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Testimony for SB403

BILL: SB403 CERTIFICATION OF FORENSIC EXAMINERS

DIVISION OF MENTAL HEALTH AND DEVELOPMENTAL SERVICES

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Good morning Chairman Amodei and members of the committee. I am Elizabeth Neighbors, director of Lake's Crossing Center, the state's only public facility designated to care for mentally ill offenders for whom there is a question of their ability to proceed with adjudication due to a mental disorder. In addition to pretrial detainees, we may be charged with caring for defendants adjudicated Not Guilty by Reason of Insanity, if legislation presently in process goes forward. These defendants require an array of assessments that are requested by the court per Chapter 178 and 175 of Nevada Revised Statutes. Presently Nevada has no formal process whereby training and accountability in current competency in state of the art procedures for completing these assessments is available. Clearly individual licensure would expect professional competency, but individual boards do not provide training, simply oversight. Nevada has no venue where individuals who perform these assessments may dialogue and share their expertise. Since these assessments may be completed by three different disciplines, fragmentation in communication about standards for these evaluations is even more likely to exist without some formal requirement for review.

Lake's Crossing Center has the opportunity to review reports from most of the examiners throughout the state and notes a wide range of presentations. Reports literally range from one sentence to 25 or more pages. There is a broad range of

methods and perceptions regarding what constitutes competency to proceed. Examiners use recently developed instruments to assess competency and attendant issues such as malingering in varying degrees.

Of somewhat greater concern is the lack of familiarity, on occasion, with Nevada Revised Statutes as they change, and evolving case law as it pertains to the issues of competency and criminal responsibility. Many examiners and courts have little familiarity with the state facility to which they refer clients and do not recognize the limitations that we experience when referred clients with severe medical problems. At times referrals have been made for competency assessment when a client suffered from a terminal illness that had not been treated prior to entry in our facility.

We have requested this bill to establish a setting in which high quality information could be shared among psychiatrists, psychologists and social workers regarding our local system for adjudication of mentally ill clients as well as the assessment of individuals to determine whether they meet the criteria to be determined mentally ill and incompetent or not criminally responsible. While the Division of MHDS has requested to oversee the process of certifying individuals in this specialty in Nevada, we propose to include a broad representation from the community in developing the curriculum and approving the process by which this certification goes forward. We believe this process will provide an excellent venue for the disciplines ,who provide these examinations, to periodically dialogue and constantly upgrade the standard of this service to the community.

It is our vision that this process would be developed by a public-private partnership consisting of representatives from psychology, social work and psychiatry. A panel of six would develop the curriculum and submit it to the Division of MHDS to be offered to the community through Lake's Crossing Center and individuals identified as qualified to present the curriculum. LCC will absorb the costs of developing this training process and distribute the certificates. Minimal processing fees would be

charged that only suffice to offset the cost of materials and producing certificates and lists to the courts. It is proposed that the curriculum will be submitted to the licensing board of each discipline to be approved for continuing education, thus giving the professional boards a voice in approving this curriculum. Additionally this proposal will provide high quality continuing education to many individuals at a minimal cost.

We expect that LCC staff will complete the process during its initial implementation. Individuals who are board certified by acceptably recognized professional bodies in their respective disciplines in the subspecialties of forensics would be excluded except for demonstrating competency in Nevada Revised Statutes in the areas in question.

We have provided a copy of an article from the Ohio Office of Forensic Mental Health regarding the importance of these evaluations. We would be happy to answer any questions that you might have.

- The Community Forensic Monitoring Program currently monitors 415 persons on Conditional Release in the community. These are people who were found Not Guilty by Reason of Insanity or Incompetent to Stand Trial, Unrestorable and held under Criminal Court Jurisdiction. This program has grown since its inception in 1997. Since 1997, the number of misdemeanor arrests for persons on Conditional Release has been maintained at 1% and the felony arrests have decreased from 1% to currently .03% (1 person over the last year). The revocations of Conditional Release have also decreased from 3% in 1997 to 1% over the last year. Hospitalizations have maintained about the same. Between 4% and 5% of those on Conditional Release have needed to be rehospitalized for stabilization, which is an expected consequence of severe mental illness.
- The Community Linkage Program, which links offenders with mental illness with community services upon release from prison, interviewed more than 2300 offenders. Appointments for mental health services were made for 1679 of those offenders, with about 55% keeping their first appointment. This percentage is up from prior years when about 50% kept their appointment.
- Many jointly sponsored, planned conferences and trainings occurred. The Office of Forensic Services sponsored its Annual Forensic Conference on *Exploring Creative Strategies* in August 2002. Several agencies, including NAMI Ohio, The Office of Criminal Justice Services, the Ohio Department of Alcohol and Drug Addiction Services, ODMH, and the Ohio Department of Rehabilitation and Correction as the lead agency, sponsored a symposium to focus on services for offenders leaving prison. The conference held in October 2002 was entitled: *Safer Communities by Bridging the Gap: Creating Systems of Care for Offenders with Mental Illness*.
- A major revision of the ODMH *Forensic Manual* is almost complete. Copies should be disseminated in early 2003.

We are looking forward to 2003 and continuing our efforts. Lake's Crossing Center stem for
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Trial Competence Revisited

by Jennifer M. Rohrer¹, Kathleen P. Stafford² & Yossef S. Ben-Porath¹

Competence to stand trial has been termed "the most significant mental health inquiry pursued in the system of criminal law" (Stone, 1975, p. 200). According to Steadman, Monahan, Hartstone, Davis and Robbins (1982), 25,000 defendants were evaluated for trial competency in the United States in 1978, and 6500 (26%) were hospitalized as incompetent to stand trial. Hoge, Bonnie, Poythress and Monahan (1992) estimated that pretrial competence evaluations are sought in 2 to 8% of all felony cases. LaFortune and Nicholson (1995) reported that judges and attorneys estimated that competency is a legitimate issue in approximately 5% of criminal cases, although only two-thirds of these defendants whose competency is questionable are actually referred for formal competency evaluations.

Conceptual Issues

Wulach (1980) identified four major legal rationales for trying only competent defendants. First, the accuracy of the proceedings demands the assistance of the defendant in acquiring the facts of the case. Second, due process depends upon the defendant's ability to exercise his rights, including the rights to choose and assist legal counsel, confront his or her own accusers, and testify in his or her own behalf. Third, the integrity and dignity of the process is undermined by the trial of an incompetent defendant, both in terms of its inherent morality and its outward appearance. Finally, the objectives of punishment are not served by sentencing a defendant who fails to comprehend the punishment and the reasons for imposing it. According to Bonnie (1992), the dignity, reliability and autonomy of the legal process itself precludes adjudication of incompetent defendants.

In the wake of the 1993 U.S. Supreme Court decision in *Godinez v. Moran*, some examiners have mistakenly concluded that there is a "low threshold" for assessing a defendant as competent to proceed with his or her case. In the *Godinez* case, the U.S. Supreme Court

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held that the competency standard for pleading guilty or waiving the right to counsel is the same as the *Dusky* standard for competency to stand trial: "whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and 'a rational as well as factual understanding of the proceedings against him.'"

***A Defendant Has
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Decisions During
a Trial***

In reaching this decision, the Court reasoned that the defendant has to make a number of complicated decisions during the course of a trial, and that a separate, higher standard is not necessary to determine whether

he has the capacity to make the decision to waive counsel. The court acknowledged that the decision to waive constitutional rights must be knowing and voluntary, but held that this fact does not constitute a heightened standard of competence. The concurring opinion suggests that the *Dusky* competence standard should not be viewed too narrowly, as a defendant must be competent throughout the proceedings, from arraignment to pleading, trial, conviction and sentencing, and whenever the defendant must make a variety of decisions during the course of the proceedings.

Although the Supreme Court did not articulate a separate standard for competence to waive counsel or plead guilty, Justice Thomas in the majority opinion acknowledged that "psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence." Felthous (1994) noted that the court "did not forbid legislatures, courts, attorneys and mental health witnesses from addressing de facto those abilities that are embodied in decisions about competency to waive counsel and to make one's own defense" (p. 110). Melton et al. (1997) speculated that *Godinez v. Moran* may well increase the level of competency evaluators and judges associate with competency to stand trial, since trial competency includes competency to waive counsel.

In Ohio, the 1998 Eighth District Court of Appeals cited the *Godinez* decision in the case of *Ohio v. Bolin*. Mr. Bolin had been permitted to plead guilty to aggravated

murder and aggravated robbery, even though expert testimony indicated that he was not competent to stand trial. The trial court had accepted the plea after experts testified that the standard for pleading guilty was *lower* than that for standing trial. In reversing and remanding the case, the Court of Appeals noted that the *Godinez* case held that the competency standard for pleading guilty or waiving the right to counsel is the *same* as the competency standard for standing trial.

The U.S. Supreme Court further emphasized the importance of competence to stand trial in the 1996 case of *Cooper v. Oklahoma*. The Court reviewed the Oklahoma requirement that a defendant be proved incompetent by clear and convincing evidence, rather than the lower standard of preponderance of the evidence. The Court ruled unanimously that to impose the higher standard of clear and convincing evidence violated due process by allowing "the State to put to trial a defendant who is more likely than not incompetent."

In Cooper's case, the Court termed the consequences of an erroneous competency determination "dire," impinging on his right to a fair trial. In contrast, the consequence to the State of an erroneous finding of incompetence when a defendant is malingering was termed "modest," as it is unlikely that even an accomplished malingerer could "feign incompetence successfully for a period of time while under professional care" (p. 1382).

The Court affirmed the importance of competence to stand trial by stating that "the defendant's fundamental right to be tried only while competent outweighs the State's interest in the efficient operation of its criminal justice system" (p. 1383).

***"Dire"
Consequences
Result From
an Erroneous
Competency
Finding***

In the 2002 case of *State v. Were*, the Ohio Supreme Court similarly emphasized the constitutional importance of competency to stand trial. The Court vacated the conviction and sentence and remanded for a new trial a capital case in which a competency hearing was not held. Although a competency evaluation had been ordered in the case, the evaluation was not conducted in a standard manner, and there were doubts regarding the defendant's competence raised throughout the proceedings.

Empirical Studies

Nicholson and Kugler (1991) conducted a meta-analysis of 30 studies of competent and incompetent criminal defendants published over 25 years. An average of 30% of the defendants evaluated were considered incompetent to stand trial by the forensic examiners. The authors found that incompetent defendants were more likely to have a psychotic diagnosis, although only half of the defendants with a psychotic diagnosis were found incompetent. Symptoms of major psychopathology, including delusions, hallucinations, impaired memory, impaired thought or communication, and disturbed behavior, significantly differentiated incompetent from competent defendants. Older defendants, those with a prior history of psychiatric hospitalization, and defendants without a prior legal history were more apt to be found incompetent. The severity of the offense was more strongly related to the decision to refer defendants for competency evaluations than it was to an actual finding of incompetence.

Warren, Rosenfeld, Fitch and Hawk (1997) reviewed data from Ohio, Michigan and Virginia from 1987 to 1988 and discovered rates of incompetence of 29%, 18% and 13%, respectively. The greater incidence of incompetence findings in Ohio is likely to be related to a greater percentage of evaluations of defendants charged with public order or misdemeanor offenses in Ohio than in Michigan or Virginia. Indeed, in all three states, a significantly greater percentage of incompetence findings occurred in cases of public order offenses. Defendants charged with sexual offenses or homicide were less likely to be found incompetent. Defendants diagnosed with schizophrenia, organic disorders, other psychotic disorders and affective disorders were significantly more likely to be considered incompetent than those not diagnosed with these major mental disorders. It might be hypothesized that defendants charged with public order offenses are more likely to have major mental disorders.

To more closely examine rates of incompetence findings and factors differentiating competent from incompetent defendants, Rohrer (2002) analyzed an extensive database of independently coded variables from Psycho-Diagnostic Clinic files of all 363 defendants evaluated for trial competency between January 1, 1988 and December 31, 1993. These defendants were referred for evaluation by criminal courts in five counties of Northeastern Ohio. Of the

defendants referred, 23% were adjudicated incompetent to stand trial. This 23% figure is slightly lower than, but consistent with, the 30% rate of findings of incompetence over a 25 year period reported by Nicholson and Kugler, and with the 29% Ohio rate reported by Warren et al. for 1987-1988.

Rohrer's results support the interpretation of the Warren et al. data that defendants charged with misdemeanor or public order offenses are more likely to be found incompetent. In the Psycho-Diagnostic Clinic sample, 53% of the 79 defendants referred by Municipal Courts for competency evaluations were found incompetent, whereas only 14% of the defendants charged with felonies and referred by Common Pleas Courts were found incompetent to stand trial.

Several constellations of clinical variables differentiate competent from incompetent defendants in this study. First, defendants found incompetent to stand trial were significantly less likely to have histories consistent with antisocial lifestyles. Compared to competent defendants, they were less likely to have a history of school suspensions, violent behavior, juvenile arrests, incarceration as adults, and prior probation or parole status.

Second, competent defendants were more likely to have abused marijuana, cocaine and amphetamines, more likely to be diagnosed with substance abuse or dependence, and more likely to have received substance abuse treatment than incompetent defendants.

Third, incompetent defendants significantly differed from competent defendants on variables indicative of severe psychopathology. They were significantly more likely to have abnormal and delusional thought processes, to be diagnosed with schizophrenia, and to be prescribed antipsychotic medication at the time of the evaluation. Incompetent defendants were significantly less likely to have been employed at the time of the offense. Interestingly, *competent* defendants were more likely to have been prescribed antidepressant medication both in the past and at the time of the evaluation than were incompetent defendants.

***About 30% of
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Fourth, incompetent defendants were significantly more likely to have lower intellectual functioning and were significantly older than were competent defendants. Taken together, these findings suggest that defendants with mental retardation, cognitive impairment or dementia are more likely to be found incompetent to stand trial.

Finally, as would be expected, the rate of incompetence did not differ in terms of gender, race, marital status or education.

This study indicates that competency evaluations conducted at the Psycho-Diagnostic Clinic yield rates of findings of incompetence consistent with those reported in the literature, and that defendants found incompetent generally differ from those considered competent in ways that are conceptually valid and that reflect differences found in similar research. The study will be expanded to include a full ten years of data, and analysis of other variables, including psychological testing.

Conclusions

Competency to stand trial is a complex issue critical to adjudication of criminal cases. To be competent to proceed, a defendant must have more than the capacity to know "who sits where and what they do" in a courtroom. Competency evaluations need to include consideration of the defendant's capacity to make reasoned decisions about his or her case through every stage of the proceedings.

The data presented indicate that approximately 30% of the defendants referred for competency evaluations can be expected to be found initially incompetent. Since competency evaluations are ordered when there is a bona fide doubt regarding the defendant's competency, even defendants who are evaluated as initially competent are likely to be somewhat compromised in working with their attorneys and making the decisions required to resolve their cases. Competency evaluations may need to include a cautionary statement about reevaluation should such a defendant face an unforeseen complication in the proceedings (such as an attempt to waive the right to counsel, or a supplementary indictment for a more serious or complex charge). It may also be prudent to indicate that a defendant with a history of deteriorating under stress or discontinuing treatment may require an updated competency evaluation if he or she appears to deteriorate before the case is resolved.

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