

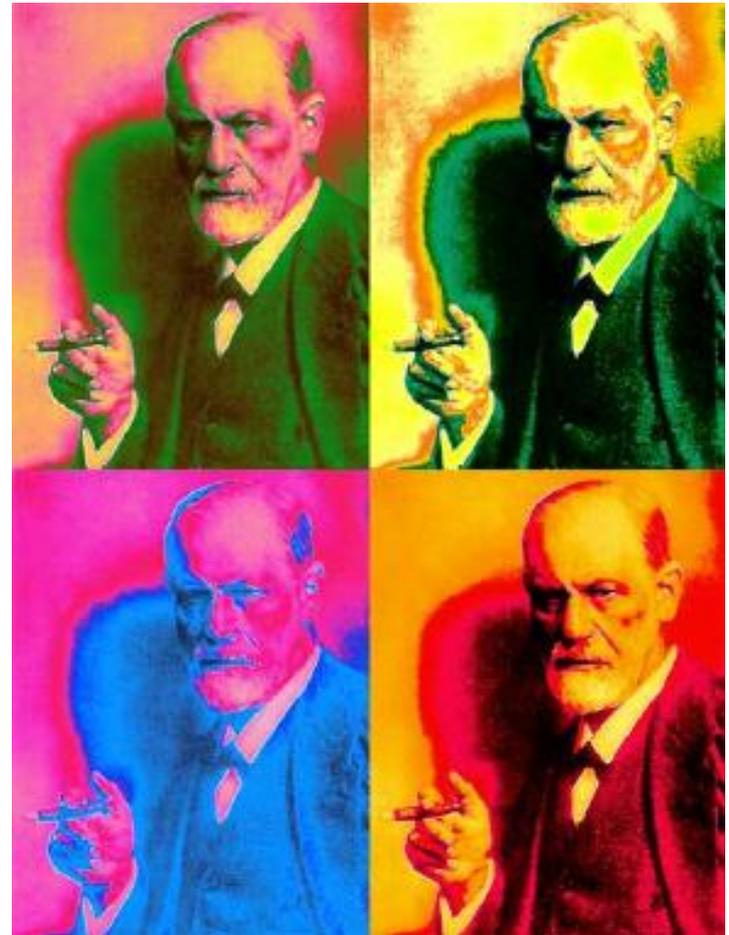
MAGICAL MYSTERY TOUR

- Competency to Stand Trial

- October 2016

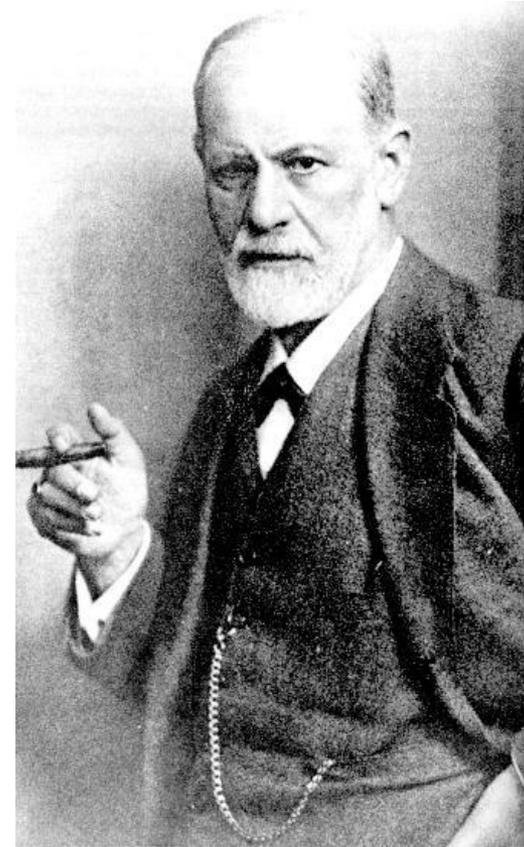
- **Creighton Horton**

- Former Utah Prosecutor



You have a defendant who may be mentally ill. What now?

- **Might result in incompetency to stand trial**
- **Might result in “insanity” or “diminished capacity” verdict**
- **Might result in reduction of offense level due to special mitigation**
- **Might result in “guilty with a mental illness” verdict**
- **Might provide mitigation for sentencing**



Your two major hurdles as a prosecutor facing mental health issues

- **Overcoming competency concerns**
- **and . . .**
- **Countering mental defenses (insanity, diminished capacity, special mitigation)**



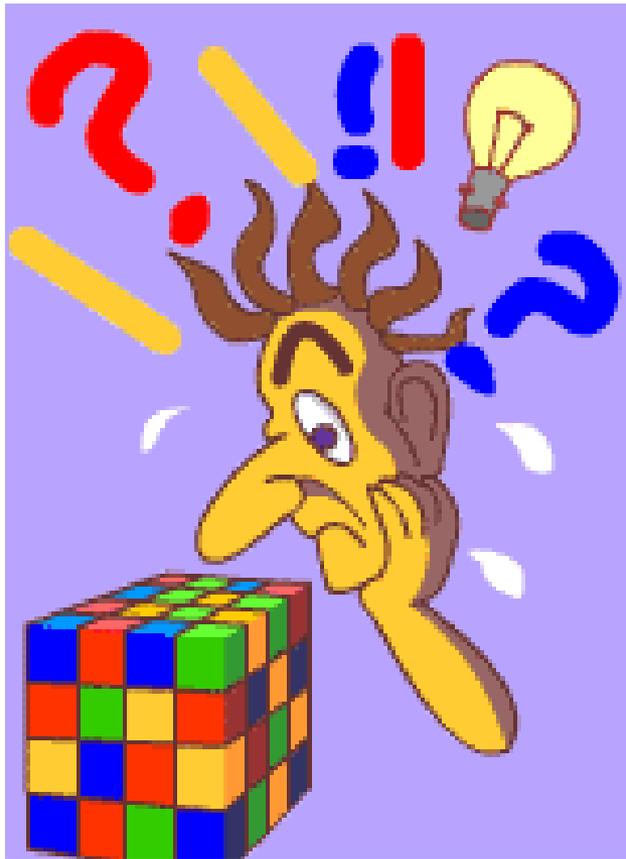
Competency v. Mental Defenses

- **Entirely different inquiries**



- **Competency is a “here-and-now” determination and relates to whether defendant is fit to be tried**
- **Mental defense inquiry (insanity, diminished capacity, special mitigation) is a “then-and-there” determination and relates to criminal responsibility**

Query: What's more likely to cause you real trouble in your case?



- **Competency?**
- **Mental defenses?**

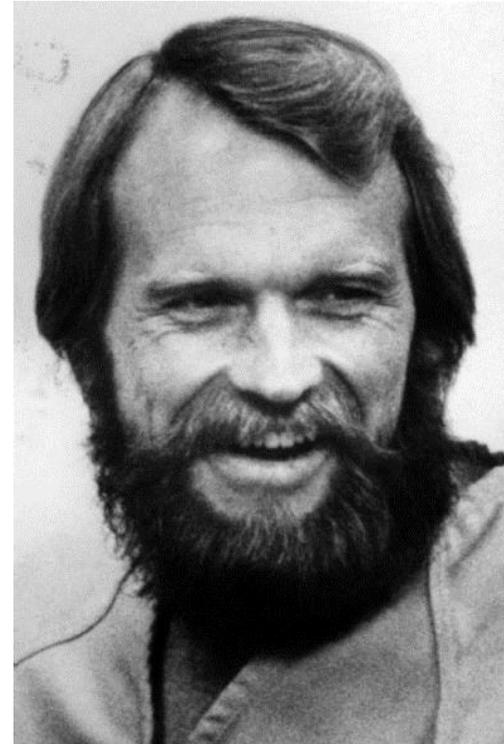
Competency!

- Because Utah has one of the most favorable mental defense laws for prosecutors in the country; and
- Competency can derail your cases before they even get started, or . . .
- Nullify them after they're all done.

**CAPTAIN
ANSWER**



- How important is it to get competency “right”?
- Cautionary tale:
State v. Ron Lafferty





Competency to Stand Trial

- **Most frequent forensic issue in criminal cases**
- **In some cases, can be the most difficult issue to deal with**
- **Once raised, can't do anything else until resolved -
- proceedings must be stayed**
- **If not handled properly, everything that happens afterward may be nullified**



Competency to Stand Trial

No one-to-one correlation between a diagnosis of any particular mental disorder and incompetency.

- **It's a functional inquiry, so a psychological or psychiatric diagnosis of a defendant is just a threshold issue.**
- **Does mental disorder interfere with a defendant's ability to function in a legally significant way?**



What is “a legally significant way?”

- **Does the defendant’s mental disorder result in either:**
- **His/her inability to have a rational and factual understanding of the proceedings or the punishment specified for the offense; or**
- **His/her inability to consult with counsel and participate in the proceedings with a reasonable degree of rational understanding.**

The Legal Standard: Case Law Authority

- ***Dusky v. U.S.* 362
U.S. 402 (1960)**
- **Due process prohibits
trying the incompetent**



Utah's statutes



- **UCA 77-15-1 et seq**
- **Re-written in 1994**
- **Comprehensive**



Consulting with counsel

- In some cases, the key question is whether the defendant is unable, versus unwilling, to consult with counsel.
- Often arises in cases in which defendants hold extreme views, or have personality traits or disorders which make them disinclined to cooperate in any proceedings.
- *State v. Woodland*, 945 P.2d 665 (Utah 1997).

Who can raise competency?

(UCA 77-15-3 & 4)

- The guy on the couch
- You
- Defense Counsel
- The Judge
- Jailors, etc.



Who files 99.9% of them?



- **Defense attorneys**
- **Some for legit reasons**
- **Some for delay, etc.**
- **Must include basis for competency concern and certify filed in good faith**



General Principles

- **Person presumed competent**
- **Burden is upon proponent of incompetency**
- **Standard is by preponderance of evidence**
- **If defendant is found incompetent, burden shifts to proponent of competency in future hearings to show defendant is no longer incompetent**
- **Incompetent defendants can't be held indefinitely.**
Jackson v. Indiana, 406 U.S. 715 (1972)



Utah's competency laws rewritten in 1994

- ***Jackson* principle recognized and codified**
- **Statutes made standards, procedures and relevant issues explicit for mental health examiners and judges**
- **Outlines what should be in reports of examiners**
- **And what should be addressed in court findings and orders**
- **UCA 77-15-5**



Practical application of statute: What if experts don't agree?

- **Statute says all should be called and examined at the hearing [UCA 77-15-5(9)]**
- **Nothing prohibits court from appointing additional expert(s), but neither is it required**
- **Discrepancy in opinions sometimes due to difference in quality of work done by examiners**
- **If one side pushing for hearing rather than appointment of “tie breaker,” probably feel they can demonstrate that to the court**

So when should we have a hearing?

- **When we can win, and have it stand up on appeal!**



When should we stipulate to reports?

- **When we agree with (all of) them, or . . .**
- **We don't agree with (all of) them, but we've got a losing hand, so it's on to the State Hospital**





When can competency be raised?

- At any time there's a bona fide doubt about competency of defendant, issue must be addressed. *Pate v. Robinson*, 86 S.Ct. 836 (1966).
- Even during trial. *Drope v. Missouri*, 95 S.Ct. 896 (1975).



Beware of stealth petitions!

Method used in *Ron Lafferty* case

- **Not by petition, motion or other direct manner.**
- **Issue raised by inference only, within defendant's "Motion in Opposition to Removing Defendant from the Courtroom."**
- **Filed the day before jury selection was to begin, and just a few months after defendant had been found competent.**
- **Since new allegations were raised, we had to put jury selection on hold pending new round of evaluations and a full competency hearing.**



What about an after-the-fact determination of competency, if competency was mishandled at trial?

- **Nope. 10th Circuit wouldn't allow in *Lafferty* case, citing U.S. Supreme Court precedent in *Pate* and *Drope*.**
- **Accord Utah – *State v. Holland*, 921 P.2d 430 (1996).**
- **As a result, even if evidence exists to establish that a defendant was actually competent when tried, there will be no opportunity to present it.**
- **So stakes are high if bona fide question of competency is not addressed at trial level.**



Had issue not been addressed in Lafferty case, likely result would have been . . .

- **Reversal on appeal (again!)**
- **This is true even though the defendant had been found competent not long before trial.**
- **So remember that a competency inquiry may be necessary, even mid-trial, if a change of circumstances creates doubt as to a defendant's competency.**



So what happens when a court finds a defendant incompetent?

- **Committed to custody of Dept. of Human Services for treatment**
- **Will likely go on waiting list to get into Utah State Hospital (USH), or outreach program**
- **Prosecutors have obligations to provide relevant stuff like charging documents, police reports and criminal history of defendant, as per UCA 77-15-5 (2).**



What happens after commitment?

- **Assessment and treatment by DHS – first report to Court in about 180 days**
- **Periodic reviews by Court**
- **Statutory time limits in UCA 77-15-6**
- **Subject to “Jackson limits”**
- **To continue holding/treating, judge must find a substantial probability defendant may become competent in the foreseeable future**

How long can incompetent defendants be held and treated?

- Depends on what they're charged with
- Check 77-15-6
- Can hold longer for more serious felonies
- Max: about 6 yrs for murder & aggravated murder
- May be extended if involuntary medication becomes an issue – see 77-15-6.5 (7)





Can you always hold and treat them for the maximum period set out in the statute?

- **Nope – may not be able to hold them for very long at all, unless . . .**
- **Court finds a substantial probability that they'll become competent in the foreseeable future.**
- **Otherwise . . .**

Defendant who are not likely to be restored in the foreseeable future cannot be held in custody as “incompetent to stand trial.”

- **Must be either:**
- **Released; or**
- **Civilly committed**
- **Charges need not be dismissed**



If an incompetent defendant is released, will he/she automatically be civilly committed?

- **Nope**
- **Different standards and criteria - See 62A-15-631**
- **Defendants can fall through the cracks.**
- **Who does the civil commitment hearing?**
- **You do.**



What if a defendant is incompetent but refuses meds to restore competency?

- ***Sell v. U.S.*, 123 S.Ct. 2174 (2003)**
- **Sets out standards that apply when the government seeks to forcibly medicate an incompetent defendant solely for the purpose of restoring trial competency**
- **Fairly stringent standard**



Until 2006, Utah had no statute

- **Enter Wanda Barzee**
- **Co-defendant in Elizabeth Smart case**
- **Found incompetent to stand trial and sent to State Hospital**
- **Refused medication**
- **Legislature responded quickly**





What does Utah Law provide?

- **UCA 77-15-6.5 sets out the standards and procedures that apply to involuntarily medicating incompetent defendants, consistent with the U.S. Supreme Court's decision in *Sell v. U.S.*, 123 S.Ct. 2174 (2003).**
- **It stops the “treatment clock” while a defendant's refusal to take medication is being litigated, and a court decides whether the defendant should be medicated to restore competency. This insures that defendants won't be able to simply “run out the clock” while the issue is being litigated.**



The substantive standard

- **Important state interests are at stake**
- **Involuntary medication will significantly further those interests, in that the medication proposed is**
 - **a. substantially likely to render defendant competent; and**
 - **b. substantially unlikely to produce side effects which would significantly interfere with his ability to assist counsel**
- **No less intrusive treatments are likely to work, and**
- **The proposed medication is medically appropriate and in the defendant's best medical interest**

Best medical interest



- **Potential punishment if convicted is not a relevant consideration under the statute in determining medical appropriateness**

What is the standard of proof?



- **Clear and convincing evidence**



What happens when a defendant is restored to competency?

- **Court makes such a finding**
- **Stay lifted**
- **Defendant returned to jail or other pre-trial placement**
- **Trial can proceed, but stay vigilant**
- **If defendant's mental state deteriorates during trial, you may have to revisit competency**

Competency Issues Specific to Capital Cases

- **Exemption from death penalty due to intellectual disability. 77-15a-104**
- **Competency to be executed. 77-19-201 et seq.**



Exemption from Death Penalty

- Based on US Supreme Court opinion in *Atkins v. Virginia*, 122 S.Ct 2242 (2002)
- Cruel & unusual punishment to subject the mentally retarded to the death penalty
- Based on idea that mentally retarded defendants have a lesser degree of culpability





Utah's statutes: UCA 77-15a-101 et seq

- **“Intellectually disabled” defined**
- **Defendant has significant subaverage general intellectual functioning that results in . . . significant deficiencies in adaptive functioning that exist primarily in the areas of *reasoning and impulse control*. . .(both manifested prior to age 22) 77-15a-102**

- 
- **Even if defendant does not meet that definition, if he meets the more generic definition of “intellectual disability,” he cannot be executed if . . .**
 - **“the state intends to introduce into evidence a confession by the defendant which is not supported by substantial evidence independent of the confession.” UCA 77-15a-101(2)**



Is there a similar prohibition against executing the mentally ill?

- **Not yet, but the presence of mental illness can be a specific mitigating circumstance for purposes of capital sentencing - 76-3-207(4)(d)**
- **Query: Might courts one day use *Atkins* case rationale to exempt those with severe mental illness from the death penalty, on the basis that they too have a “lesser degree of culpability”?**

What does it mean to be incompetent to be executed?

- Means that, “due to a mental condition, the inmate is unaware of the punishment he is about to suffer or why he is to suffer it.”
- UCA 77-19-201
- Patterned after *Ford v. Wainwright*, 106 S.Ct. 2595 (1986)





Distinction between (1) exemption from death penalty and (2) incompetency to be executed

- **Exemption from death penalty due to intellectual disability generally occurs at the beginning of a prosecution, and is limited to intellectual disability**
- **Competency to be executed is a “back-end” determination as a convicted defendant’s execution awaits execution, and can be based on mental illness or intellectual disability**



Can we forcibly medicate an inmate to restore his competency to be executed?

- **You might think so**
- **After all, the defendant was convicted and sentenced while competent, and has had years of appeals**
- **So if it's OK for the State to execute him, it's OK to forcibly medicate him, right?**

Not So Fast!





Opposition From:

- **Utah Psychiatric Association**
- **Utah Association of Criminal Defense Lawyers**
- **Disability Law Center**
- **Several Legislators**

Concerns included:

- Ethical concerns
- Practical concerns
- Philosophical concerns



The Great Compromise

**Utah Law, enacted in
2003, prohibits
forcible medication for
the sole purpose of
restoring a prisoner's
competency to be
executed**

77-19-205 (1)(a)(ii)



On to Mental Defenses!

