



JUVENILE COMPETENCY OUTLINE

PRIMARY CORE PRINCIPLE: A juvenile defense attorney must consider the legal competency of all juvenile clients to proceed by reviewing all relevant records and obtaining an evaluation of the client when appropriate.

LAW OF COMPETENCY TO STAND TRIAL:

- Whether the person “has sufficient present ability to consult with [their] lawyer with a reasonable degree of rational understanding - and whether [they have] a rational as well as factual understanding of the proceedings against [them.]” *Dusky V. U.S.*, 362 U.S. 402, 403 (1960)
- But why must a person be competent to stand trial?
 - Persons should not be tried in absentia;
 - Incompetent person cannot defend themselves, and
 - As a consequence, they cannot exercise their constitutional rights to be informed of the accusation, cannot confront their accusers; and the court lacks jurisdiction over them.
- Why is competence necessary and required?
 - To preserve the integrity and credibility of the justice system process.
 - To reduce the risk of erroneous convictions.
 - To protect the youth’s decision-making autonomy.
 - Fairness.
- Who can raise the issue?
 - In most cases, we as, defense counsel, will be the one to raise competency.

- Theoretically, both the judge and prosecutor can raise competency, as well. If anyone has reason to doubt, that should give us reason to doubt.
- If there is “reason to doubt” competence, counsel *must* raise it:
 - Failure to raise renders counsel’s representation unreasonable. *State v. Johnson*, 133 Wis.2d 207 (Ct. App. 1985).
 - Failure to raise renders counsel’s representation deficient. *State v. Haskins*, 139 Wis.2d 257 (1987).
 - Strategic considerations do not eliminate counsel’s duty to raise competence. *State v. Johnson*, 133 Wis.2d 207 (Ct. App. 1985)
- Practical application of Raising Competency:
 - All that is required to doubt competency is “some evidence raising doubt as to his competence.” *State v. McKnight*, 65 Wis.2d 582, 223 N.W.2d 550 (1974).
 - It does not require definitive proof that the juvenile does not understand the proceedings.
- Factors supporting a “reason to doubt”?
 - Young age
 - Difficulty communicating, especially about the case
 - Limited intellectual functioning
 - Poor academic record
 - Receives special education services
 - History of emotional or behavioral issues
- How much do you have to tell the court?
 - Wis. Stat. § 938.30(5)(a): if probable cause exists that the juvenile committed the alleged offense and “there is **reason to doubt** the juvenile’s competency to proceed” the court shall order a competency evaluation
 - Keep in mind - “**an attorney’s opinions, perceptions, and impressions of a client’s competency to proceed are protected by the attorney-client privilege.**” *State v. Meeks*, 263 Wis.2d 794 (2003)
- Who has the burden of proof in raising the issue?
 - Party raising the issue bears the burden

- Suggestion of incompetency must be supported by facts giving rise to the doubt.
McKnight, 65 Wis.2d 582.
- Who has the BOP in *proving* competence?
 - The State (generally).
- What is the standard of proof? (See Wis. Stat. § 971.14(4)(b))
 - If the defendant claims to be incompetent, the state bears the burden of proving by the greater weight of the credible evidence that the defendant is competent.
 - If the defendant claims to be competent, the state must prove by clear and convincing evidence that the defendant is incompetent.

PROCESS:

- Court appoints an expert to evaluate your client:
 - Wis. Stat. §938.295(a): expert appointed and exam conducted.
 - Wis. Stat. §938.295(b)3: If you object to the examiner the court shall appoint a different examiner.
- Issues to raise with the evaluator:
 - Plea bargaining is likely to be involved.
 - The evidence is uncertain so that the child's ability to provide a coherent, personal account of events is likely to be relevant.
 - The trial likely will involve many witnesses.
 - The trial likely will require a complex legal defense.
 - The child will likely have to testify.
 - The trial is likely to be lengthy.
 - The child has few sources of social support.
- Evaluator's report:
 - Wis. Stat. § 938.295(2)(b)3
 - Report must include:
 - Opinion regarding the juvenile's present mental capacity to understand the proceedings and assist in his or her defense;

- If conclusion is that the juvenile is incompetent, the examiner's opinion regarding the likelihood that the juvenile, if provided with treatment, may be restored to competency within time frame of 938.30(5)(e)1 [within 12 months or the length of the max sentence if that's shorter].
- Hearing (Wis. Stat. § 938.30(5)(a)3):
 - Must be held within 10 days of plea hearing if juvenile in secure custody.
 - Within 30 days of plea hearing if juvenile is not in secure custody.
 - See 938.315(1)a – this is often used by the court to justify delays.
- Court's options at the hearing (Wis. Stat. § 938.30(5)(d)2):
 - If the court determines the juvenile is not competent to proceed, the court shall suspend the proceedings; and
 - Order the district attorney to file a JIPS petition; *or*
 - Order the county to file a chapter 51 petition (rare).

PROCEDURE AFTER A FINDING OF INCOMPETENCE:

- Wis. Stat. § 938.30(5)(e):
 - Juvenile shall be periodically reexamined.
 - Written report filed every 3 months and within 30 days before the expiration of the Ch. 51 commitment order or JIPS dispositional order.
 - If the report says juvenile is competent, court shall hold a hearing within 10 days after the court receives the report.
 - If after the hearing the court determines that the juvenile is competent then the court shall terminate the commitment or dispositional order and resume the delinquency proceeding.

JIPS PROCEDURE:

- Plea: If a petition alleges that a juvenile is in need of protection or services under everything, but (12), the non-petitioning parties and the juvenile, if he or she is 12 years of age or older or is otherwise competent to do so, shall state whether they desire to contest the petition. (938.30(3)).
- Both the child and the parents can contest the JIPS finding.
- Court trial.
- Burden of proof – clear and convincing evidence.

JIPS DISPOSITION (Wis Stat. § 938.345):

- Dispositional options are the same as for a delinquency case except:
 1. No SJO, DOC or secured RCC.
 2. No forfeiture or surcharge.
 3. No restriction or suspension of driving privileges, except in certain circumstances for cases of school dropout or habitual truancy.
 4. No placement in a facility for developmental disabilities or a mental illness without proper diagnosis and finding. (This does not disqualify RCC placement).
 5. No placement in juvenile detention as a dispositional placement.
- Practical matters in JIPS incompetent cases:
 - How do I enter a plea for an incompetent client?
 - Arguably, some clients who are found not competent regarding their pending delinquency are competent to state whether they desire to contest the JIPS petition given the relatively less complicated nature of a JIPS proceeding. However, there is always the option to have a fact-finding on the JIPS. The court will likely take judicial notice that the client was charged with a crime and found not competent. The court should also make a finding regarding what specific services the client needs, which may be an opportunity for argument. Nevertheless, this hearing will likely not take very long, and the statute makes the outcome feel almost like a forgone conclusion for a JIPS finding.
 - Services, treatment, and evaluations under a JIPS petition
 - There is an obvious tension in these sorts of cases between the language of 938.345(1), giving the Court pretty wide-ranging authority for a JIPS disposition, and the legal reality that, at this point, the only legal finding vis-a-vis the allegations is that there is probable cause (found at the time of ordering the competency evaluation under s. 938.30(5)(a)). It is always worth reminding the Court that probable cause is far from beyond a reasonable doubt, especially when we are talking about dispositional recommendations that severely infringe on liberty.
 - Special considerations for Sexual Assault Cases:

- Arguments regarding psycho-sexual evaluations for juveniles with suspended sexual assault cases.
 - The client has not been adjudicated so it's not proper to require an evaluation at this point. The child may not even be adjudicated if/when they are found competent.
 - The validity/use of any risk assessment on an incompetent child is questionable---your client is likely to come back high risk if he or she either denies or can't talk about the offense that may or may not have occurred and that it would be improper to expect an incompetent child to conform to the requirements of a sex offender program.
 - Should the client participate in sex offender treatment?
 - If your client is willing, it could very well be beneficial in terms of negotiation later if the client is later found competent, and generally to help stave off possible future offense. However, if your client is adamant that nothing happened and does not wish to do any treatment, we should be making due process arguments against the court ordering SO treatment.
- The impact of *In the Interest of A.L.*, 385 Wis.2d 612 (2019), 2019 WI 20.
 - The Supreme Court held that:
 1. The circuit court can resume suspended juvenile delinquency proceedings to reexamine the competency of a juvenile who was initially found not competent and not likely to become competent within the statutory time frame; and
 2. A circuit court retains competency over juvenile delinquency proceedings even after an accompanying JIPS order has expired.
 - Things to think about regarding A.L.:
 - What will trigger reevaluation?
 - New charges and finding of competent.
 - Overzealous prosecutors.
 - Vocal victims who find out about the possibility of reevaluation in the course of proceedings.
 - The State labelled its motion "State's Motion to Recall Suspended Case." Such a motion would be the procedural mechanism triggering a circuit court to order a

competency evaluation. See *In the Interest of A.L.*, ¶ 12, n. 5.

- What will happen once the case is unsuspended?
 - New plea hearing scheduled.
 - DA should have to present reasons for believing the client is now competent.
 - Raise competency if still reason to doubt.
 - If client is found competent, the options depend on the age of your client at that time.
- Clients still under age 18
 - Competency for a new case doesn't necessarily mean competent to deal with all cases, especially if there are many.
 - DA may or may not be able to file a waiver petition (See below).
 - If competent and no waiver, case proceeds as if it had not been suspended. However, there may be speedy trial and constitutional issues to raise. (See *In the Interest of A.L.*, ¶ 22, n. 8.)
- Clients over age 18
 - A.L. (footnote 5) says the options are:
 - Waiver; (or)
 - Dismiss with prejudice.
- Can a person over the age of 18 be put on a Dispo Order?
 - No. (See *State v. Kleser*, 328 Wis. 2d 42, ¶ 119.)
- Some good news about waiver
 - The applicability of waiver relates to **age at the time of the offense**. Therefore, if you have a charge from when the client was under 14, then they cannot be waived. If your client was age 14 at the time of the offense, then only certain offenses will allow the State to seek waiver.
- Bad news about waiver
 - For clients who are age 15 or 16 at the time the offense occurred, they are subject to waiver for any offense.
 - For clients older than 18, the waiver factors pursuant to Wis. Stat. § 938.18(5) weigh heavily in favor of waiver when the court has no juvenile court option.

- Thus, Speedy trial and constitutional issues should be raised early and often.
- Would the State consider dismissal instead of suspension?
 - Potential arguments – the case is not serious, the victim is in support of dismissal, JIPS supervision is enough.
 - You could also ask the court to consider dismissal, and perhaps a judge would be willing to press the State on why not to dismiss, but case law suggests that the court cannot dismiss over the State’s objection.
 - Maybe consider seeing if they would set a date at the end of disposition order on the JIPS to consider dismissal if the client has done well.