuroscience Narrative in Criminal Cases for Twelve Decades: A Warning for the Future*, 63 WILLIAM & MARY L. REV. 1215 (2022). The *Clark* decision rejects a due process challenge to Arizona's "fragment[ary]" *M'Naghten* rule which asks only the "moral incapacity" question "whether a mental disease or defect leaves a defendant unable to understand that his action is wrong" and not the "alternative" "cognitive incapacity" question "whether a mental defect leaves the defendant unable to understand what he is doing" (*id*. at 747, 756); the *Kahler* decision rejects a due process challenge to Kansas's refusal to recognize any insanity defense that goes beyond the

traditional concept of "diminished capacity" (see § 33.21 *infra*), the Court noting that Kansas does allow defendants to "raise mental illness after conviction to justify either a reduced term of imprisonment or commitment to a mental health facility" (140 S. Ct. at 1024); the upshot of these cases is that the federal Constitution imposes no significant substantive constraint upon the states' power to craft insanity-defense standards. *But see* Matthew Hughes, *Comment, A New Argument for the Next* Kahler v. Kansas*: Due Process Demands More Than Cognitive Capacity,* 15 LIBERTY U. L. REV. 27 (2020).

In all jurisdictions the defense bears the burden of introducing sufficient evidence to raise the issue of insanity. The requisite quantum of evidence varies among jurisdictions. Some States provide that the defense can raise the issue by merely presenting "some evidence," or enough evidence to raise a reasonable doubt, whereupon the burden shifts to the prosecution to prove sanity beyond a reasonable doubt, just as it must prove every element of the offense beyond a reasonable doubt. In other States the defense bears the burden of persuasion and must prove insanity by a preponderance of the evidence. Constitutional challenges to placing the burden on the defense have been consistently rejected. *Rivera v. Delaware,* 429 U.S. 877 (1976) (per curiam); *see Patterson v. New York,* 432 U.S. 197, 201-05 (1977) (dictum); *Jones v. United States,* 463 U.S. 354, 368 n.17 (1983) (dictum).

§ 12.23 INADVISABILITY OF RAISING THE INSANITY DEFENSE IN JUVENILE DELINQUENCY CASES

The primary consideration militating against the raising of incompetency claims in juvenile court (see § 12.19 *supra*) – the risk of institutionalization in a mental hospital for many years more than the respondent would serve if convicted at trial – also renders the insanity defense highly inadvisable. Indeed, the risks are even greater in the context of insanity defenses. A respondent who is found incompetent to stand trial and who is then subjected to involuntary civil commitment proceedings is entitled to a hearing at which the State must show by clear and convincing evidence both that the respondent is mentally ill and that s/he is dangerous to self or others. See §§ 12.18, 12.20 *supra.* In a number of States the statutes provide for civil commitment of an insanity acquittee as an automatic consequence of the finding of insanity made at trial, even though that finding is usually made under the far weaker "preponderance of the evidence" standard and does not involve an express finding of dangerousness. *See, e.g.,* COLO. REV. STAT. § 16-8-105.5(4) (2023). *But cf. People v. Daryl T.*, 166 A.D.3d 68, 84 N.Y.S.3d 458 (N.Y. App. Div., 1st Dep't 2018) (describing New York's procedure, under which a verdict or plea that a defendant is "not responsible by reason of mental disease or defect" gives rise to a hearing at which the prosecution "bear[s] the burden of proving 'to the satisfaction of the court,' i.e., by a fair preponderance of the credible evidence, that the defendant has a dangerous mental disorder or is mentally ill" (*id*. at 77, 74 N.Y.S.3d at 464); the court holds that defense counsel "rendered ineffective assistance when he conceded at the plea proceeding that defendant was a danger to himself and society, and waived defendant's right to an initial hearing [on the issue of dangerousness] before reviewing the psychiatric examination reports which had not yet been prepared for the court. Further, at the proceeding that followed the issuance of the reports,

counsel simply relied on the psychiatrists' reports and deferred to the court's discretion. He did not call any witnesses or seek to cross-examine the psychiatrists who prepared the reports. Nor did counsel consult an expert on defendant's behalf who might have offered a contrasting opinion." (*id*., 84 N.Y.S.3d at 464-65).).

In *Jones v. United States,* 463 U.S. 354 (1983), the Court sustained the constitutionality of a statute that provided that defendants who "successfully invoke[ ] the insanity defense" are automatically "committed to a mental hospital" (*id*. at 356). Under such a statutory scheme, an insanity acquitee is theoretically "entitled to release when he has recovered his sanity or is no longer dangerous." *Id*. at 368. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71 (1992) (holding Due Process violated by a state statute that permitted the continuing confinement of an insanity acquittee even after a hospital review committee had concluded that the acquittee's mental illness was in remission); *see also Kansas v. Crane*, 534 U.S. 407, 412-13 (2002); *Richard S. v. Carpinello*, 589 F.3d 75, 82-85 (2d Cir. 2009); *State v. Edwards*, 2022-00983 (La. 11/1/22), 348 So.3d 1269, 1272 (La. 2022) (a person acquitted by reason of insanity "must be conditionally discharged despite the State's clear and convincing evidence of his dangerousness because, under the law as amended to comply with *Foucha* , . . . [such a person] must be *both* dangerous *and* mentally ill" in order to justify his or her continued detention). But once in an institution the acquittee is likely as a practical matter to be confined at the pleasure of the institution's medical staff, since they will both create and evaluate the record on which any subsequent determination of recovery or dangerousness is going to be based, and their observations and findings are bound to be given great deference by the courts. *See, e.g.*, *State v. Klein*, 156 Wash. 2d 103, 124 P.3d 644 (2005).

Even in the States that extend the usual procedural protections in civil commitment proceedings to insanity acquittees, an insanity acquittal still poses greater risks than a finding of incompetency to stand trial. A respondent who is found incompetent to stand trial cannot have the pending delinquency charge used against him or her in the determination of "dangerousness" for civil commitment purposes, since s/he has never been convicted of the charge and must be presumed innocent. In contrast, "[a] verdict of not guilty by reason of insanity establishes two facts: (i) the [respondent] . . . committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness." *Jones,* 463 U.S. at 363. And in *Jones,* the Court concluded that "[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness," *id.* at 364, even when the criminal act is "a nonviolent crime against property." *Id.* at 365. The Court's conclusions on this point were made solely in the context of reviewing the reasonableness of a finding of legislative fact underlying a challenged statute, *see id.* at 364-65, and the Court's deference to legislative judgment in *Jones* would not necessarily justify a finding of fact in an individual case that the evidence shows a particular respondent to be "dangerous." *Cf. id.* at 365 n.14. However, notwithstanding this argument for distinguishing *Jones,* there is considerable risk that lower courts will follow the reasoning of *Jones* and find in individual cases that proof of delinquency satisfies the criterion of "dangerousness" for purposes of civil commitment.

Thus, the suggestion in § 12.19(b) *supra* that counsel could consider a claim of incompetency to stand trial with somewhat less trepidation in cases in which a defense psychiatrist is confident that the respondent will not qualify for civil commitment as "dangerous" to self or others, is inapplicable in the context of an insanity defense. Even in jurisdictions that do not provide for automatic commitment but require a finding of dangerousness to support confinement of an insanity acquittee, the risk that the respondent's conviction alone will suffice to establish dangerousness is too great.

In assessing the advisability of an insanity defense, counsel also must consider whether a finding of "not guilty by reason of insanity" could result in any of the collateral consequences that may stem from a delinquency adjudication. *See, e.g.*, *Halvonik v. Maryland Department of Safety and Correctional Services*, 2015 WL 7301702, at *1, *3 (Md. Ct. Special App. 2015), *cert. denied*, 446 Md. 705, 133 A.3d 1110 (Table) (2016) (the defendant, who pled guilty to sexual offenses but was deemed "not criminally responsible" and placed on probation for five years, nonetheless "was required [by state law] to register as a sex offender" and "the required registration was for life"). For discussion of the various types of collateral consequences that can result from a delinquency adjudication, see § 14.07 *supra*.

§ 12.24 DEFENDING AGAINST THE JUDICIAL INTERPOSITION OF AN INSANITY DEFENSE

In some jurisdictions the court can raise the issue of insanity *sua sponte. E.g.*, *Hendrix v. People*, 10 P.3d 1231 (Colo. 2000); *and see generally* Justine A. Dunlap, *What's Competence Got to Do with It: The Right Not to Be Acquitted by Reason of Insanity*, 50 OKLA. L. REV. 495, 508-10 (1997). In jurisdictions of this sort defense counsel may have to defend against the judge's interposition of the insanity defense, in order to avoid an insanity acquittal with the probable consequence of prolonged institutionalization in a mental hospital. This often requires addressing a test that "balance[s] . . . the public's interest in not holding criminally liable a defendant lacking criminal responsibility and the defendant's interest in autonomously controlling the nature of her defense" (*Hendrix*, 10 P.3d at 1241). In urging that the balance should be struck in favor of the defendant's autonomy interest, counsel can analogize to decisions recognizing the weight of that interest in related contexts: *Faretta v. California*, 422 U.S. 806 (1975); and *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018). *Hendrix*, for example, cites *Faretta*, *inter alia*, in concluding that "an individual's interest in autonomously controlling the nature of her defense, provided that interest is premised on a choice that satisfies the basic rationality test, will predominate over the broader interest of society unless pressing concerns mandate a contrary result" (10 P.3d at 1243). In jurisdictions that have not resolved the issue, counsel can take the position that "the trial judge may not force an insanity defense on a defendant found competent to stand trial *if* the individual intelligently and voluntarily decides to forego that defense." *Frendak v. United States,* 408 A.2d 364, 367 (D.C. 1979) (emphasis in original); *accord, United States v. Marble*, 940 F.2d 1543 (D.C. Cir. 1991); *United States v. Read*, 918 F.3d 712 (9th Cir. 2019); *State v. Brown*, 2005 VT 104, 179 Vt. 22, 32-36, 890 A.2d 79, 88-91 (2005) (citing caselaw from other States); *State v. Jones*, 99 Wash. 2d 735, 664 P.2d

1216 (1983); *State v. Glenn*, 148 Hawai'i 112, 126, 468 P.3d 126, 140 (2020); *Farrell v. People*, 54 V.I. 600, 614 (Virgin Islands 2011) ("in the absence of a statute or precedential local case law addressing this issue, this Court adopts the majority approach, which prohibits an unpled insanity defense from being imposed on a defendant unless the trial court ascertains that the defendant did not voluntarily and intelligently waive the defense"). *See also* Christopher Slobogin, *The American Bar Association's Criminal Justice Mental Health Standards: Revisions for the Twenty-First Century*, 44 HASTINGS CONST. L. Q. 1, 33 (2016) (noting that some jurisdictions treat "the decision about raising the insanity defense . . . as a tactical one to be made by the [defense] attorney," and explaining that ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARD 7-6.3 "instead provides that this decision is controlled by the defendant if he or she is competent to make it"). However, counsel should be prepared for an inquiry into the respondent's competency to intelligently waive an insanity defense, which is not necessarily the same as competency to stand trial. *See Frendak,* 408 A.2d at 367; *Phenis v. United States*, 909 A.2d 138, 154-60 (D.C. 2006).

Even if a judge is permitted to foist an insanity defense on an unwilling respondent, it does not follow that the consequence of the defense once established should be automatic involuntary civil commitment in those jurisdictions where such commitment is the usual fate of insanity acquittees. The *Jones* case discussed in § 12.23 *supra* attached importance to the fact that "automatic commitment under [the challenged statute was provided] . . . only if the *acquittee himself* advances insanity as a defense . . . ." *Jones v. United States,* 463 U.S. 354, 367 (1983) (emphasis in original); *see also id.* at 367 n.16. Counsel in jurisdictions with statutes that are ambiguous on the subject can argue that they should be construed as imposing the same limitation, under the doctrine calling for statutory construction that avoids unnecessary constitutional issues (*e.g.*, *In re M.F.*, 298 Ga. 138, 780 S.E.2d 291 (2015); *State v. Dahl*, 874 N.W.2d 348 (Iowa 2016)); and, if the statute is not so construed, counsel can distinguish *Jones* in arguing that the statute is unconstitutional for all of the reasons advanced in the dissenting opinions in that case (463 U.S. at 371-87).