CHAPTER 10

OCTOBER, 2011

Competency to Stand Trial

Written by Robert H. Weber (1st edition),
and Karen Hurvitz and Lisa Mardin (this revision)

Table of Contents:

§ 10.1 Introduction to Competency 2
§ 10.2 Raising the Issue 3
A. Obligation of Judicial Inquiry 4
B. Determining the Defense Position 5
C. Questioning Competency After Trial or Guilty Plea 6
§ 10.3 The § 15a Initial Outpatient Evaluation 7
A. In General 7
B. Role of Counsel at the Evaluation 7
§ 10.4 The § 15(b) Commitment for Further Evaluation 9
A. Criteria for Bridgewater Commitments 9
B. Extension of the Twenty-Day Observation Period 9
§ 10.5 The Competency Hearing 10
A. Preparation for the Hearing 10
B. The Role of Medication in Competency Proceedings 10
C. Hearing to Determine Competency to Stand Trial 11
§ 10.6 Procedures After the Hearing 12

Cross-References:

Arraignment and initial appearance, § 7
Competence of witness to testify, §§ 32.7, 48.3.
Directory of sentencing alternatives, § 38
Disruption by defendant, §§ 28.1C, 28.2
Forced medication of defendant, § 28.3
Forensic evidence, § 12

§ 10.1 INTRODUCTION TO COMPETENCY

An individual's right to understand the charges that have been brought against him and to participate in his own defense is guaranteed by the due process clause of the Fourteenth Amendment to the Constitution of the United States.[1] It is unconstitutional to force a legally incompetent person to stand trial for a criminal offense, and therefore, a defendant has a constitutional right to have a competency evaluation before proceeding to trial.[2] The test for competency to stand trial in Massachusetts is:

> [W]hether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.[3]

The test of *competency to plead guilty* is the same as the test for competency to stand trial,[4] and an incompetent defendant may not plead guilty through an attorney's or guardian's "substituted judgment."[5] Moreover, the standard of competence required of a defendant representing himself *pro se* may be higher than that of a represented defendant.[6]

---

[1] Abbott A. v. Commonwealth, 458 Mass. 24, 27 (2010); Commonwealth v. Robidoux, 450 Mass. 144, 152-53 (2007); Commonwealth v. Simpson, 428 Mass. 646, 649 (1999); Commonwealth v. Crowley, 393 Mass. 393 (1984); Cooper v. Oklahoma, 517 U.S. 348 (1996); Medina v. California, 505 U.S. 437 (1992); Pate v. Robinson, 383 U.S. 375 (1966); Bishop v. United States, 350 U.S. 961 (1956). *See also* MASS. CONST. DECLARATION OF RIGHTS art. 12.

[2] Dusky v. United States, 362 U.S. 402 (1960).

[3] Abbott A. v. Commonwealth, 458 Mass. 24 (2010); Commonwealth v. Robidoux, 450 Mass.144, 152-53 (2007); Commonwealth v. Robbins, 431 Mass. 442, 445 (2000); Commonwealth v. Chubbuck, 384 Mass. 746 (1981); Oliveira v. Commonwealth, 425 Mass. 1004 (1997); Commonwealth v. Vailes, 360 Mass. 522 (1971); Godinez v. Moran, 113 S. Ct. 2680, 2686 (1993) (citing Dusky v. United States, 362 U.S. 402 (1960)). *But see* Commonwealth v. Nikas, 431 Mass. 453 (2000), where the SJC distinguished *Robbins*, noting that in Nikas "defense counsel never stated that he had reviewed the relevant *law* with the defendant… only… that defense counsel discussed the Commonwealth's *evidence* with his client. [In]… *Robbins*...defense counsel stated that he had reviewed, at length, proposed jury instructions explaining elements of crime with which the defendant was charged."

[4] Commonwealth v. Goodreau, 442 Mass. 341, 351 n.5 (2004); Commonwealth v. Conaghan, 433 Mass. 105, 109 (2000); Commonwealth v. Robbins, 431 Mass. 442, 445 (2000); Commonwealth v. Blackstone, 19 Mass. App.Ct. 209 (1985); Commonwealth v. Perry, 389 Mass. 464, 467 (1983); Commonwealth v. Hubbard, 371 Mass. 160, 170 (1976); Godinez v. Moran, 113 S. Ct. 2680, 2686 (1993). A mentally ill person may be competent to decide to plead guilty to trespassing charge although he may be incompetent to plead to murder. *See* Chavez v. United States, 656 F.2d 512, 518 (9th Cir. 1981) (assessment of competency must consider gravity of particular decision). For a complete discussion of the issue of accepting a guilty plea on behalf of an incompetent defendant, see Commonwealth v. DelVerde, 398 Mass. 288 (1986), and *Blackstone,* 19 Mass. App.Ct. at 209.

[5] Commonwealth v. DelVerde, 398 Mass. 288 (1986).

[6] Commonwealth v. Barnes, 399 Mass. 385, 389 n. 3 (1987); Commonwealth v. Cote, 74 Mass. App. Ct. 709 (2009) quoting Commonwealth v. Jackson, 376 Mass. 790, 795 (1978) (ruling that a valid waiver of counsel requires that the court "must be confident that the defendant was 'adequately aware of the seriousness of the charges, the magnitude of his undertaking, the availability of advisory counsel, and the disadvantages of self-representation'"); Commonwealth v. Simpson, 44 Mass. App. Ct. 154, (1998) ("…the judge may decide there is sufficient connection between the defendant and reality so that the

Being found "not competent to stand trial" is not equivalent to a medical/psychiatric diagnosis of "incompetency" nor is it a mental illness as recognized by the American Psychiatric Association in its compilation of mental illnesses, the DSM IV.[7] Rather, it is a finding made by the court after hearing testimony from, among others, a psychologist or psychiatrist who has interviewed the defendant and formed an opinion as to whether the defendant meets the above legal definition.

The question of the defendant's competency to stand trial is also distinct from the issue of his criminal responsibility. Criminal responsibility raises the issue of the defendant's mental state at the time the crime was committed,[8] while the question of the defendant's competence to stand trial pertains to the defendant's mental state at the time of trial. Thus, a person may be competent to stand trial although the trial may result in a finding of not guilty by reason of insanity.[9] Competence to stand trial is also distinct from competence of a witness to testify, which involves a different standard.[10]

§ 10.2 RAISING THE ISSUE

Although there is a presumption that a defendant is competent to stand trial, if there is an issue of competency, it may be raised by any party at any stage of the

defendant is competent to stand trial but is not competent to waive assistance of counsel and conduct his own defense. Two of our cases have recognized that the standard of competence to waive counsel and appear *pro se* is a degree higher than the standard of competence to stand trial. [T]he test...to appear *pro se* contains an additional ingredient. [T]he defendant must be shown to have an awareness of the magnitude of the task confronting him and the disadvantages of representing oneself. This does not, however, require a demonstration that the defendant have any particular skill or training. The focus of the inquiry is on rational understanding, not legal ability"; Commonwealth v. Wertheimer, 19 Mass. App. Ct. 930, 931 (1984); Westbrook v. Arizona, 384 U.S. 150 (1966). But there must be a "bona fide doubt" concerning defendant's competency to proceed *pro se* to require a hearing. *Barnes, supra,* 399 Mass. at 389–90. *But see* Godinez v. Moran, 113 S. Ct. 2680, 2686 (1993) (under federal due process clause, standards of competence to stand trial, plead guilty, and waive counsel in favor of *pro se* representation are identical; *Westbrook v. Arizona* requires only an inquiry into whether the waivers of trial and/or counsel rights are intelligent and voluntary). Compare dissenting opinion of Justice Blackmun in Godinez at 113 S. Ct. 2680, 2691–96 (1993).

[7] AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994).

[8] The test of criminal responsibility in Massachusetts is whether "at the time of [the alleged criminal event], as a result of mental disease or mental defect [the defendant] lacked the substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Commonwealth v. McHoul, 352 Mass. 544, 546-547 (1967) (adopting definition of insanity from Model Penal Code §4.01(i) (proposed official draft (1962)).

[9] Once the defendant provides notice to the Commonwealth that he will be presenting an insanity defense, the Commonwealth must prove beyond a reasonable doubt that the defendant was sane at the time of the crime. Commonwealth v. Kappler, 416 Mass. 574, 578 (1993).

[10] Commonwealth v. Piedra, 20 Mass. App. Ct. 155, 160 (1985) (mentally ill person is not necessarily an incompetent witness, as mental condition is merely a factor regarding credibility); Commonwealth v. Hill, 5 Mass. App. Ct. 130 (1977), *rev'd on other grounds,* 375 Mass. 50 (1978), *See* Massachusetts Guide to Evidence, section 11.1; Commonwealth v. Brusqulis, 398 Mass. 325 (1986) (child witness). See full discussion *infra* at §§ 32.7 (competence of witness) and 48.3 (competence of child witness).

proceedings[11], including sentencing [12] and after.[13] If the defendant raises the question of competence, his competence must be proven by the Commonwealth by a preponderance of the evidence.[14] See Section 10.2(C) below for a detailed discussion of raising the issue of defendant's competency after a guilty plea or on appeal.

§ 10.2A. OBLIGATION OF JUDICIAL INQUIRY

Whether or not a party raises the issue, the judge is required to observe the defendant's demeanor in the courtroom at all stages of the proceeding and to take cognizance of any psychiatric or psychological reports[15] and testimony. If the court has reason to doubt the defendant's competence, the judge may order an examination of the defendant *sua sponte*.[16] The judge is not required to inquire into a defendant's competence *sua sponte* unless and until there exists a "substantial question of possible

---

[11] Seng v. Commonwealth, 445 Mass. 536, 539 (2005) quoting MASS. GEN. LAWS ch.123, §15(a); Dusky v. U.S., 362 U.S. 402 (1960); Commonwealth v. Vailes, 360 Mass. 522, 524 (1971). S*ee* Abbott A. v. Commonwealth, 458 Mass. 24, 27 (2010) (citing Jackson v. Indiana, 406 U.S. 715, 740-41 (1972)) (although a criminal defendant who is found incompetent may not stand trial, "[d]ue process...may not require the cessation of all pretrial proceedings"); Commonwealth v. Torres, 441 Mass. 499, 502 (2004) (further citations omitted). "In deciding whether due process permits a pretrial hearing to proceed where the defendant…is incompetent, we consider the private interest that will be affected by the pretrial proceeding, and the risk that the defendant's… incompetency during the proceeding will erroneously deprive him or her of his liberty." *Abbott A.*, at 28 (citing *Torres*).

[12] Commonwealth v. Vailes, 360 Mass. 522 (1971); Commonwealth v. Hill, 375 Mass. 50 (1978), United States v. Pellerito, 878 F.2d 1535, 1544 (1989). *But see* Commonwealth v. O'Connor, 79 Mass. App. 314, 387 (1979) (judge did not abuse discretion in denying defendant's motion for psychiatric examination prior to sentencing pursuant to MASS. GEN. LAWS ch. 123 § 15(e), which permits but does not require such examination).

[13] Commonwealth v. Hanson, 57 Mass. App. Ct. 1105 (2003) (defendant was not entitled to a post-conviction competency examination because she had filed no documents to corroborate that she was suffering from battered women's syndrome).

[14] Abbott A. v. Commonwealth, 458 Mass. 24 (2010); Commonwealth v. Hilton, 450 Mass. 173, 179 (2007); Commonwealth v. Serino, 436 Mass. 408, 414 (2002); Commonwealth v. Simpson, 428 Mass. 646, 654 (1999); Commonwealth v. Crowley, 393 Mass. 393 (1984); MASS. GEN. LAWS ch. 123, § 15(d). *Compare* Cooper v. Oklahoma, 517 U.S. 348 (1996) (due process clause permits a state to require the defendant to prove incompetence by a preponderance of the evidence, Medina v. California, 505 U.S. 437 (1992), but not by clear and convincing evidence). The appellate court may infer the judge's knowledge of the correct placement of the burden on the issue of the defendant's competence from her knowledge of the test for competency. Commonwealth v. Wentworth, 53 Mass. App. Ct. 82, 89 n. 5 (2001).

[15] Under MASS. GEN. LAWS ch. 123, § 15(c), the examining physician or psychologist must submit written signed reports of the findings, including clinical findings bearing on both competence and need for DMH care and treatment. However, the court may reject the uncontradicted opinion of a court-appointed expert that the defendant is incompetent, and rely instead on her own observations of the defendant's demeanor and conduct. Commonwealth v. McMahon, 443 Mass. 409, 423 (2005) quoting Commonwealth v. Russin, 420 Mass. 309, 317 (1995) (further citations omitted) ("We give substantial deference to a judge's determination of a defendant's competence to stand trial…recognizing that the judge has had the 'opportunity to observe the defendant's demeanor during the trial'"); Commonwealth v. DeMinico, 408 Mass. 230, 235–36 (1990).

[16] Pate v Robinson, 383 U.S. 375 (1966), MASS. GEN. LAWS ch. 123, § 15(a).

doubt" as to the defendant's competence; however, even then, the law provides only that failure to inquire *may* result in reversible error.[17]

§ 10.2B. DETERMINING THE DEFENSE POSITION

A defendant's decision to raise the issue of competency carries potentially serious and undesirable consequences, including, but not limited to, the following:

1. The defendant may be incarcerated in a locked mental health or correctional facility during the observational period. He may be forced to accept unwanted treatment, including medication.[18]
2. The defendant does not have the right to bail during the evaluation period.
3. The defendant may lose his right to a speedy trial, and the observational commitment may result in a longer period of incarceration than he would have received as a sentence after a guilty plea.[19]
4. If ultimately committed, the defendant may experience the stigma of having been committed to a mental hospital.

Because of these risks, counsel should approach competency issues with caution and seriously contemplate opposing any request for a competency evaluation unless sufficient communication with the client is unattainable and counsel ultimately

---

[17] Commonwealth v. Boateng, 438 Mass. 498, 503 (2003) (quoting Commonwealth v. Hill, 375 Mass. 50, 54 (1978)) ("While the judge is sometimes required to conduct a *sua sponte* inquiry into a defendant's competence…that requirement arises only if there exists a 'substantial question of possible doubt' as to that competence"); Commonwealth v. Barnes, 399 Mass. 385 (1987); Drope v. Missouri, 420 U.S. 162 (1975); Commonwealth v. Vailes, 360 Mass. 522 (1971); Pate v. Robinson, 383 U.S. 375 (1966) (where "bona fide doubt," judge must raise issue *sua sponte*). The issue may require reconsideration despite early findings of competence if subsequent events or testimony raise doubt. *Hill*, 373 Mass. at 54. *Cf*. Commonwealth v. Painten, 429 Mass. 536, 543 (1999) (defense counsel's assertion to judge that defendant was extremely agitated did not require judge to hold full evidentiary hearing on competency); Commonwealth v. Martin, 35 Mass. App. Ct. 96 (1993) (refusal to hold evidentiary hearing was not abuse of discretion where court relied upon written psychiatric reports and court's own observations of defendant); Commonwealth v. Dias, 402 Mass. 645 (1988) (failure to conduct court-ordered competency evaluation does not require new trial where defense counsel did not raise issue and trial occurred 15 months after exam ordered); Commonwealth v. Hall, 15 Mass. App. Ct. 1, 2–3 (1982) ("inappropriate remarks" by defendant not sufficient to require hearing); Commonwealth v. Tarrant (No. 1), 14 Mass. App. Ct. 1020 (1982) (defense counsel's assertion of irrationality not sufficient, without more, to require hearing); Commonwealth v. Goldman, 12 Mass. App. Ct. 699, 707–09 (1981) (no hearing required despite defendant's erratic behavior; failure of attorney to raise competence is an evidentiary factor); Commonwealth v. Burkett, 5 Mass. App. Ct. 901, 902–03 (1977) (rescript) (same).

[18] MASS. GEN. LAWS ch. 123, § 8(B)(d) provides for a judicial determination of incompetency and court ordered medication for patients who are committed to a mental health facility or Bridgewater State Hospital, including patients who are under observational commitments. However, forced medication requires a judicial finding that the patient would accept the medication if he were competent. Rogers v. Commissioner of the Dep't. of Mental Health, 390 Mass. 489 (1983). *See also* Cohen v. Bolduc, 435 Mass. 608, 616 (2002); Guardianship of Weedon, 409 Mass. 196, 199–200 (1991).

[19] *See infra* § 10.6, regarding procedures after a defendant is declared incompetent to stand trial.

determines that it is not possible to adequately defend the client.[20] A particularly troublesome situation involves a client charged with a minor crime who would not likely be incarcerated if convicted but might be hospitalized as part of a competency evaluation or subsequent civil commitment. Where a guilty plea is appropriate, counsel should attempt to obtain a knowledgeable and rational decision from the client.[21] If this is impossible, counsel should discuss with the client the possibility of taking medication that would restore competency in order to proceed with the plea or trial.[22] (Note, however, that the defendant may have the right to appear at trial un-medicated, despite an incompetency finding, if the defendant is presenting an insanity defense.[23])

§ 10.2C. QUESTIONING COMPETENCY AFTER TRIAL OR GUILTY PLEA

Even if no issue as to the defendant's competency was raised at trial, but the trial transcript reveals bizarre behavior of the defendant indicative of incompetency, appellate counsel may raise the competency issue in the appeals court as a ground of relief from the conviction notwithstanding the defendant's explicit refusal to assert his incompetency at trial.[24]

The Supreme Judicial Court, in *Commonwealth v. Simpson*,[25] issued detailed guidelines to govern a retrospective post-trial determination of whether or not the defendant was competent at the time of trial.[26] In the subsequent case of *Commonwealth* v. *Conaghan*,[27] the Court set out a procedure by which a defendant who entered a plea of guilty may retrospectively raise the issue of her competence to plead guilty.[28]

---

[20] *See* ABA Code EC 7-12; Model Rules of Prof. Resp. 1.14, 1.16; John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 Am. U. L. Rev. 207 (2008). *See generally* Goldman, Mental Health Proceedings in Massachusetts: A Manual for Defense Counsel (CPCS, 2004); Uphoff, The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court, 1988 WIS. L. REV. 65.

[21] *See supra* § 10.1, regarding competence to plead guilty.

[22] *See infra* § 10.5B, regarding medication as means of restoring competency.

[23] *See infra* § 10.6, regarding defendant's right to appear in natural, un-medicated state if he is presenting an insanity defense.

[24] Commonwealth v. Simpson, 428 Mass. 646, 648, 654 (1999); Commonwealth v. Simpson, 44 Mass. App. Ct. 154, 163 (1998), *S.C.,* 428 Mass. 646 (1999).

[25] 428 Mass. 646, 654 (1999).

[26] Commonwealth v. Simpson, 428 Mass. 646, 654 (1999) (Ruling that when competency is raised on appeal "defense counsel must file a motion for a new trial alleging that the defendant was incompetent at the time of trial. If the defendant is … competent [at time of appeal] the judge should decide the new trial motion. If the defendant is not … competent [during appeal], no evidentiary hearing may properly be held on the new trial motion").

[27] 433 Mass. 105 (2000).

[28] The defendant in *Conaghan*, who had pleaded guilty to manslaughter in the death of her minor son, subsequently submitted a post-conviction motion supported by her affidavit and psychiatric records indicating that she had been incompetent to enter the plea by reason of battered woman syndrome. The Court held that this showing entitled her to an examination by an expert in battered woman syndrome under MASS. GEN. LAWS ch.123. §15(a), as to her competence to assist her plea counsel and to enter a voluntary plea of guilty. 433 Mass. 105, 105-107 (2000).

§ 10.3 THE § 15A INITIAL OUTPATIENT EVALUATION

§ 10.3A. IN GENERAL

Massachusetts law requires an initial competency evaluation to be completed on an outpatient basis.[29] The evaluation should take place at the courthouse or place of detention and may be conducted by a physician, psychiatrist or psychologist.[30] A court may not commit a defendant to a mental health facility for completion of an inpatient competency evaluation until completion of the initial outpatient evaluation.

The evaluation is generally conducted by a qualified clinician, i.e., a forensic psychologist from the court clinic, which, if there is one, is located in the courthouse and operated by the Department of Mental Health. Those courts without a clinic usually make arrangements for competency evaluations to be conducted by the local community mental health center, which frequently means the defendant must remain in the courthouse lock-up until a clinician from the local center can come to the court.

The privilege against self-incrimination applies to § 15 examinations,[31] and counsel should take steps, when necessary, to protect against violation of the privilege.

§ 10.3B. ROLE OF COUNSEL AT THE EVALUATION

Although the District Court Standards for Civil Commitment advise the appointment of counsel prior to an order for evaluation,[32] it is not constitutionally required,[33] and many courts order an evaluation without appointing counsel until prior to the competency hearing. However, because the test to determine the defendant's

---

[29] MASS. GEN. LAWS ch. 123, § 15(a).

[30] Obviously, the better choice would be a psychiatrist or psychologist.

[31] Nolan v. Police Commissioner of Boston, 383 Mass. 625, 628 (1981); Blaisdell v. Commonwealth, 372 Mass. 753 (1977). Additionally, MASS. GEN. LAWS ch. 233 § 23B provides that statements of a defendant examined under MASS. GEN. LAWS ch. 123 § 15 or § 16 are admissible only as to mental condition, and not even then if they constitute a confession. If there is no valid waiver of the privilege, however, statements made during a state-ordered psychiatric examination are inadmissible for any purpose, unless they were preceded by a warning that the statements will not be privileged. Commonwealth v. Lamb, 365 Mass. 265 (1974). *See* full discussion *infra* at § 19.4H. But *see* Commonwealth v. Seabrooks, 433 Mass. 439, 451 (2001) (holding communications between defendant and psychologist did not violate constitutional privileges against self-incrimination despite lack of *Lamb* warnings because "[f]or the privileges to attach, the State must compel the defendant to produce testimonial evidence. Here, the defendant consulted with his attorney before he met with Dr. Sherry, and agreed to discuss some, but not all, matters with him. More importantly, the defendant, through the testimony of his experts, introduced in evidence his communications to Dr. Sherry") (citations omitted). *See* also Seng v. Commonwealth, 445 Mass. 536 (2005).

[32] Standards of Judicial Practice: Civil Commitment (Dec. 31, 1979) (hereinafter "Civil Commitment Standards"): "Sec. 4.00. Whenever a court doubts whether a criminal defendant is competent to stand trial or criminally responsible by reason of mental illness or mental defect, it should determine these issues according to the procedures established under MASS. GEN. LAWS ch. 123 § 15. Prior to an order for evaluation or observational commitment, a person should be represented by counsel."

[33] Nolan v. Police Comm'r, 383 Mass. 625, 628 (1981) (no right to counsel at a §15 hearing).

competence to stand trial is based on the defendant's ability to communicate with his attorney and participate in his own defense,[34] it seems that the opinion of the defense attorney on these matters should be a factor considered by the court, and that defense attorney should be part of the process from the beginning.[35]

It is important for the attorney to brief the clinician before the examination. If the attorney believes that she can communicate with her client and effectively represent him, she should inform the clinician of these facts and of her conclusion that the client is competent. The attorney should talk to the clinician following the evaluation to ascertain whether the clinician is going to present an opinion that the client is competent, or whether he intends to recommend a further, inpatient evaluation. If the clinician indicates that he will recommend an inpatient evaluation, defense counsel should speak with the client again to determine what may have been missing in his understanding, explain the proceedings to him, and then try to convince the clinician to spend more time with the defendant instead of making a recommendation for inpatient evaluation. A clinician's determination is not binding on the court, and the judge may not go along with it.[36] If the attorney's attempts fail, she may be able to arrange an evaluation on a voluntary basis at a private mental health facility,[37] thus avoiding a commitment to a public facility. Additionally, counsel should consider securing an independent evaluation, if necessary, funded by the Commonwealth.[38]

---

[34] That is, the defendant should be able to understand the charges, the relevant facts, the potential penalties and dispositions, possible defenses, the role of defense counsel, prosecutor, judge, jury, and witnesses, and to reason about legal options, such as plea bargaining. *See* Bonnie, *The Competence of Criminal Defendants; Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539 (1993), Robey, M.D., *Criteria for Competency to Stand Trial: a Checklist for Psychiatrists,* Am J Psychiatry 1965; 122:616-623. At the time he wrote this article, Dr. Robey was the Medical Director at MCI Bridgewater. He was the first to develop a formal checklist for evaluating competency. Since 1965, other assessments have been developed, and they are explained and critiqued in Pirelli, Gottdiener, and Zaph, *A Meta-Analytic Review of Competency to Stand Trial Research,* Psychology, Public Policy and Law, Vol.17, No.1, 1-153 (2011).

[35] *See* Estelle v. Smith, 451 U.S. 454, 472 (1981) (Defendant has a right to the assistance of counsel "in making the significant decision of whether to submit to the evaluation and to what end the psychiatrist's findings could be employed"); Commonwealth v. Sargent, 449 Mass. 576 (2007).

[36] MASS. GEN. LAWS ch. 123, § 15(a)-(b). It is within the judge's discretion to credit the testimony of the Commonwealth's expert as to defendant's competency. Commonwealth v. Brown, 449 Mass 747, 872 NE2d 711(2007) .

[37] If a client wants to be examined in a private facility, the attorney should first determine if the client has sufficient insurance or private funds to pay for the evaluation. If the funds are available, the attorney should contact the private facility to determine if it is qualified to perform the evaluation and if it has a bed for the defendant.

[38] An indigent defendant may obtain funds for an independent examination pursuant to MASS. GEN. LAWS ch. 261§§ 27A-27G. If an insanity defense may be at issue, the defendant has the right to appointment of a competent psychiatrist to examine him and to assist in the preparation of a defense. Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

§ 10.4 THE § 15(B) COMMITMENT FOR FURTHER EVALUATION

After the § 15(a) evaluation has been completed, a written report is submitted to the court.[39] If the court believes that further examination is necessary it "may order that the person be hospitalized at a public [mental health] facility or, if such person is a male and appears to require strict security, at the Bridgewater State Hospital."[40] Although the statute requires that the evaluation take place at a "public facility," most courts will permit a § 15(b) evaluation to take place at a qualified private psychiatric facility. The privilege against self-incrimination applies to such examinations.[41]

§ 10.4A. CRITERIA FOR BRIDGEWATER COMMITMENTS

Bridgewater State Hospital is an institution operated by the Massachusetts Department of Correction to provide care, treatment, and evaluations of mentally ill men[31] who require "strict security."[42] Although only men who require "strict security" should be sent to Bridgewater for competency evaluations[33], some judges use Bridgewater for all criminal defendants who require inpatient evaluations. To reduce the inappropriate use of Bridgewater, the defense attorney should point out that a male defendant should be sent to Bridgewater only if:

1. He is charged with a major felony (murder, rape, arson, assault with intent to murder), and a qualified psychiatrist believes an inpatient evaluation is required; or
2. He is not charged with a major felony, but there is evidence of an acute risk of assaultive, homicidal behavior that would justify sending him to a hospital with "strict security."

Because of Bridgewater's uncomfortable conditions, most defendants would prefer being evaluated in a mental health facility run by the Department of Mental Health. Therefore, defense counsel should actively oppose an observational commitment to Bridgewater for any defendant who does not require "strict security" as set forth in the statute.

§ 10.4B. EXTENSION OF THE TWENTY-DAY OBSERVATION PERIOD

The § 15(b) evaluation should be for no longer than twenty days. This period may be extended for an additional twenty days if the examining clinician reports that an extension is needed to complete the examination. The clinician must submit a written request to the court, specifying the reason(s) for which further observation is necessary.[43] There is no authority for observational confinement beyond this period. Accordingly, whether or not the facility has completed its evaluation at the end of the extended period, counsel should insist on a court order releasing the defendant. If the district court fails to act, counsel should file an application to the superior court to seek

[39] MASS. GEN. LAWS ch. 123, § 15(a)-(b). For a detailed analysis of how the report should be written and what its content should be, *see* Massachusetts Department of Mental Health Forensic Services, MASS. GEN. LAWS ch. 123, § 15(a) Report Writing Guidelines, revised 9/18/2008.

[40] MASS. GEN. LAWS ch. 123, § 15(b).

[41] *See supra* § 10.3A

[42] MASS. GEN. LAWS ch. 123, § 15(b).

[43] MASS. GEN. LAWS ch. 123, § 15(b).

relief.[44]

Since most competency evaluations consist of a review of the charges and the court records followed by a simple clinical interview and the writing of the report, there is no reason for an evaluation to require more than twenty days to complete. However many facilities, including Bridgewater, will routinely request a twenty-day extension because the clinicians do not have the time to begin the evaluation during the first twenty days. The statute does not appear to condone the granting of an extension for this reason, and any such request should be opposed by counsel. Although there is no statutory provision for a hearing on the granting of the extension, the District Court Standards for Civil Commitment provide that the defendant should be given the opportunity to be heard on the request for an extension.[45]

If the defendant is responding to treatment in the hospital, including medication, the additional time may be requested to accurately assess the impact of treatment on the defendant's competency.

Finally, the period of observation is not a sentence. There is no reason for the defendant to remain in a mental health facility any longer than necessary, and the defendant should be returned to court as soon as the evaluation is completed. The defendant is entitled to receive credit against any sentence he ultimately receives for the evaluation period at Bridgewater or, presumably, any other mental health facility.[46] Periods of delay resulting from an examination of defendant's competency to stand trial pursuant to §§ 15 and 16 are excluded from the speedy trial calculation under MASS. R. CRIM. P. 36(b)(2)(A)(i).[47]

§ 10.5 THE COMPETENCY HEARING

§ 10.5A. PREPARATION FOR THE HEARING

Counsel should speak with the person who is writing the competency report and get a copy of the report before the hearing. If counsel has hired an independent expert to make a competency evaluation, counsel should show the report to his expert and go over it with him in order to prepare for cross-examination, should counsel want to contest the conclusion. Counsel is also advised to send a letter to the doctor in charge of the confining facility on the commitment order, requesting notice in advance of any hearing involving the defendant, including guardianship, treatment, or civil commitment hearings.

§ 10.5B. THE ROLE OF MEDICATION IN COMPETENCY PROCEEDINGS

The defendant cannot be forced to accept medication against his will without a judicial finding that he is incompetent to make the medical decision *and* that he would

[44] MASS. GEN. LAWS ch. 123, §9

[45] CIVIL COMMITMENT STANDARDS 4:01 provides: "Requests for extensions of observational commitments should only be allowed for good cause." The commentary for this section further notes: "Requests for extensions by the hospital should not be routinely granted. Form DCD-56 should be completed and an extension should only be granted when good cause has been shown, and then only for the number of days shown to be necessary. The defendant (or prisoner) should be given the opportunity to be heard on the necessity for an extension."

[46] Stearns, Petitioner, 343 Mass. 53, 56 (1961).

[47] Commonwealth v. Montgomery, 76 Mass. App. Ct. 500 (2010).

accept the medication if he were competent.[48] Even after a finding of incompetency, if the defendant asserts the affirmative defense of insanity, and competency-restoring medication might mislead the jury as to the defendant's mental state at the time of the crime, Massachusetts law may give the defendant the option of waiving his right to be competent at trial in order to appear in his natural, un-medicated state, as he was at the time of the alleged crime.[49]

Defense counsel may present medication as an option available to the client, and inform the client that if the medication is sufficiently competency-restoring, it may result in the defendant's complete avoidance of the commitment procedures. If a "substituted judgment" treatment decision is sought, procedures will be instituted pursuant to statute.[40] Similarly, a defendant cannot be held beyond statutory time limits without a civil commitment hearing.[41]

§ 10.5C. HEARING TO DETERMINE COMPETENCY TO STAND TRIAL

The court is bound by the constitutional test detailed *supra* at § 10.1. Generally the court will make its decision based on the testimony of the clinician who conducted the competency evaluation, but even in the absence of contrary expert findings it may disbelieve the clinician's testimony and rely instead on the defendant's demeanor and response to questioning, and testimony of counsel and other witnesses.[42] However, counsel preparing to oppose the recommendation should review all present and previous hospital records, and interview potential witnesses to the defendant's competence, including family and friends. Counsel should also consider putting an articulate,

---

[48] *See* Rogers v. Commissioner of the Dep't of Mental Health, 390 Mass. 489 (1983); MASS. GEN. LAWS ch. 123,§ 8(b). In Commonwealth v. Louraine, 390 Mass. 28, 38 n. 13 (1978), the court reserved for another case the issue of whether the Commonwealth might involuntarily medicate a defendant to ensure competency to stand trial. *See* Riggins v. Nevada, 504 U.S. 127 (1992) (forcing antipsychotic medication on a defendant during trial is unconstitutional absent a finding of "overriding justification"). In a concurring opinion, Justice Kennedy argued that only an "extraordinary showing" could justify involuntary administration of antipsychotic drugs in order to render an accused competent for trial. Discussion *infra* at §10.6.

[49] *See* Jamie Mickelson, *"Unspeakable Justice": The Oswaldo Martinez Case and the Failure of the Legal System to Adequately Provide for Incompetent Defendants*, 48 WM. & MARY L. REV. 2075 (2007); Aimee Feinberg, *Forcible Medication of Mentally Ill Criminal Defendants: The Case of Russell Eugene Weston, Jr.*, 54 STAN. L. REV. 769 (2002); Winick, *Psychotropic Medication in the Criminal Trial Process: The Constitutional and Therapeutic Implications of Riggins v. Nevada*, 10 N.Y.L. SCH. J. HUM. RTS. 637 (1993); Fentiman, *Whose Right Is It Anyway? Rethinking Competency to Stand Trial in Light of the Synthetically Sane Insanity Defendant*, 40 U. MIAMI L. REV. 1109, 1150 (1986).

[40] MASS. GEN. LAWS ch. 123, § 8(b) (treatment), or MASS. GEN. LAWS ch. 201, §§ 6, 14 (probate court).

[41] MASS. GEN. LAWS ch. 123, §§ 7 & 8 or 16(b).

[42] Commonwealth v. Jones, 2010 WL 1178411 at 2 (2010); Commonwealth v. Robidoux, 450 Mass. 144, 155 (2007); Commonwealth v. Companonio, 445 Mass. 39, 41 (2005); Commonwealth v. Hung Tan Vo, 427 Mass. 464 (1998) (rejecting clinician's post trial incompetency finding); Commonwealth v. DeMinico, 408 Mass. 230, 232–37 (1990) (rejecting clinician's incompetency finding); Commonwealth v. Lameire, 50 Mass. App. Ct. 271, 274-277(2000) (rejecting clinician's recommendation of commitment to Bridgewater for further evaluation).

communicative client on the stand. If the defendant demonstrates the ability to answer questions about the criminal process and his role in it, he may convince the judge that he is competent to stand trial, notwithstanding the opinion of the expert. The defendant should be able to identify the judge, prosecutor, jury, and defense counsel, and to express a basic understanding of their roles. He should be able to testify to his understanding that he has been charged with a crime and that the judge can send him to jail if he is found guilty by either a judge or jury. He must convince the judge that he can communicate with his counsel and participate in his own defense.

At the hearing to determine competency, the defendant has all of the same procedural rights as he would have at trial. He has the right to cross-examine the Commonwealth's witnesses and the right to call his own witnesses, including the right to an independent psychiatrist.[43] As discussed *supra*, the judge's initial finding that the defendant is competent does not bar the defendant from raising the issue of his competency again at any later point in the proceedings, including on appeal.[50]

§ 10.6 PROCEDURES AFTER THE HEARING

If the defendant is found competent to stand trial, he is returned to court and the criminal process continues in the usual course.[51] If the defendant is found competent after an inpatient court-ordered evaluation and wishes to remain in the mental health facility or Bridgewater until trial, he may request "continued care and treatment during the pendency of the criminal proceedings," and if the facility head agrees to provide the treatment, the defendant may remain in the hospital pending trial.[52]

If the defendant raises the defense of insanity at trial, he has a right to present himself to the jury in the same state of mental illness that existed at the time of the crime,[53] which might require discontinuing competency-restoring medication. Massachusetts law gives the defendant the option of waiving his right to be competent at trial, in order to appear before the jury in an un-medicated state.[54]

---

[43] MASS. GEN. LAWS ch. 123, § 5.

[50] Commonwealth v. Wentworth, 53 Mass. App. Ct. 82, 89 (2001). The failure of defense counsel to alert the judge to any difficulty the defendant is having in assisting in his defense is not a waiver of the issue of competency, but may be considered by an appellate court as additional evidence that the defendant was competent. *Id*. at 89 n. 4.

[51] The defendant is entitled to be released on bail and should be given a bail hearing with full right of appeal. Interlocutory review of the competency ruling will not lie unless the defendant can show that his rights will not be adequately protected by appeal after conviction. *See* Oliveira v. Commonwealth, 425 Mass. 1004 (1997) (constitutional error in trying an incompetent defendant could be rectified on appeal by vacating conviction and barring retrial until defendant is competent).

[52] MASS. GEN. LAWS ch. 123, § 15(b).

[53] Commonwealth v. Louraine, 390 Mass. 28, 32–38 (1983); *see also* Riggins v. Nevada, 504 U.S. 127 (1992) (forcing antipsychotic medication on a defendant during trial is unconstitutional absent a finding of "overriding justification"). This topic is addressed *infra* at § 28.3.

[54] Commonwealth v. Louraine, 390 Mass. 28, 38 n. 13 (1983). *Accord* State v. Hayes, 118 N.H. 458, 462, 389 A.2d 1379 (1978). *But see* Commonwealth v. Gurney, 413 Mass. 97, 103–04 (1992) (conviction reversed for excluding defendant's evidence of effects of antipsychotic medication to explain to jury his controlled outward demeanor at trial, but dictum

If the defendant is found incompetent to stand trial, trial of the criminal case is stayed until the defendant becomes competent or the case is dismissed.[55] After a finding of incompetence, the defendant may be committed to a mental health facility or Bridgewater State Hospital. The initial period of commitment is for a period of six months and all subsequent commitments are for a period of one year. MASS. GEN. LAWS ch. 123, §§ 8(d) & 16(b). The period of commitment may exceed the period of time the defendant would have been required to serve if he had been convicted of the crime charged.[56]

The court having jurisdiction over the criminal case may order the defendant hospitalized for additional observation and examination at a mental health facility or Bridgewater State Hospital in order to determine whether hospitalization and treatment during the period of incompetency is necessary. This period of observation may be for a period of forty days, although the combined periods of hospitalization under this section and § 15(b) (competency evaluation) may not exceed fifty days.[57] At the end of this period, the Commonwealth must release the defendant or commence civil commitment

---

that "not every defendant who routinely is treated for mental illness is entitled to be observed by the jury in an unmedicated state").

[55] MASS. GEN. LAWS ch. 123, § 15(d). However, under MASS. GEN. LAWS ch. 123, § 17(b), the court may allow the defendant to offer evidence of a defense, other than insanity, on the merits. If the court finds a lack of "substantial evidence" of guilt, it must dismiss the charges. *See* Spero v. Commonwealth, 424 Mass. 1017 (1997) (upholding § 17(b)'s exclusion of insanity defense against equal protection challenge).

Concerning the plight of defendants who face prolonged incompetence, the CPCS Training Bulletin notes:

> MASS. GEN. LAWS ch. 123, § 16(f) provides that the charges must be dismissed against an incompetent, committed defendant upon the date of parole eligibility had s/he been convicted of the most serious offense charged and sentenced to the maximum penalty. Parole eligibility, for the purposes of this section, is defined as at a minimum, one-half of the maximum potential sentence. The statute also permits dismissal earlier than the parole eligibility date when it would be in the "interest of justice to do so".

CPCS Training Bulletin, June 1997, at 13. In order to preserve the defendant's confrontation rights at any future trial, the Bulletin also advises counsel to explore preserving helpful testimony by motions to depose witnesses under MASS. R. CRIM. P. 10(c) or 35. The Bulletin states:

> This, of course, is problematic because the defendant is not competent to participate in that proceeding and there can be no real confrontation. Presumably, the defendant could waive any objection to the deposition once competent; if the defendant chooses not to waive the objection, it would not be usable at trial.

CPCS Training Bulletin, June 1997, at 13.

[56] MASS. GEN. LAWS ch. 123, § 16(f). Foss v. Commonwealth, 437 Mass. 584, 595, 591 (2002).

[57] MASS. GEN. LAWS ch. 123, § 16(a).

procedures described in MASS. GEN. LAWS ch. 123,[58] because it is unconstitutional to confine a person for an indefinite period until he may become competent to stand trial.[59]

The commitment procedures under § 16 are exactly the same as those under the civil commitment statutes, MASS. GEN. LAWS ch. 123, §§ 7 and 8. The court must find that the failure to hospitalize the defendant will create a likelihood of serious harm by reason of mental illness.[60] In addition, the court must determine that there is no less restrictive placement that can provide care and treatment for the defendant. The petitioner must prove each of these elements beyond a reasonable doubt after a full adversarial hearing at which the defendant is present and is represented by counsel.[61]

Counsel should be aware of the very significant difference between the legal standard for civil commitment and the legal finding made when a defendant is determined to be incompetent to stand trial. Although a defendant may be declared incompetent to stand trial by reason of mental illness or mental defect,[62] he may be civilly committed only if he is mentally ill.[63] This means that a defendant may be incompetent to stand trial by reason of mental defect (i.e., mental retardation[64]), but he

[58] Pursuant to MASS. GEN. LAWS ch. 123, § 16(b), during the period of observation of a person believed to be incompetent to stand trial, or within 60 days after the person is found to be incompetent, the district attorney, the superintendent of the mental health facility, or the medical director of Bridgewater, may petition the court that has jurisdiction of the criminal case for the commitment of the person to a mental health facility or Bridgewater.

[59] A person who is not competent to stand trial can be held only for a period of time necessary to determine if there is a "substantial probability" that he will become competent in the foreseeable future; further confinement must be pursuant to civil commitment. Jackson v. Indiana, 406 U.S. 715 (1971).

[60] "Likelihood of serious harm" is defined as: (1) a substantial risk of physical harm to the person himself as manifested by evidence of threats of, or attempts at, suicide or serious bodily harm; (2) a substantial risk of physical harm to other persons as manifested by evidence of homicidal or other violent behavior or evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them; or (3) a very substantial risk of physical impairment or injury to the person himself as manifested by evidence that the person's judgment is so affected that he is unable to protect himself in the community and that reasonable provision for his protection is not available in the community. MASS. GEN. LAWS ch. 123, § 1. "Mental illness" is defined in regulations of the Department of Mental Health as "a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality or ability to meet the ordinary demands of life, but shall not include alcoholism." 104 C.M.R. 3.01.

[61] Any attorney who intends to represent a defendant in a commitment hearing should contact the Mental Health Legal Advisors Committee for assistance ((617) 338-2345). The attorney should also become familiar with THE TRIAL MANUAL FOR CIVIL COMMITMENT by Donald Stern and Steve Schwartz published by MHLAC.

[62] MASS. GEN. LAWS ch. 123, § 15. These terms are not synonymous. The term *mental illness* is defined in the regulations of the Department of Mental Health. *Mental defect* is never defined in the statute or the regulations of the Department. However, the universally accepted interpretation is that the phrase describes an individual who is mentally retarded.

[63] MASS. GEN. LAWS ch. 123, §§ 7, 8, 16. *See, e.g.,* Commonwealth v. DelVerde, 401 Mass. 447 (1988) (Commonwealth proved through expert testimony that incompetent defendant's commitment to Bridgewater was required); *In re* Laura L., 54 Mass. App. Ct. 853, 857 (2002).

[64] For assistance in recognizing and representing clients who are mentally retarded, counsel may contact the statewide Mental Retardation Criminal Defense Panel, established in 1996 by CPCS. Call your local CPCS office to obtain names of local Panel members.

cannot be committed to a mental health facility or any other institution on that basis alone.[65]

[65] Nor may he be labeled mentally ill simply because he is mentally retarded. MASS. GEN. LAWS ch. 123, § 1.