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# Competence to Stand Trial in Florida\*

BRUCE J. WINICK\*\* AND TERRY L. DEMEO\*\*\*

*The Florida law of competence to stand trial has recently undergone a number of significant reforms and innovations. To achieve these reforms and to protect the rights of incompetent defendants adequately, criminal defense attorneys, prosecutors, judges, and professionals in mental health must acquaint themselves with these changes. The authors analyze the new rules and statutory provisions and discuss how the courts will interpret and apply these new provisions in light of case law and constitutional mandates.*

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## I. INTRODUCTION

In Florida, as in all jurisdictions, a criminal defendant incompetent to stand trial cannot be tried.<sup>1</sup> Long recognized in Florida, the incompetency doctrine evolved from the common law premise that the state should not prosecute an individual if he lacks the capacity to participate adequately in the proceedings.<sup>2</sup> The contemporary basis for an incompetency designation is a judicial determination that the defendant, as a result of mental impairment, is incapable of understanding the nature of the proceedings against him or of assisting in his defense. The doctrine is justified as a means of protecting the integrity of the adversarial criminal proceeding through promotion of the accuracy, fairness, and dignity of the trial process.<sup>3</sup> The Supreme Court of Florida has emphasized that the purpose of the doctrine "is to protect the accused—to make sure that he will be able to assist his counsel in preparing the

1. Perkins v. Mayo, 92 So. 2d 641, 644 (Fla. 1957).

2. One can trace the origins of this doctrine back to mid-17th century England. GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, COMM. ON PSYCHIATRY AND LAW, MISUSE OF PSYCHIATRY IN THE CRIMINAL COURTS: COMPETENCY TO STAND TRIAL 912-15 (1974) [hereinafter cited as MISUSE OF PSYCHIATRY]. Blackstone wrote that a defendant who became "mad" after the commission of an offense should not be arraigned, "because he is not able to plead . . . with the advice and caution that he ought," and should not be tried, for "how can he make his defense?" 4 W. BLACKSTONE, COMMENTARIES 24 (9th ed. 1783). See also M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 34 (1847). Some commentators have traced the common law prohibition on trying the incompetent defendant to the ban on trials *in absentia*. Foote, *A Comment on Pre-trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960); see, e.g., Frith's Case, 22 How. St. Tr. 307 (1790); Kinloch's Case, 18 How. St. Tr. 395 (1746). Others have traced the origins of the doctrine to the difficulties that resulted when a defendant frustrated the ritual of the English common law trial by remaining mute instead of pleading to the charges. Slovenko, *The Developing Law on Competency to Stand Trial*, 5 J. PSYCH. & L. 168 (1977); MISUSE OF PSYCHIATRY, *supra*, at 887-88, 912-13.

3. S. BRAKEL & R. ROCK, THE MENTALLY DISABLED AND THE LAW 408 (rev. ed. 1971); Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 457-59 (1967).

best defense possible to the crime with which he is charged."<sup>4</sup> In fact, both the United States Supreme Court and the Supreme Court of Florida have indicated that conviction of an incompetent person would violate due process.<sup>5</sup>

Few areas of the law have undergone as rapid a change in recent years as the law of competency to stand trial. Until recently, incompetent defendants faced automatic commitment to mental hospitals for what was, in effect, an indeterminate sentence.<sup>6</sup> Many hospitalized defendants never regained their competency, and those who did remained institutionalized for lengthy periods; hospital staff often failed to notice their improvement—and sometimes ignored it.<sup>7</sup> The period of confinement for incompetent defendants was lengthy, often exceeding the maximum sentence for the crime charged<sup>8</sup> and occasionally lasting a lifetime.<sup>9</sup>

In 1972, the Supreme Court's decision in *Jackson v. Indiana*,<sup>10</sup> which placed significant constitutional limits on the power of the

4. *Daniels v. O'Connor*, 243 So. 2d 144, 147 (Fla. 1971), *appeal dismissed as moot sub nom. Daniels v. Hirshberg*, 406 U.S. 902 (1972).

5. *Pate v. Robinson*, 383 U.S. 375, 388 (1966) (dictum); *accord*, *Martin v. Estelle*, 546 F.2d 177 (5th Cir. 1977); *Bruce v. Estelle*, 483 F.2d 1031, 1036 (5th Cir. 1973), *overruled in part on other grounds*, *Zapata v. Estelle*, 585 F.2d 750 (5th Cir. 1978); *State v. Tait*, 387 So. 2d 338 (Fla. 1980).

6. D. WEXLER, CRIMINAL COMMITMENTS AND DANGEROUS MENTAL PATIENTS: LEGAL ISSUES OF CONFINEMENT, TREATMENT, AND RELEASE 38 (DHEW Pub. No. 76-331, 1976); Gobert, *Competency to Stand Trial: A Pre- and Post-Jackson Analysis*, 40 TENN. L. REV. 659, 685 (1973). A statutory survey in 1971 revealed that 42 states required automatic hospitalization. S. BRAKEL & R. ROCK, *supra* note 3, at 415, 444-50 (Table 11.2). As of March 1979, as many as 19 states and the District of Columbia still provided for automatic and indefinite commitment. Roesch & Golding, *Treatment and Disposition of Defendants Found Incompetent to Stand Trial: A Review and a Proposal*, 2 INT'L J.L. & PSYCH. 349, 357, 358-61 (Table 2).

7. See, e.g., McGarry, *Demonstration and Research in Competency for Trial and Mental Illness: Review and Preview*, 49 B.U. L. REV. 46, 50-51 (1969).

8. SPECIAL COMMITTEE ON THE STUDY OF COMMITMENT PROCEDURES AND THE LAW RELATING TO INCOMPETENCE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, MENTAL ILLNESS, DUE PROCESS AND THE CRIMINAL DEFENDANT 72-73 (1968) [hereinafter cited as SPECIAL COMMITTEE]; Engelberg, *Pretrial Commitment to Mental Institutions: The Procedure in Massachusetts and Suggested Reform*, 17 CATH. U.L. REV. 163, 165 (1967); Hess & Thomas, *Incompetency to Stand Trial: Procedures, Results, and Problems*, 119 AM. J. PSYCH. 713, 716 (1963); Roesch & Golding, *supra* note 6, at 349-50; Winick, *Psychotropic Medication and Competence to Stand Trial*, 1977 AM. B. FOUNDATION RESEARCH J. 769, 792.

9. SPECIAL COMMITTEE, *supra* note 8, at 214-15; A. STONE, MENTAL HEALTH AND LAW: A SYSTEM IN TRANSITION 203 (DHEW Pub. No. 76-176, 1976); Hess & Thomas, *supra* note 8, at 717-18; McGarry, Curran, & Kenefick, *Problems of Public Consultation in Medical Legal Matters*, 125 AM. J. PSYCH. 42, 44; Winick, *supra* note 8, at 792; Note, *supra* note 3, at 456.

10. 406 U.S. 715 (1972); see D. WEXLER, *supra* note 6, at 38-41; Gobert, *supra* note 6; notes 80-81 & 130 and accompanying text *infra*.

states to commit incompetent defendants, drastically changed this situation. *Jackson* caused a substantial revision of state procedures for incompetency commitment, although perhaps half of the states have not yet enacted legislation consistent with its requirements.<sup>11</sup> Florida was one of the first jurisdictions to respond to this landmark case, revising Rule of Criminal Procedure 3.210 within months of the *Jackson* decision.<sup>12</sup>

In the years since 1972, the Florida law governing competence to stand trial has been revised frequently.<sup>13</sup> On July 1, 1980, a new Florida statute<sup>14</sup> and rule of criminal procedure<sup>15</sup> took effect. These new provisions created a number of significant changes in the law of competency in Florida, which other jurisdictions con-

11. Roesch & Golding, *supra* note 6, at 357.

12. FLA. R. CRIM. P. 3.210, *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972). The Supreme Court of Florida adopted the former rule in 1967, before which the procedure appeared in FLA. STAT. § 917.01 (1967). Note, *Florida's Incompetency-to-Stand-Trial Rule: A Possible Life Sentence?* 4 FLA. ST. U.L. REV. 523, 525 n.8 (1976).

13. The Supreme Court of Florida amended rule 3.210 on February 10, 1977, effective July 1, 1977. 343 So. 2d 1247 (Fla. 1977). The rule was repealed, effective September 29, 1977 by 1977 Fla. Laws ch. 77-312, which contained a new statutory formulation of the law on competency. In 1978 the court found unconstitutional the bifurcated trial system established by 1977 Fla. Laws ch. 77-312, § 1 for the trial of insanity cases. *State ex rel. Boyd v. Green*, 355 So. 2d 789 (Fla. 1978). Finding that § 10, which replaced provisions of ch. 77-312, depended on the bifurcated trial provision, the court reinstated former FLA. R. CRIM. P. 3.210. *Id.* at 795. This rule continued to govern competence to stand trial until October 1, 1979, when ch. 79-336, § 4 and ch. 79-400 made effective FLA. STAT. §§ 394.02 and 394.03. Chapter 79-336 repealed FLA. R. CRIM. P. 3.210 and reenacted ch. 77-312 with a number of modifications. On October 9, 1979, the Supreme Court of Florida issued Transition Rule 23(a), 375 So. 2d 855 (Fla. 1979), which adopted as a court rule those sections of ch. 79-336 that were procedural in nature, and further provided that

[a]t the initial hearing held pursuant to Fla. Stat. 394.902, the court shall consider the following issues:

- a. Whether the defendant is competent to stand trial;
- b. If it is determined by the court that the defendant is not competent to stand trial, whether the defendant meets the criteria for involuntary hospitalization.

375 So. 2d at 855. By adopting as a court rule the statutory provisions that were procedural in nature, the court avoided what otherwise would have been a substantial constitutional question concerning the legislature's power to adopt at least some of the statutory provisions governing competence to stand trial. See *In re* Clarification of Florida Rules of Pract. & Proc., 281 So. 2d 204 (Fla. 1973); Means, *The Power to Regulate Practice and Procedure in Florida Courts*, 32 U. FLA. L. REV. 442 (1980).

14. FLA. STAT. §§ 916.11-.14, 916.16-.17 (Supp. 1980).

15. FLA. R. CRIM. P. 3.210-.214, *In re* Florida Rules of Criminal Procedure, 389 So. 2d 610 (Fla. 1980). The current statute apparently avoids the separation of powers problem, see Means, *supra* note 13, by leaving procedural matters to the revised Florida Rules of Criminal Procedure. The Court Rules Steering Committee of the Florida Bar drafted these rules in conjunction with the current statutory provisions to avoid conflict and constitutional difficulties.

templating similar revisions will undoubtedly examine closely. This article analyzes the new Florida provisions and relevant state and Federal case law on competency, and discusses how the courts will interpret these provisions in light of developing constitutional requirements.

## II. THE COMPETENCY STANDARD

### A. *The Dusky Standard*

Early formulations of the competency standard in Florida case law appeared in *Deeb v. State*<sup>16</sup> and *Southworth v. State*.<sup>17</sup> The decision of the United States Supreme Court in *Dusky v. United States*,<sup>18</sup> however, provides the current Florida standard. That case set forth the competency criteria for federal cases: "whether [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."<sup>19</sup> In the view of several courts, due process requires the *Dusky* standard.<sup>20</sup> Florida Statutes section 925.22(1) (1980) and Florida Rule of Criminal Procedure 3.211(a) have adopted the standard, verbatim.<sup>21</sup>

Significantly, the inquiry into trial competence is a narrow one. Thus, a diagnosis that the defendant is "mentally ill" does not in itself justify a finding of incompetency.<sup>22</sup> To satisfy the test, the defendant's illness must render him incapable of understanding the nature of the proceedings against him and of assisting in his defense. Contrary to the tendency of some psychiatric evaluators to confuse the determination of incompetency with a diagnosis of psychosis, a defendant can be severely mentally ill—even overtly psychotic—and still be competent to stand trial.<sup>23</sup> A medical diagnosis of psychosis or the existence of particular descriptive symp-

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16. 118 Fla. 88, 158 So. 880 (1935) (en banc).

17. 98 Fla. 1184, 1190, 125 So. 345, 347 (1929).

18. 362 U.S. 402 (1960).

19. *Id.* at 402.

20. *Bruce v. Estelle*, 483 F.2d 1031, 1042 (5th Cir. 1973), *overruled in part on other grounds*, *Zapata v. Estelle*, 585 F.2d 750 (5th Cir. 1978); *Noble v. Sigler*, 351 F.2d 673, 677 (8th Cir. 1965), *cert. denied*, 385 U.S. 853 (1966).

21. 389 So. 2d 610, 618 (Fla. 1980).

22. Robey, *Criteria for Competency to Stand Trial: A Checklist for Psychiatrists*, 122 AM. J. PSYCH. 616, 617 (1975); *see Hall v. United States*, 410 F.2d 653 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969); *United States v. Horowitz*, 360 F. Supp. 772 (E.D. Pa. 1973).

23. Robey, *supra* note 22, at 617; e.g., *Feguer v. United States*, 302 F.2d 214 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962).

toms is therefore not dispositive of the legal question of competence to stand trial.<sup>24</sup> Moreover, a history of some previous mental disorder or admission to a mental institution should not alone serve as proof of incompetence to stand trial.<sup>25</sup> A mentally ill individual should not be found incompetent unless his illness substantially interferes with his ability to play the role of defendant in the criminal process.

### B. *Incompetence Distinguished from Insanity at the Time of the Offense*

An incompetency determination is not synonymous with an inquiry into criminal responsibility or, as many describe it, insanity at the time of the offense.<sup>26</sup> More specifically, the *Dusky* standard is distinct from the M'Naghten rule governing legal insanity, the test under which Florida courts determine whether a defendant had, at the time of the offense, the mental capacity to be responsible for his alleged criminal act.<sup>27</sup> Although the inapplicability of the M'Naghten rule to considerations of incompetency seems to be obvious, prior formulations of Florida Rule of Criminal Procedure 3.210 used the misleading phrase "insanity at the time of trial," which occasionally confused lawyers, judges, and psychiatrists about the appropriate legal standard for incompetency.<sup>28</sup>

Indeed, a defendant may not have been mentally ill at the time of the alleged offense, but may nevertheless be incompetent to stand trial. The primary issue in an incompetency appraisal is

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24. See Note, *The Identification of Incompetent Defendants: Separating Those Unfit for Adversary Combat from Those Who are Fit*, 66 Ky. L.J. 666, 676 (1978); *United States v. Adams*, 297 F. Supp. 596 (S.D.N.Y. 1969) (finding of paranoid schizophrenia does not automatically require finding of incompetence).

25. *Newman v. Missouri*, 394 F. Supp. 83, 91 (W.D. Mo. 1974).

26. *Martin v. Estelle*, 546 F.2d 177, 180 (5th Cir. 1977); *Bruce v. Estelle*, 483 F.2d at 1039-42; *Walcott v. United States*, 407 F.2d 1149 (10th Cir.), *cert. denied*, 396 U.S. 879 (1969); *Deeb v. State*, 118 Fla. 88, 92, 158 So. 880, 882 (1935) (en banc). Psychiatric evaluators often confuse these issues. S. HALLECK, *LAW IN THE PRACTICE OF PSYCHIATRY: HANDBOOK FOR CLINICIANS* 233-34 (1980); A. MATTHEWS, JR., *MENTAL DISABILITY AND THE CRIMINAL LAW: A FIELD STUDY* 85 (1970); A. STONE, *supra* note 9, at 202-03; Hess & Thomas, *supra* note 8. Indeed, measuring competency to stand trial by the insanity standard has been held to violate due process. *Ex parte Harris*, 592 S.W.2d 624 (Tex. Ct. Crim. App. 1980).

27. *Davis v. State*, 44 Fla. 32, 32 So. 822 (1902); *Zamora v. State*, 361 So. 2d 776 (Fla. 3d DCA 1978); *Camp v. State*, 149 So. 2d 367 (Fla. 2d DCA 1963). Florida courts, following the M'Naghten rule or "right and wrong" test, have decided that "a person is insane when he is legally precluded by mental disease from distinguishing between right and wrong at the time of the act." 361 So. 2d at 779.

28. See, e.g., *Harrison v. Settle*, 151 F. Supp. 372, 375 (W.D. Mo. 1957).

not, therefore, the defendant's mental condition at the time of the offense, but his condition at the time of trial.

### C. *Incompetence Distinguished from Civil Commitment Standards*

In Florida, the legal criteria for involuntary civil commitment to a mental hospital are whether the person, as a result of mental illness, is likely to injure himself or others, or needs care or treatment to overcome a real and present threat of substantial harm to his well-being.<sup>29</sup> Although a Florida court must consider these criteria once it finds a criminal defendant incompetent to stand trial,<sup>30</sup> the civil commitment standards do not apply to the determination of competence, for which the court uses the *Dusky* standard.

## III. DETERMINING COMPETENCE

### A. *Raising the Issue*

Florida Rule of Criminal Procedure 3.210(b) provides:

If before or during the trial the court of its own motion, or upon motion of counsel for the defendant or for the State, has reasonable ground to believe that the defendant is not mentally competent to stand trial, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition . . . .

In practice, the defendant's counsel usually raises the issue of the accused's competence, although the state attorney also may bring the issue to the court's attention. On occasion, the court will raise the competency issue *sua sponte*. When counsel for defendant or the state raises the issue by written motion for competency examination, the Florida Rules of Criminal Procedure require a certificate that counsel made the motion in good faith and on reasonable grounds, and a recital of specific observations and statements of the defendant that formed the basis for the motion.<sup>31</sup>

Individuals other than the judge and the attorneys may initially raise the problem of the defendant's mental illness. For example, the arresting officer may indicate in his arrest report that the individual appears to be mentally ill; the defendant's family or

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29. FLA. STAT. § 394.467(1) (1979).

30. See notes 118-54 and accompanying text *infra*.

31. FLA. R. CRIM. P. 3.210(b)(1)-(2).



friends may disclose a prior history of psychological problems; or jail officials may comment upon a defendant's bizarre behavior in detention. In such instances, the defense attorney should inquire further and, if appropriate, move for a hearing. This further inquiry should include an evaluation by an expert retained by the defense. If the defendant is indigent, counsel may apply to the court for the appointment of such an expert.<sup>32</sup> When appointed, such a defense expert "shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege."<sup>33</sup>

### B. Grounds for the Hearing

In *Pate v. Robinson*,<sup>34</sup> the United States Supreme Court held that a trial judge must raise the issue of competency *sua sponte* when the evidence before the court creates a bona fide doubt about the defendant's competence. Under these circumstances, trial and conviction without determining competency, even when the defendant does not raise the issue, violates due process and requires automatic reversal.<sup>35</sup>

Florida law requires a hearing to determine competence when a reasonable doubt exists about the defendant's competence.<sup>36</sup> Although Rule 3.210(b) uses the term "reasonable ground,"<sup>37</sup> courts have construed that language as equivalent to the standard of reasonable doubt.<sup>38</sup> Once a question about the defendant's competence is raised, the focus shifts to whether there are sufficient indications on the record, *i.e.*, reasonable grounds, to order a competency evaluation. The courts must determine what constitutes "reasonable grounds" on a case-by-case basis: "There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated."<sup>39</sup>

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32. *Id.* 3.216(a).

33. *Id.* See *Pouncy v. State*, 353 So. 2d 640 (Fla. 3d DCA 1977).

34. 383 U.S. 375 (1966).

35. *Id.* at 385; *accord*, *Drope v. Missouri*, 420 U.S. 162 (1975); *State v. Tait*, 387 So. 2d 338 (Fla. 1980).

36. *State v. Tait*, 387 So. 2d at 340; *Daniels v. O'Connor*, 243 So. 2d 144, 147 (Fla. 1971); *Brock v. State*, 69 So. 2d 344 (Fla. 1954).

37. FLA. R. CRIM. P. 3.210(b).

38. *Pedrero v. Wainwright*, 590 F.2d 1383, 1388-89 (5th Cir. 1979); *see, e.g.*, *State v. Tait*, 387 So. 2d 338 (Fla. 1980); *Quesada v. State*, 321 So. 2d 441 (Fla. 3d DCA 1975).

39. *Drope v. Missouri*, 420 U.S. 162, 180 (1975).

The Florida cases addressing this issue agree that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining the need for further inquiry. General or unsupported assertions that the defendant is mentally ill or unable to confer with counsel are usually insufficient.<sup>40</sup> Similarly insufficient is an unsubstantiated or uncorroborated allegation of a specific type of illness.<sup>41</sup> Prior institutionalization is important,<sup>42</sup> but it may not be sufficient in itself, especially if remote in time.<sup>43</sup> The testimony of witnesses is also important in establishing a history of irrational behavior and in corroborating allegations made in the motion.<sup>44</sup>

If sufficient evidence presents reasonable grounds for believing that the defendant may be incapable of understanding the proceedings or of assisting in the preparation of a defense, then the trial court's failure to make a formal inquiry denies the accused his constitutional right to a fair trial.<sup>45</sup> As a result, a prudent trial judge who wishes to avoid reversal will order a competency evaluation if counsel, particularly the defense, raises any doubt about competence.<sup>46</sup> Moreover, if reasonable grounds for a hearing exist, the failure of defendant to request one does not constitute waiver.<sup>47</sup>

### C. *The Competency Examination*

#### 1. APPOINTMENT OF EXPERT EVALUATORS

If the court decides that a competency evaluation is necessary, rule 3.210(b) requires it to appoint expert evaluators and "immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20

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40. *Jordan v. Wainwright*, 457 F.2d 238 (5th Cir. 1972); *Walker v. State*, 384 So. 2d 730, 732-33 (Fla. 4th DCA 1980); *Coney v. State*, 348 So. 2d 672 (Fla. 3d DCA 1977).

41. *Robbins v. State*, 312 So. 2d 243 (Fla. 2d DCA 1975).

42. *See, e.g., Pedrero v. State*, 262 So. 2d 737 (Fla. 2d DCA 1972).

43. *Albright v. State*, 191 So. 2d 65 (Fla. 2d DCA 1966), *cert. denied*, 389 U.S. 862 (1967).

44. *See, e.g., Meeks v. State*, 289 So. 2d 479 (Fla. 3d DCA 1974).

45. *Pate v. Robinson*, 383 U.S. 375 (1966); *State ex rel. Deeb v. Campbell*, 123 Fla. 894, 167 So. 805 (1935); *Mitchell v. State*, 289 So. 2d 418 (Fla. 2d DCA 1974).

46. *See Jones v. State*, 362 So. 2d 1334 (Fla. 1978). "In deciding whether or not to order an examination, the trial judge must consider all the circumstances, including the representations of counsel, and unless clearly convinced that an examination is unnecessary, order an examination before beginning or proceeding with trial." *Id.* at 1336.

47. *State v. Tait*, 387 So. 2d 338, 341 (Fla. 1980).

days after the date of the filing of the motion." The courts strictly construed similar requirements in a prior rule that the court "shall immediately fix a time for a hearing."<sup>48</sup> One court held that the failure to fix a time for the evaluation renders continued detention of the defendant unlawful, justifying release on habeas corpus.<sup>49</sup>

The evaluators must assess the defendant's competence in terms of a number of specified factors.<sup>50</sup> If the court determines that there is "reason to believe that the defendant may require involuntary hospitalization," it must also order the experts to consider this issue in their reports.<sup>51</sup> The Committee Note to Florida Rule of Criminal Procedure 3.210 indicates that the experts should inquire into involuntary hospitalization not as a matter of course, but only if the court so orders.<sup>52</sup> When hospitalization of the defendant appears likely to the court, it will order the experts to consider the applicability of the involuntary commitment standards, so that the court may consider at the competency hearing whether to commit a defendant it finds incompetent. For similar considerations of efficiency, if the defendant files a notice of intent to rely on the insanity defense, then the court may also order the experts to consider and report on the issue of the defendant's sanity at the time of the offense.<sup>53</sup>

Rule 3.210(b), as well as section 925.21(1) of the Florida Statutes, requires that the court appoint two or three experts to determine the defendant's mental condition. Section 925.21(2) provides that, if possible, at least one of the appointed experts shall be a psychiatrist, psychologist, or physician employed by the state or by a community mental health center, or designated by the district mental health board. The testimony and evidence introduced by the court-appointed experts, however, do not limit either party who may introduce additional evidence at the hearing.<sup>54</sup>

In appointing the experts, the court must order that they examine the defendant before the date of the hearing, which must be no later than twenty days from the filing of any motion for competency evaluation.<sup>55</sup> The experts examine the defendant in jail, or,

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48. *E.g.*, *Fowler v. State*, 255 So. 2d 513 (Fla. 1971) (construing FLA. R. CRIM. P. 3.210(a)(1), adopted in 1967).

49. *Lederer v. Stack*, 294 So. 2d 107 (Fla. 4th DCA 1974).

50. See notes 66-70 and accompanying text *infra*.

51. FLA. R. CRIM. P. 3.211.

52. *Id.*, Committee Note.

53. *Id.* 3.211(c).

54. *Id.* 3.212.

55. *Id.* 3.210(b).

for a defendant on bail or other pre-trial release, in an appropriate local facility or other place for evaluation designated by the court.<sup>56</sup>

## 2. PRESENCE OF COUNSEL AT THE EXAMINATION

Traditionally, the examiner and the defendant were the only people present at the examination. The new rules break with tradition by permitting the presence of attorneys for both the state and the defendant.<sup>57</sup> The Revision Committee based this new provision on its assumption that the examination is a "critical stage" in the proceedings, and therefore subject to the sixth amendment right to counsel.<sup>58</sup> The overwhelming majority of cases that have considered the sixth amendment issue, however, have reached the opposite conclusion, in the context of both the evaluation of competency<sup>59</sup> and the examination for legal insanity.<sup>60</sup> In fact, the Florida Supreme Court, in the context of psychiatric examination for civil commitment, has rejected the contention that the right to counsel permits attorneys to be present at the interview.<sup>61</sup> In view of the supreme court's concern that such presence "would unduly interfere with the objective evaluation of the patient's mental condition by the examining physician,"<sup>62</sup> it is surprising that the court approved the presence of counsel at the competency evaluation.

Although rule 3.210(b) authorizes the presence of counsel at

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56. *Id.* 3.210(b)(3).

57. *Id.* 3.210(b).

58. *Id.*, Committee Note.

59. *United States ex rel. Stukes v. Shovlin*, 464 F.2d 1211 (3d Cir. 1972); *Davis v. Campbell*, 465 F. Supp. 1309 (E.D. Ark. 1979); *United States v. Fletcher*, 329 F. Supp. 160 (D.D.C. 1971); see *Thornton v. Corcoran*, 407 F.2d 695, 705 (D.C. Cir. 1969) (Burger, J., concurring in part and dissenting in part). *But see id.* at 701-02 (Bazelon, C.J.) (dictum); Golten, *Role of Defense Counsel in the Criminal Commitment Process*, 10 AM. CRIM. L. REV. 385, 394 (1972).

60. *United States v. Greene*, 497 F.2d 1068 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *United States v. Trapnell*, 495 F.2d 22 (2d Cir.), *cert. denied*, 419 U.S. 851 (1974); *United States v. Mattson*, 469 F.2d 1234 (9th Cir. 1972), *cert. denied*, 410 U.S. 986 (1973); *United States v. Smith*, 436 F.2d 787 (5th Cir.), *cert. denied*, 402 U.S. 796 (1971); *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968); *People v. Larsen*, 74 Ill. 2d 348, 385 N.E.2d 679, *cert. denied*, 444 U.S. 908 (1979); *People v. Martin*, 386 Mich. 407, 192 N.W.2d 215 (1971), *cert. denied*, 408 U.S. 929 (1972); *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965); *State v. Wilson*, 26 Ohio App. 2d 23, 268 N.E.2d 814 (1971); *Commonwealth v. Stukes*, 435 Pa. 535, 257 A.2d 828 (1969). *Contra, In re Spencer*, 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965); *In re Lee v. County Court*, 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705, *cert. denied*, 404 U.S. 823 (1971).

61. *In re Beverly*, 342 So. 2d 481 (Fla. 1977).

62. *Id.* at 489.

the examination, it does not define counsel's role. As in the lineup context,<sup>63</sup> the court will probably limit counsel to observing the proceedings, rather than actively participating by making objections and advising his client not to respond to questions.<sup>64</sup> The presence of counsel for the state, even as an observer, is particularly troubling. The prosecutor's presence will inevitably inhibit the defendant's responses to questions by the evaluator, thereby reducing the accuracy of the evaluation. Moreover, any incriminating statements made by the defendant during the evaluation in the presence of the prosecutor may raise substantial fifth amendment problems.<sup>65</sup>

The rule does not mention whether the defendant may have his own psychiatrist or other experts observe the examination. This observation should be permissible if the examiner does not object. Several federal cases, however, have rejected the contention that the defendant has the right to have his own psychiatrist present at the examination.<sup>66</sup>

### 3. FORM OF EXAMINATION

The actual examination may take one of several forms and may last from about one-half hour to several hours. Regardless of the form of examination, the examiner must apply the *Dusky* standard and, if so ordered, must also consider the application of the involuntary commitment standards or the criminal responsibility standard. The examiner, frequently a psychiatrist, typically performs a standard psychiatric evaluation of the defendant, including the taking of a history of the individual and a mental status examination. Sometimes the examiner also performs a physical examination, although this is rarely necessary for competency evaluation.

The history portion of the examination includes collecting information about the defendant's present illness and its cause; his past history, including past medical history; his social history, in-

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63. See *United States v. Wade*, 388 U.S. 218, 231-32 (1967); Uviller, *The Role of the Defense Lawyer at a Line-up in Light of the Wade, Gilbert, and Stovall Decisions*, 4 CRIM. L. BULL., 273, 278, 285-86 (1968).

64. See *In re Lee v. County Court*, 27 N.Y.2d 432, 443-44, 267 N.E.2d 452, 458-59, 318 N.Y.S.2d 705, 714-15, cert. denied, 404 U.S. 823 (1971).

65. See notes 88-89 and accompanying text *infra*.

66. *Proctor v. Harris*, 413 F.2d 383 (D.C. Cir. 1969); *United States v. Fletcher*, 329 F. Supp. 169 (D.D.C. 1971). *Contra*, *State v. Whitlow*, 45 N.J. 3, 28, 210 A.2d 763, 775-76 (1965).

cluding work history, school performance, and prior encounters with the law; and his family history, including relations with parents and other relatives, and any problems of marital adjustment. The mental status examination consists of collecting information about the defendant's general appearance and behavior; his "stream of talk," including his rate of speech and the manner in which he expresses ideas; his "affect" or mood; his thought content, including the existence of delusions or hallucinations; his "sensorium," including information about the individual's orientation, his recent and remote memory, and his intelligence; and his insight and judgment.

#### 4. FACTORS BEARING ON COMPETENCY

If the evaluator determines that the defendant suffers from mental illness, he should then determine whether the illness interferes substantially with the defendant's ability either to understand the nature of the proceedings or to participate in his defense. Rule 3.211(a)(1) seeks to refine this aspect of the examiner's evaluation by requiring consideration and analysis of the defendant's mental condition as it affects each of the following factors:

- (i) Defendant's appreciation of the charges;
- (ii) Defendant's appreciation of the range and nature of possible penalties;
- (iii) Defendant's understanding of the adversary nature of the legal process;
- (iv) Defendant's capacity to disclose to attorney pertinent facts surrounding the alleged offense;
- (v) Defendant's ability to relate to attorney;
- (vi) Defendant's ability to assist attorney in planning defense;
- (vii) Defendant's capacity to realistically challenge prosecution witnesses;
- (viii) Defendant's ability to manifest appropriate courtroom behavior;
- (ix) Defendant's capacity to testify relevantly;
- (x) Defendant's motivation to help himself in the legal process;
- (xi) Defendant's capacity to cope with the stress of incarceration prior to trial.<sup>67</sup>

These factors represent the most comprehensive statutory attempt to define competency; most states simply use the *Dusky* lan-

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67. FLA. R. CRIM. P. 3.211(a)(1).

guage, or its equivalent, without elaboration.<sup>68</sup> The Florida Department of Health and Rehabilitation Services developed these factors in its Competency Evaluation Instrument, which refined the McGarry Competency Evaluation Procedure.<sup>69</sup> The McGarry checklist, developed under a federal grant from the National Institute of Health, is an attempt to objectify the competency evaluation by using an assessment instrument with numerical ratings.<sup>70</sup> The checklist approach is controversial, and some rating instruments have received criticism for built-in bias.<sup>71</sup> The rule's specification of general factors, however, does not suffer from this problem. Moreover, such factors should provide useful guidance for the examiner's evaluation, as well as standardizing the evaluation process. Further standardization within each of the circuits may come through the use of standardized report forms, which rule 3.211(d) authorizes if the chief judge of the circuit approves them.

In probing the defendant's ability to assist his counsel in making a defense, the evaluator should also (but probably rarely does) consult with defense counsel to determine the nature of the defense contemplated.<sup>72</sup> If a defendant intends to testify, he may need a higher degree of competency than he would if he did not take the stand. Similarly, he would need a higher degree of competence if he contested the charges against him than if he pleaded guilty. The defense attorney, however, may be unable to provide the information sought or may decline to reveal such information for strategic reasons, particularly if asked in the presence of the prosecutor who, under rule 3.210(b), may attend the examination. In such cases, evaluators should draw no inferences from lack of defense cooperation.

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68. Janis, *Incompetency Commitment: The Need for Procedural Safeguards and a Proposed Statutory Scheme*, 23 *CATH. U.L. REV.* 720, 720-21, 721 n.3 (1974) (statutory compilation). Several state statutes supplement the general information with more detail, e.g., N.J. *STAT. ANN.* § 2c:4-4 (West 1979), but none provide as much detail as the new Florida provision.

69. *FLA. R. CRIM. P.* 3.211, Committee Note.

70. See *Laboratory of Community Psychiatry, Harvard Medical School, Competency to Stand Trial and Mental Illness* (National Institute of Mental Health Monograph, 1973); Lipsitt, Lelos, & McGarry, *Competency for Trial: A Screening Instrument*, 128 *AM. J. PSYCH.* 105 (1971). Examples of other attempts to fashion an objective evaluation procedure include Bukatman, Foy & de Grazia, *What is Competency to Stand Trial?* 127 *AM. J. PSYCH.* 1225 (1971); Robey, *supra* note 22.

71. See Brakel, *Presumption, Bias, and Incompetency in the Criminal Process*, 1974 *WIS. L. REV.* 1105.

72. See Bukatman, Foy & de Grazia, *supra* note 70, at 1228-29.

## 5. CONSIDERATION OF COMMITMENT CRITERIA

When the experts are to report on the issue of involuntary commitment, they must consider whether the defendant meets the criteria for involuntary hospitalization set forth in the Baker Act,<sup>73</sup> or in the case of mental retardation, in the Retardation Prevention and Community Services Act.<sup>74</sup> Rule 3.211(b)(1) provides that in determining the issue of involuntary commitment, the examining experts shall consider and include in their report an analysis of the following factors:

- (i) The nature and extent of the mental illness or mental retardation suffered by the defendant;
- (ii) Whether the defendant, because of such mental illness or mental retardation meets the criteria for involuntary hospitalization or placement set forth by law;
- (iii) Whether there is a substantial probability that the defendant will attain competence to stand trial within the foreseeable future;
- (iv) The nature of the care and treatment to be afforded the defendant and its probable duration;
- (v) Alternatives other than involuntary hospitalization which might be less restrictive on the defendant's liberty.<sup>75</sup>

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73. FLA. STAT. §§ 394.451-.478 (1979 & Supp. 1980). The Baker Act authorizes the involuntary commitment of a person:

if he is mentally ill, and, because of his illness, is:

1. Likely to injure himself or other if allowed to remain at liberty, or
2. In need of care or treatment which, if not provided, may result in neglect or refusal to care for himself, and such neglect or refusal poses a real and present threat of substantial harm to his well-being.

*Id.* § 394.467(1)(b).

74. FLA. STAT. §§ 393.061-.20 (1979) (as amended by 1980 Fla. Laws ch. 80-174, §§ 2-4). The Retardation Act sets out the criteria that must be met before a court may approve the involuntary admission of a mentally retarded person to residential services provided by the Department of Health and Rehabilitative Services:

- (a) The person is mentally retarded, and
- (b) Placement in a residential setting is the least restrictive and most appropriate alternative to meet his needs; and
- (c) Because of his degree of retardation:
  1. Lacks sufficient capacity to give express and informed consent to a voluntary application for services . . . and lacks basic survival and self-care skills to such a degree that close supervision and habilitation in a residential setting is necessary and if not provided would result in a real and present threat of substantial harm to the person's well-being; or
  2. Is likely to injure others if allowed to remain at liberty.

*Id.* § 393.11(1). A Florida appellate court has ruled that the predecessor of Fla. Laws ch. 80-174, § 3—FLA. STAT. § 393.11 (1977)—unconstitutionally violated substantive due process. *Kinner v. State*, 382 So. 2d 756 (Fla. 2d DCA 1980).

75. FLA. R. CRIM. P. 3.211(b)(1).



This new provision, applicable only to cases in which the court has ordered the experts to consider the issue of involuntary commitment, necessitates a more comprehensive analysis by the expert than previously required. Moreover, by tying the commitment of the incompetent defendant to the criteria for civil commitment, this provision avoids problems of equal protection and procedural due process. In the early 1970's, the overwhelming majority of states automatically committed the incompetent defendant without determining whether commitment was warranted.<sup>76</sup> A recent survey revealed that nineteen states and the District of Columbia still do so.<sup>77</sup> This practice offends equal protection, since the incompetent defendant's outstanding charges cannot justify his hospitalization without a determination that he meets the same commitment standards as civil patients, or at least that hospitalization is likely to restore him to trial competence.<sup>78</sup> In addition, the practice offends procedural due process, because although satisfaction of the *Dusky* standard justifies holding the trial in abeyance, it does not justify commitment without a new finding of fact.<sup>79</sup> The Florida procedure avoids these problems.

The Florida procedure also avoids substantive due process problems. The factors set forth in subsections (iii) and (iv) stem from the landmark Supreme Court case of *Jackson v. Indiana*,<sup>80</sup> which held, as a matter of fourteenth amendment substantive due process, that a state's authority to commit an incompetent defendant to a hospital solely because of his incompetence to stand trial is limited by its ability to provide treatment that makes probable the defendant's attainment of competence within a foreseeable time. According to *Jackson*, if there is no substantial probability that the defendant will regain competence in the foreseeable future, or if treatment provided for a reasonable period has not succeeded in restoring him to competence, substantive due process requires that the state either release the defendant or institute civil commitment proceedings.<sup>81</sup> Accordingly, if in response to factor

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76. S. Brakel & R. Rock, *supra* note 3, at 415, 444-50 (Table 11.2) (42 states); Janis, *supra* note 67, at 729.

77. Roesch & Golding, *supra* note 6, at 357, 358-61 (Table 2).

78. See *Jackson v. Indiana*, 406 U.S. 715, 724 (1972); *Baxtrom v. Herold*, 383 U.S. 107 (1966).

79. See *Specht v. Patterson*, 386 U.S. 605 (1967).

80. 406 U.S. 715 (1972).

81. *Id.* at 738; *Garrett v. State*, 390 So. 2d 95 (Fla. 3d DCA 1980), *review denied*, No. 60,065 (Fla. Apr. 10, 1981). Due process may also require, in extreme cases, the dismissal of charges against a defendant held for more than a "reasonable period" without restoration to

(iii) the examiners conclude that there is no substantial probability that the defendant will attain competence within the foreseeable future, the state may commit the defendant only if he meets the criteria for involuntary commitment under the Baker Act or the Retardation Act.

Factor (v) is particularly significant. By requiring consideration of alternatives "less restrictive on the defendant's liberty" than hospitalization, the rule incorporates the "least restrictive alternative" principle.<sup>82</sup> Under this provision, if the examiner finds the involuntary commitment standards otherwise met, he must then consider the existence of community-based alternative programs that would be as effective as hospitalization in restoring the defendant to trial competence.

#### D. Fifth Amendment Issues

Numerous federal court decisions have concluded that an examination by a government or court-appointed psychiatrist or other expert does not violate either the fifth amendment privilege against self-incrimination or the rule of *Miranda v. Arizona*.<sup>83</sup> Although the expert examiner may testify concerning the defendant's mental status, the fifth amendment bars the prosecution from introducing the defendant's statements into evidence on the issue of his guilt.<sup>84</sup> Newly adopted Florida Rule of Criminal Procedure 3.211(e) recognizes the fifth amendment problem by specifically providing that:

The information contained in any motion by the defendant for determination of competency or in any report of experts filed under this section insofar as such report relates to the issues of competency to stand trial and involuntary hospitalization, and

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competency or determination of the likelihood of his eventual ability to stand trial. *Id.* at 96-97 (six-year period); see notes 123-54 and accompanying text *infra*.

82. See notes 113-16 and accompanying text *infra*.

83. *Miranda v. Arizona*, 344 U.S. 436 (1966); see, e.g., *United States v. Greene*, 497 F.2d 1068 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *United States v. Trapnell*, 495 F.2d 22 (2d Cir. 1974); *United States v. Handy*, 454 F.2d 885 (9th Cir. 1971), *cert. denied*, 409 U.S. 846 (1972); *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971); *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968); *Davis v. Campbell*, 465 F. Supp. 1309 (E.D. Ark. 1979); *Collins v. Auger*, 428 F. Supp. 1079 (S.D. Iowa 1977).

84. *Gibson v. Zahradnick*, 581 F.2d 75, 78-79 (4th Cir.), *cert. denied*, 439 U.S. 996 (1978); *United States v. Reifsteck*, 535 F.2d 1030 (8th Cir. 1976); *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *United States v. Greene*, 497 F.2d 1068 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975); *Collins v. Auger*, 428 F. Supp. 1079 (S.D. Iowa 1977); *In re Lee v. County Court*, 27 N.Y.2d 432, 26 N.E.2d 452, 218 N.Y.S.2d 705, *cert. denied*, 404 U.S. 823 (1971); see 18 U.S.C. § 4244 (1970).

any information elicited during a hearing on competency or involuntary hospitalization held pursuant to this Rule, shall be used only in determining the mental competency to stand trial of the defendant or the involuntary hospitalization of the defendant.

This new provision follows Florida case law on the use of an individual's statements made during a court-ordered examination in the course of a civil commitment hearing<sup>85</sup> and in an examination concerning legal insanity.<sup>86</sup> Of course, if the defendant uses the report of the expert for any other purpose, such as to support a defense of legal insanity, he thereby waives the privilege contained in the rule.<sup>87</sup> Moreover, if the defendant so uses only a part of the report, "the State may request the production of any other portion of that report which in fairness ought to be considered."<sup>88</sup>

The limitation of rule 3.211(e) on the use of such statements or information also seems to prohibit the prosecution from introducing at trial other evidence derived from them, as well as their use for impeachment purposes. Because a defendant must submit to the examination, the court should consider his responses compelled, for fifth amendment purposes. This characterization would prohibit not only the use of the statements themselves but also, under established fifth amendment doctrine, the use of derivative evidence to which such statements provide connections or leads.<sup>89</sup> When the prosecutor is present at the evaluation, as authorized by rule 3.210(b),<sup>90</sup> he thus may have to justify evidence he seeks to have admitted at trial as having derived from a source independent of the defendant's statements.<sup>91</sup> Moreover, because such in-

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85. *In re Beverly*, 342 So. 2d 481, 488-89 (Fla. 1977).

86. *Parkin v. State*, 238 So. 2d 817, 820 (Fla. 1970).

87. FLA. R. CRIM. P. 3.211(e).

88. *Id.*

89. *Blaisdell v. Commonwealth*, 372 Mass. 753, 761-65, 364 N.E.2d 191, 198-99 (Mass. 1977); see *Kastigar v. United States*, 406 U.S. 441 (1972); Berry, *Self-Incrimination and the Compulsory Mental Examination: A Proposal*, 15 ARIZ. L. REV. 919 (1973).

90. See notes 57-64 and accompanying text *supra*.

91. See *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (when defendant is granted use immunity and is later prosecuted, the prosecutor must show that the evidence has been derived from "a legitimate source wholly independent of the compelled testimony"). Because it can be difficult to establish the independent derivation of evidence, prosecutors may adopt a practice, employed by federal prosecutors in the context of use immunity, of delivering sealed files to the court containing evidence already secured against the defendant before his competency evaluation. See C.H. WHITEBREAD, *CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS* 262 (1980). Of course, this practice may prove so burdensome that in the typical case a busy prosecutor may prefer to forego his opportunity to be present at the evaluation.

voluntary statements raise fifth amendment questions, the court should not admit the statements for impeachment purposes.<sup>92</sup>

### E. *Bail or Pre-Trial Release*

Rule 3.210(b)(3) provides that a motion made for competency evaluation "shall not otherwise affect the defendant's right to pre-trial release." This new provision makes it explicit that the mere filing of a motion for competency examination should not necessarily affect the freedom from custody of either a defendant already on bail or other pre-trial release, or a defendant seeking such release.

The rule specifically authorizes the court to order a defendant released from custody on "a pre-trial release provision . . . to appear at a designated place for evaluation at a specific time as a condition of such release provision."<sup>93</sup> Competency evaluation therefore need not be performed in custody; the defendant may undergo examination on an outpatient basis at a designated facility. The rule, however, permits the defendant to be taken into custody or maintained in custody "[i]f the court determines that the defendant will not submit to the evaluation provided for herein or that the defendant is not likely to appear for the scheduled evaluation."<sup>94</sup>

By specifically authorizing pre-trial release and outpatient evaluation of defendants whose competency is in question, the new rule should substantially change prior practice, under which courts rarely permitted release or bail for such defendants.<sup>95</sup> The prior automatic no-bail policy was clearly inconsistent with the requirement of the United States Supreme Court that restrictive bail be justified as "relevant to the purpose of assuring the presence of that defendant" at trial.<sup>96</sup> Issuance of an examination order under the new rule should not, in itself, justify the denial of bail. Pre-trial release should be appropriate unless the defendant's mental condition (or some other factor) suggests he will not appear for evaluation or subsequent proceedings. Moreover, the court may not deny bail altogether, even if the risk of non-appearance is pre-

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92. *Blaisdell v. Commonwealth*, 372 Mass. at 764, 364 N.E.2d at 198; see *New Jersey v. Portash*, 440 U.S. 450 (1979); *Mincey v. Arizona*, 437 U.S. 385 (1978).

93. FLA. R. CRIM. P. 3.210(b)(3).

94. *Id.*

95. *Burt & Morris, A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66, 88 (1972); *Slovenko, supra note 2*, at 174.

96. *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

sent except, of course, in a capital case;<sup>97</sup> even in a capital case, the Supreme Court of Florida has held that denial of bail may not be automatic.<sup>98</sup>

### F. *The Hearing and the Burden of Proof*

After the experts have completed their evaluation of the defendant, they prepare written reports analyzing the factors set forth in rule 3.211. They then submit the reports to the court, with copies to the attorneys for the state and the defense.<sup>99</sup> If the reports are unanimous in their conclusions, the prosecution and defense will frequently stipulate to accept the reports, in which case a formal hearing is unnecessary.<sup>100</sup> Otherwise, the court will hold a hearing at which the attorneys have an opportunity to offer evidence and examine witnesses, including the examining experts.<sup>101</sup> At the hearing, the court-appointed experts, whether called by the court or by either party, are "court witnesses . . . and may be examined as such by either party."<sup>102</sup> As a result, counsel may ask leading questions or impeach the court-appointed expert, even if the party represented by counsel called the expert to testify.<sup>103</sup>

The ultimate determination of the defendant's competence is within the discretion of the trial judge.<sup>104</sup> The Supreme Court of Florida has stressed that the examiner's report "is merely advisory

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97. *Pugh v. Rainwater*, 572 F.2d 1053 (5th Cir. 1978); *United States v. Curry*, 410 F.2d 1372 (4th Cir. 1969); *Burt & Morris*, *supra* note 95, at 88; *Gobert*, *supra* note 6, at 671; *Project, Legal Issues in State Mental Health Care: Proposals for Change—Incompetence to Stand Trial on Criminal Charges*, 2 MENTAL DISABILITY L. REP. 613, 620-21 (1978).

98. *State v. Arthur*, 390 So. 2d 717 (Fla. 1980).

99. FLA. R. CRIM. P. 3.211.

100. See *Fowler v. State*, 255 So. 2d 513, 515 (Fla. 1971). Either party, however, is entitled to insist upon a formal hearing. *Id.* Moreover, even if both counsel wish to waive the hearing, due process requires a hearing if the defendant himself wishes to contest the reports. *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 204 N.W.2d 13 (1973).

101. FLA. R. CRIM. P. 3.212. Due process protects the right of the defendant at the competency hearing to confront the witnesses against his interest and to cross-examine them. See *People v. Charette*, — A.D.2d —, 431 N.Y.S.2d 733, 734 (1980).

102. *Id.*

103. *Id.*, Committee Note.

104. In most jurisdictions the court decides the competency issue, although some permit a jury determination. *Slovenko*, *supra* note 2, at 168. Several courts have held the sixth amendment right to jury trial inapplicable to determinations of competency, *United States v. Holmes*, 452 F.2d 249 (7th Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972); *Hall v. United States*, 410 F.2d 653 (4th Cir.), *cert. denied*, 396 U.S. 970 (1969); *United States v. Huff*, 409 F.2d 1225 (5th Cir. 1969), even when civil commitment proceedings use a jury. *State ex rel. Matalik v. Schubert*, 57 Wis. 2d 315, 204 N.W.2d 13 (1973). *But see Gomez v. Miller*, 341 F. Supp. 323 (S.D.N.Y. 1972), *aff'd*, 412 U.S. 914 (1973); *Gobert*, *supra* note 6, at 673.

to the court, which itself retains the responsibility of decision."<sup>105</sup> Although the court need not follow the recommendations of the appointed experts, it generally does so. The tendency of judges to defer to the conclusions of psychiatrists regarding competency, as well as other issues, is well-documented in the literature.<sup>106</sup> This deference accorded the "expert" is nevertheless problematic, in view of a variety of factors making psychiatric judgments much less reliable and less valid than is commonly thought.<sup>107</sup> The tendency to defer to psychiatric expertise also presents difficulties for the defense counsel seeking to controvert the psychiatrists' conclusions concerning competency. Defense counsel may, of course, hire his own expert to evaluate the defendant and, if the defendant is indigent, may seek such a defense expert by court appointment.<sup>108</sup> Also, either party may introduce additional evidence.<sup>109</sup> Defense counsel may, for example, adduce the testimony of friends and family members about their observations of the defendant's behavior, mental condition, and trial capabilities.<sup>110</sup> Moreover, the defendant himself may testify at the hearing.<sup>111</sup> Counsel should, of course, stress the argument that the decision to deprive the defendant of his right to stand trial is not a psychiatric judgment, but a legal one, which the judge must reach independently.<sup>112</sup>

105. *Brock v. State*, 69 So. 2d 344, 346 (Fla. 1954) (quoting 23 C.J.S. *Criminal Law*, § 940, at 239).

106. See, e.g., H. STEADMAN, BEATING A RAP? DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL 56 (1979); Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 580 (1972); Rosenberg & McGarry, *Competency for Trial: The Making of an Expert*, 128 AM. J. PSYCH. 1092, 1092-95 (1972); Vann & Morganroth, *The Psychiatrist as Judge: A Second Look at the Competence to Stand Trial*, 43 U. DET. L.J. 1, 2-3, 9 (1965).

107. See J. ZISKIN, COPING WITH PSYCHIATRIC AND PSYCHOLOGICAL TESTIMONY (3d ed. 1981); Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1974).

108. FLA. R. CRIM. P. 3.216(a).

109. *Id.* 3.212.

110. *Brown v. State*, 245 So. 2d 68, 71-72 (Fla. 1971), *modified*, 408 U.S. 938 (1972); see *Butler v. State*, 261 So. 2d 508, 510 (Fla. 1st DCA 1972) (lay witnesses may testify on issue of legal insanity); *Byrd v. State*, 178 So. 2d 884 (Fla. 2d DCA 1965) (same).

111. Any statements made by the defendant at his competency hearing may not later be used against him at trial on the question of guilt. *Pedrero v. Wainwright*, 590 F.2d 1383, 1388 n.3 (5th Cir. 1979); *People v. Angelillo*, — Misc. 2d —, 432 N.Y.S.2d 127, 131 (N.Y. Sup. Ct. 1980); see *Simmons v. United States*, 390 U.S. 377 (1968). Some courts, however, permit the use of such statements for impeachment. See *People v. Sturgis*, 58 Ill. 2d 211, 317 N.E.2d 545 (1974), *cert. denied*, 420 U.S. 936 (1975). But see *New Jersey v. Portash*, 440 U.S. 450 (1979).

112. *United States v. Makris*, 535 F.2d 899, 908 (5th Cir. 1976); *United States v. Davis*, 365 F.2d 251, 256 (6th Cir. 1966); *United States v. Sermon*, 228 F. Supp. 972, 976 (W.D. Mo. 1964); *Brown v. State*, 245 So. 2d 68, 70 (Fla. 1971), *modified*, 408 U.S. 938 (1972);

There are, of course, circumstances in which the court would rule against the recommendations of the experts. For example, such circumstances arise when the reasons the experts give are not those required by law, when there is overwhelming conflicting evidence, or when the experts themselves disagree.<sup>113</sup>

Under Florida law, the defendant enters the courtroom with a presumption of competence.<sup>114</sup> When the defendant seeks a finding of incompetence, the defense bears the burden of persuasion, which it must carry by a preponderance of the evidence.<sup>115</sup> Although apparently no reported Florida decision addresses the question of who bears the burden of persuasion when either the prosecutor or the court seeks the evaluation and the defendant asserts that he is competent, the state should carry the burden in such cases, in view of the presumption in favor of competence.<sup>116</sup>

#### IV. DISPOSITION OF THE INCOMPETENT DEFENDANT

Rule 3.212(a) directs the court to consider the issue of the defendant's competence first. The court should therefore make this determination before any consideration of the issue of involuntary hospitalization. "If the court finds the defendant competent to stand trial, the court shall enter its order so finding and shall proceed to trial."<sup>117</sup>

If the court determines that the defendant is not competent, "the court shall consider the issue of involuntary hospitalization of the defendant if examination into that issue has been previously

Butler v. State, 261 So. 2d 508, 510 (Fla. 1st DCA 1972).

113. See, e.g., *United States v. Makris*, 535 F.2d at 908; *In re Lee v. County Court*, 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705, cert. denied, 404 U.S. 823 (1971).

114. *Child v. Wainwright*, 148 So. 2d 526 (Fla. 1963).

115. *Brown v. State*, 245 So. 2d 68, 70-71 (Fla. 1971); *Brock v. State*, 69 So. 2d 344 (Fla. 1954); *Flowers v. State*, 353 So. 2d 1259 (Fla. 3d DCA 1978). *Contra*, *United States v. DiGilio*, 538 F.2d 972, 988 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *United States v. Makris*, 535 F.2d 899, 906 (5th Cir. 1976) (prosecution bears burden of showing, by preponderance of evidence, that defendant is competent). *But see* *People v. Carl*, 58 A. D. 2d 1948, 397 N.Y.S.2d 193 (1977), *rev'd on other grounds*, 46 N.Y.2d 806, 386 N.E.2d 828, 413 N.Y.S.2d 916 (1978); Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. CHI. L. REV. 21, 55-57, 66 (1977) (court should bear burden of determining competency).

116. See Project, *supra* note 97, at 624 (the party asserting incompetency should bear burden of proof by preponderance of evidence). *Contra*, *State v. Aumann*, 265 N.W.2d 316 (Iowa 1978) (burden of proof upon defendant, regardless of who raises the issue).

117. FLA. R. CRIM. P. 3.212(a). A verbal finding on the record is sufficient; the court need not make a written order. *Alexander v. State*, 380 So. 2d 1188, 1190-91 (Fla. 5th DCA 1980).

ordered."<sup>118</sup> Presumably, although rule 3.212 does not so provide, if the court has not previously ordered inquiry into that issue but finds from the evidence before it that the defendant may meet the involuntary commitment standards of the Baker Act or Retardation Act, the court may then order the experts to consider the involuntary commitment issue in accordance with the factors set forth in rule 3.211(d)(1).

*A. Incompetent Defendant Not Meeting Criteria for Involuntary Commitment*

If the court decides that the defendant, although incompetent to stand trial, does not meet the criteria for involuntary commitment, it may release him "on appropriate release conditions for a period not to exceed one year."<sup>119</sup> The court may order outpatient treatment at a local facility and periodic evaluation to determine whether the defendant has regained his competence.<sup>120</sup> If the evaluation indicates that the defendant may have become competent, the court should hold a hearing. If it then finds the defendant competent, it must proceed to trial.<sup>121</sup> If the defendant fails to comply with the conditions of release, or if his condition deteriorates and requires inpatient care, the court may hold a hearing and modify the conditions of release or commit the defendant to the Department of Health and Rehabilitative Services for treatment.<sup>122</sup>

*B. Incompetent Defendant Meeting Criteria for Involuntary Commitment*

If the court decides that a defendant found incompetent meets the criteria for involuntary commitment, rule 3.212(b)(1) requires it to transfer the defendant to a treatment facility as defined in the Baker Act, or to order that he receive "outpatient treatment at any other appropriate facility or service on an involuntary basis." This section further provides that "[s]uch involuntary hospitalization or treatment shall be subject to all provisions of Florida Statutes not in conflict herewith."<sup>123</sup>

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118. FLA. R. CRIM. P. 3.212(b).

119. *Id.* 3.212(c).

120. *Id.*

121. *Id.* 3.212(a).

122. 1980 Fla. Laws ch. 80-75, § 1 (to be codified at FLA. STAT. § 925.27(2)).

123. FLA. R. CRIM. P. 3.212(b)(1). *See also* 1980 Fla. Laws ch. 80-75, § 2 (to be codified at FLA. STAT. § 925.28) (expressing the intent of the legislature that treatment for such involuntarily-hospitalized defendants be provided "in such a manner as to insure the full



## 1. COMMUNITY ALTERNATIVES TO COMMITMENT

The statutes and rules now governing competence to stand trial in Florida demonstrate a broad acceptance of the "least restrictive alternative" principle.<sup>124</sup> For example, rule 3.211(b)(1)(v) requires the examining expert to consider alternatives other than hospitalization that might be less restrictive on the defendant's liberty. Rule 3.212(b)(1) provides for outpatient treatment, while both rule 3.212(c) and section 925.27 of the Florida Statutes authorize conditional release. Moreover, rule 3.212(b)(1) and section 925.28 of the Florida Statutes incorporate by reference all nonconflicting provisions contained in the Baker Act or Retardation Act—statutes that themselves strongly endorse the principle.<sup>125</sup>

In the past, the court routinely would commit an incompetent defendant to the forensic wards of the South Florida State Hospital at Pembroke Pines, the Florida State Hospital at Chattahoochee, or the North Florida Treatment and Evaluation Center in Gainesville. Such a practice of automatic hospitalization for an incompetent defendant was questionable as a matter of policy and may also have violated the constitutional "least restrictive alterna-

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protection of the rights of said patients" as set forth in the Baker Act).

124. See Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 MICH. L. REV. 1108 (1972); Ashe v. Robinson, 450 F.2d 681 (D.C. Cir. 1967); Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969); Davis v. Watkins, 384 F. Supp. 1196 (N.D. Ohio 1974); Welsch v. Likens, 373 F. Supp. 487 (D. Minn. 1974).

125. Both the Baker Act and the Retardation Act require the placement of an involuntarily committed individual in the least restrictive environment. A condition of involuntary commitment for a mentally retarded person is that such placement be "the least restrictive and most appropriate alternative to meet his needs." FLA. STAT. § 393.11(1)(b) (Supp. 1980). See also FLA. STAT. § 393.065(2) (1979), requiring the Department of Health and Rehabilitative Services to "prescribe and provide an appropriate individual habilitation plan for each client. . . . Each plan shall include the most cost-beneficial, least restrictive environment for accomplishment of the objectives for client progress . . . ." The declaration of intent of the Retardation Act (*id.* § 393.062) states that

greatest priority shall be given to the development and implementation of community-based residential placements, services and treatment programs for the retarded and other developmentally disabled individuals . . . to achieve their greatest potential for independent and productive living, which will enable them to live in their own homes or in facilities located in their own communities, and which will permit clients to be diverted or removed from unnecessary institutional placements.

The Baker Act similarly adopts the principle of the least restrictive alternative. *Id.* § 394.453, entitled "Legislative Intent," declares that "the least restrictive means of intervention be employed based on the individual needs of each patient within the scope of available services." *Id.* § 394.459(2)(b) (Supp. 1980) provides that "[i]t is further the policy of the state that the least restrictive available treatment be utilized based on the individual needs and best interests of the patient."

tive" doctrine.<sup>126</sup> Defense counsel should use these new provisions to seek community alternatives to hospitalization for incompetent clients. Generally, the state hospital forensic wards are grossly overcrowded and underfunded, and provide little treatment other than psychotropic medication. As a result, it is generally in the best interest of incompetent defendants to avoid hospitalization and receive outpatient treatment in the community. Defense counsel should use the assistance of social workers to locate less restrictive community placements and treatments. The availability of these facilities provides defense counsel a basis for insisting that the court not order hospitalization when the defendant's condition does not require it.

## 2. HOSPITALIZATION AND TREATMENT

If the court commits the defendant to a hospital or retardation facility, rule 3.212(b)(2) requires the order of commitment to contain the following:

- (i) Findings of fact relating to the issues of competency and involuntary hospitalization, addressing the factors set forth in Rule 3.211 above where applicable;
- (ii) Copies of the reports of the experts filed with the court pursuant to the order of examination;
- (iii) Any other psychiatric, psychological or social work reports submitted to the court relative to the mental state of the defendant;
- (iv) The charging instrument and also supporting affidavits or other documents used in determination of probable cause.<sup>127</sup>

These provisions attempt to give greater assistance to the staff of the relevant treatment facility in making their initial evaluation and in instituting appropriate treatment more expeditiously.

Rule 3.212(b)(3), as well as complementary section 924.23(1) of the Florida Statutes, provides that "[t]he treatment facility shall admit the defendant for hospitalization and treatment and may retain and treat the defendant."<sup>128</sup> Such treatment, as well as

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126. A. STONE, *supra* note 9, at 212; D. WEXLER, *supra* note 6, at 40-41; Janis, *supra* note 68, at 738; *see* United States v. Klein, 325 F.2d 283 (2d Cir. 1963). A federal district court recently found that Connecticut's statutory procedure governing incompetence to stand trial violated due process by failing to require a determination that commitment is the least restrictive alternative to effect restoration to competency. DeAngelas v. Plaut, No. N-77-147 (D. Conn. Sept. 29, 1980), 5 MENTAL DISABILITY L. REP. 9, 10 (1981).

127. FLA. R. CRIM. P. 3.212(b)(2).

128. *Id.* 3.212(b)(3).

that rendered in a community-based program, seeks to restore the defendant to sufficient competence to stand trial, not necessarily to cure him of his mental illness.<sup>129</sup> Because the purpose of committing the incompetent defendant is to restore him to capacity to stand trial,<sup>130</sup> such commitment must entail treatment that makes it substantially probable "that he will attain that capacity in the foreseeable future."<sup>131</sup> If treatment that the state hospital or retardation facility affords is inadequate to achieve this goal expeditiously, such hospitalization is subject to attack as a violation of the defendant's constitutional right to treatment,<sup>132</sup> as well as his fourteenth amendment right to liberty.<sup>133</sup> In view of the current condition of the state hospital forensic wards and retardation facilities, right-to-treatment suits on behalf of incompetent defendants committed therein would likely result in court-ordered improvements.<sup>134</sup>

### C. Continuing Incompetence or Need for Commitment

#### 1. INITIATING REVIEW

If the administrator of the facility determines on the basis of the defendant's response to treatment that he has become compe-

129. Winick, *supra* note 8, at 770.

130. *Jackson v. Indiana*, 406 U.S. 715 (1972); *Garrett v. State*, 390 So. 2d 95 (Fla. 3d DCA 1980), *review denied*, No. 60,065 (Fla. Apr. 10, 1981).

131. *Jackson v. Indiana*, 406 U.S. at 738.

132. *See Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305, 1312 (5th Cir. 1974). By placing substantive due process limits on the state's power to commit the incompetent defendant, *Jackson v. Indiana*, 406 U.S. 715 (1972), gives rise to a right to treatment for defendants committed on this basis. *See Gobert, supra* note 6, at 684-85; *Project, supra* note 97, at 625. In fact, the Supreme Court in *Jackson* expressed "substantial doubts about whether the rationale of pre-trial commitment—that care or treatment will aid the accused in attaining competency—is empirically valid given the state of most of our mental institutions." 406 U.S. at 735. The defendant also has a statutory right to treatment under FLA. STAT. § 394.459(2) & (4) (1979 & Supp. 1980). Provisions of the Baker Act are incorporated by reference in FLA. R. CRIM. P. 3.212(b)(1) and in FLA. STAT. § 916.18 (Supp. 1980). Section 394.459(2)(a) (Supp. 1980) provides that the Department of Health and Rehabilitative Services "shall not deny treatment for mental illness to any person." FLA. STAT. § 394.459(4)(a) (Supp. 1980) provides that

Each patient in a facility shall receive treatment suited to his needs, which shall be administered skillfully, safely, and humanely with full respect for his dignity and personal integrity. Each patient shall receive such medical, vocational, social, educational, and rehabilitative services as his condition requires to bring about an early return to his community.

133. *See O'Connor v. Donaldson*, 422 U.S. 563, 575-76 (1975).

134. *See, e.g., State v. Twyman*, No. 75-525 CFA (Fla. 17th Cir. Ct., March 27, 1980) (stipulation of settlement on conditions, staffing patterns, and treatment of patients confined in the forensic wards of South Florida State Hospital).

tent to stand trial or no longer meets the criteria for involuntary commitment, rule 3.212(b)(3) requires the administrator to notify the court by sending it a report, with copies to all parties. The report must consider the factors dealing with competence and the need for involuntary commitment set forth in rule 3.211(a) and (b).<sup>135</sup> Moreover, if counsel for the defendant has reasonable grounds to believe that the defendant has regained his competence to stand trial or no longer meets the criteria for involuntary commitment, counsel may move the court for a hearing on that issue.<sup>136</sup> The motion must certify that counsel made it in good faith and on reasonable grounds, and without invading the attorney-client privilege, the motion must recite the specific observations of and conversations with the defendant that form the basis for the motion.<sup>137</sup> If the court concludes, upon consideration of such a motion filed by counsel for the defendant, that reasonable grounds exist to believe that the defendant may have regained competence or no longer meets the criteria for involuntary commitment, the court may order the administrator of the facility to submit a report to the court on these issues, with copies to all parties, "and shall order a hearing to be held on those issues."<sup>138</sup>

## 2. HEARING

Rule 3.212(b)(4) requires the court to hold the hearing within thirty days of the receipt of any report on competence or need for hospitalization from the administrator of the facility, whether provided under rule 3.212(b)(3) or in response to the court's order. If, following the hearing, the court finds the defendant competent to stand trial, "it shall enter its order so finding and shall proceed with the trial."<sup>139</sup> The court cannot adjudicate a change in the defendant's status from incompetent to competent without a hearing.<sup>140</sup> If the court determines that the defendant remains incompetent and still meets the criteria for involuntary commitment, it must order continued hospitalization or treatment.<sup>141</sup> If the court determines that the defendant remains incompetent but no longer

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135. See notes 123-54 and accompanying text *supra* for a discussion of these factors.

136. FLA. R. CRIM. P. 3.212(b)(3)(i).

137. *Id.*

138. *Id.* 3.212(b)(3)(ii).

139. *Id.* 3.212(b)(5).

140. *Alexander v. State*, 380 So. 2d 1188, 1190 (Fla. 5th DCA 1980); *Parks v. State*, 290 So. 2d 562 (Fla. 4th DCA 1974).

141. FLA. R. CRIM. P. 3.212(b)(4).

meets the criteria for involuntary commitment, it may order conditional release.<sup>143</sup>

### 3. CONDITIONAL RELEASE

Rule 3.212(c) authorizes conditional release of an incompetent defendant who no longer meets the criteria for involuntary commitment:

The defendant may be released on appropriate release conditions for a period not to exceed one year. The court may order that the defendant receive outpatient treatment at an appropriate local facility and that the defendant report for further evaluation at specified times during such release period as conditions of release. A report shall be filed with the court after each such evaluation by the persons appointed by the court to make such evaluations, with copies to all parties.<sup>143</sup>

Rule 3.219 and section 925.27 of the Florida Statutes also authorize such conditional release, and further provide that if the administrator of the facility deems outpatient treatment appropriate for the defendant, the administrator may file with the court a written plan for the defendant's release, with copies to all parties. Such a plan, which the defendant may also submit, must include: "(1) Special provisions for residential care and/or adequate supervision of the defendant; (2) Provisions for outpatient mental health services; (3) If appropriate, recommendations for auxiliary services such as vocational training, educational services, or special medical care."<sup>144</sup>

The statute further requires the court to specify the conditions of release based upon the release plan, and to direct that the appropriate agency submit periodic reports to the court on the defendant's compliance with these conditions and progress in treatment.<sup>145</sup> If the defendant fails to comply with the conditions of release, or if his condition deteriorates and requires inpatient care, the court may, following a hearing, order the defendant returned to the Department of Health and Rehabilitative Services for further treatment.<sup>146</sup> Following a hearing the court may, when appropriate, modify the release conditions.<sup>147</sup>

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142. FLA. R. CRIM. P. 3.212(c).

143. *Id.*

144. *Id.* 3.219.

145. 1980 Fla. Laws ch. 80-75, § 1 (to be codified at FLA. STAT. § 916.17(1)).

146. *Id.* (to be codified at § 925.27(2)).

147. *Id.*

#### 4. PERIODIC REVIEW

Even if no one initiates the review procedure described above,<sup>148</sup> the administrator must nonetheless file with the court a report discussing both the defendant's competence and the question of whether the defendant still meets the criteria for involuntary commitment.<sup>149</sup> The administrator must do this no later than six months from the date of the defendant's admission to the facility.<sup>150</sup> His report must consider the factors set forth in rule 3.211(a) and (b).<sup>151</sup> Within thirty days of the receipt of the report, the court must hold a hearing on the issues.<sup>152</sup> Again, if at this hearing the court determines that the defendant is competent, it must proceed with the trial; if it determines that the defendant remains incompetent and still meets the criteria for involuntary commitment, it must order continued hospitalization or treatment for a period not to exceed one year; if it determines that the defendant remains incompetent but no longer meets the criteria for involuntary commitment, it may order conditional release.<sup>153</sup>

When the facility retains the defendant, the administrator and the court must repeat the same review procedure before the expiration of each additional one-year period of extended hospitalization, unless within that period the defendant's counsel files a motion or the administrator files a report stating that the defendant no longer meets the criteria for involuntary commitment.<sup>154</sup>

#### D. *Disposition of the Defendant Who Remains Incompetent*

If the defendant remains incompetent for five years after a determination of incompetence in the case of a defendant charged with a felony, or for one year in the case of a defendant charged with a misdemeanor, rule 3.213(a) requires that the court conduct a hearing. If the court determines that the defendant remains incompetent and there is no substantial probability that he will become competent in the foreseeable future, the court must dismiss the charges against the defendant. In such a case, the court must also determine whether the defendant meets or continues to meet

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148. See text accompanying notes 139-47 *supra*.

149. FLA. R. CRIM. P. 3.212(b)(3).

150. *Id.*

151. 1980 Fla. Laws ch. 80-75, § 1 (to be codified at FLA. STAT. § 916.13(1)); see notes 123-54 and accompanying text *supra* for a discussion of these factors.

152. FLA. R. CRIM. P. 3.212(b)(4).

153. *Id.* 3.212(b)(5)-(6).

154. *Id.* 3.212(b)(4).

the criteria for involuntary commitment;<sup>155</sup> if not, the court must order the defendant released from custody.<sup>156</sup> If, on the other hand, the defendant still meets those criteria, the court must either commit the defendant to the Department of Health and Rehabilitative Services for involuntary hospitalization or placement solely under the provisions of the Baker Act or the Retardation Act, or order that he receive outpatient treatment at any other facility, subject to the provisions of those statutes.<sup>157</sup> In any such order of commitment, the court must require the administrator of the facility to notify the state attorney no less than thirty days before any anticipated date of release of the defendant.<sup>158</sup>

The rule does not address the case of a defendant who remains incompetent following the specified period but continues to present a substantial probability of restoration to competence in the foreseeable future. In the absence of an express provision, the more general provisions of rule 3.212 would appear to apply. A defendant still meeting the criteria for involuntary commitment must annually undergo review and a hearing on his condition. If he does not meet those criteria, the court will grant a conditional release under rule 3.212(c), with periodic reevaluation. Although theoretically this process could continue indefinitely, it is unlikely that a defendant who has remained incompetent for a lengthy period would also continue to present a substantial probability of restoration to competence in the foreseeable future. With the passage of time, it becomes more and more difficult to justify assertions that the defendant will regain capacity in the foreseeable future. Ultimately, application of rule 3.213 will become appropriate and require dismissal of charges. Moreover, such repeated findings by the court of a substantial probability of regaining capacity in the foreseeable future may, if sufficient time has passed and if the defendant suffers prejudice as a result, support a claim that these rulings and the attendant delay have violated the defendant's right to due

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155. *Id.* 3.213(a)-(b). The District Court of Appeal, Third District, considering a case in which the critical events occurred before the recent revision of the rule, ordered a dismissal of charges after the defendant had been held for a six-year period without restoration to competency or determination of the likelihood of eventual ability to stand trial. *Garrett v. State*, 390 So. 2d 95 (Fla. 3d DCA 1980), *review denied*, No. 60,065 (Fla. Apr. 10, 1981). The court acted on due process grounds, finding that the lengthy commitment violated the "reasonable period" requirement of *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). See notes 217-22 and accompanying text *infra*.

156. See FLA. R. CRIM. P. 3.213(a).

157. *Id.* 3.213(b).

158. *Id.* This requirement of notification would provide the state attorney an opportunity to contest release, under appropriate circumstances.

process or a speedy trial.<sup>159</sup>

If, under rule 3.213, the court has dismissed the charges against the defendant and subsequently declares him competent to stand trial, the prosecutor may refile charges against him. Rule 3.214(a) and section 925.24 provide that such prior dismissal "shall not constitute former jeopardy." Moreover, section 925.24 of the Florida Statutes provides that "[t]he statute of limitations shall not be applicable to criminal charges dismissed because of the incompetency of the defendant to stand trial." Such a revival of charges, of course, could raise a possible speedy trial defense,<sup>160</sup> and, in extreme cases, due process problems.<sup>161</sup>

## V. PSYCHOTROPIC MEDICATION AND COMPETENCE

### A. Competence Dependent on Medication

Psychotropic medication is perhaps the most widely used and most effective treatment technique for psychiatric conditions that result in incompetence to stand trial.<sup>162</sup> As a result, many defendants adjudicated incompetent can regain competence by the use of these drugs.<sup>163</sup> Many, however, will require continued medication to maintain their competence. Under rule 3.214(c) and section 925.22(2) of the Florida Statutes, a defendant whose competence depends on use of these drugs "shall not automatically be deemed incompetent to stand trial simply because his satisfactory mental functioning is dependent on such medication."<sup>164</sup> Virtually all appellate courts that have considered the issue have taken this approach.<sup>165</sup> The Task Panel on Legal and Ethical Issues of the President's Commission on Mental Health,<sup>166</sup> as well as other commentators,<sup>167</sup> also has recommended this approach. Of course,

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159. See notes 183-222 and accompanying text *infra*.

160. See notes 183-216 and accompanying text *infra*.

161. See notes 217-22 and accompanying text *infra*.

162. MISUSE OF PSYCHIATRY, *supra* note 2, at 901; HOLLISTER, *Psychotropic Drugs and Court Competence in LAW PSYCHIATRY AND THE MENTALLY DISORDERED OFFENDER 1* (L. Irvine & T. Brelje eds. 1972); Winick, *supra* note 8, at 769-77.

163. Winick, *supra* note 8, at 769-77.

164. FLA. STAT. § 916.12(2) (Supp. 1980).

165. *E.g.*, United States v. Hayes, 589 F.2d 811 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979); People v. Dalfonso, 24 Ill. App. 3d 748, 321 N.E.2d 379 (1974); State v. Hampton, 253 La. 399, 218 So. 2d 311 (1969).

166. TASK PANEL, PRESIDENT'S COMMISSION ON MENTAL HEALTH, TASK PANEL REPORT: LEGAL AND ETHICAL ISSUES 1459-60 (Feb. 15, 1978).

167. See, *e.g.*, MISUSE OF PSYCHIATRY, *supra* note 2; S. HALLECK, *supra* note 26, at 239-40; HOLLISTER, *supra* note 162; Winick, *supra* note 8.



if the medication does not succeed in restoring the defendant to competence, or if its side effects materially interfere with his ability to understand the nature of the proceedings or to assist in his defense, then the court should not deem him competent.<sup>168</sup>

Rule 3.214(c)(2) provides that if a defendant proceeds to trial under psychotropic medication, upon motion of his counsel, "the jury shall, at the beginning of the trial, and in the charge to the jury, be given explanatory instructions regarding such medication."<sup>169</sup> Such an instruction would be particularly appropriate in the case of a defendant raising an insanity defense. The jury, observing the defendant in an artificially calm state—with the medication keeping the bizarre symptoms of his mental illness in check—may otherwise find it difficult to believe he was mentally ill at the time of the crime.<sup>170</sup>

### B. *Right to Refuse Psychotropic Medication*

Florida case law does not address the issue whether a defendant may refuse psychotropic medication that a psychiatrist believes is necessary to maintain the defendant's competence. A growing body of recent case law in other jurisdictions recognizes a constitutional right of competent mental patients to refuse mental health treatment, including psychotropic medication.<sup>171</sup> The Baker Act broadly provides that patients who are competent to consent

168. Winick, *supra* note 8, at 815; e.g., *Whitehead v. Wainwright*, 447 F. Supp. 898 (M.D. Fla. 1978).

169. FLA. R. CRIM. P. 3.214(c)(2).

170. See *State v. Jojola*, 89 N.M. 489, 553 P.2d 1296 (Ct. App. 1976); *In re Pray*, 133 Vt. 253, 336 A.2d 174 (1975); *State v. Murphy*, 56 Wash. 2d 761, 355 P.2d 323 (1960).

171. E.g., *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976); *Winters v. Miller*, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971); *Rogers v. Okin*, 478 F. Supp. 1342 (E.D. Mass. 1979), *aff'd in part*, 634 F.2d 650 (1st Cir. 1980); *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978). See generally R. SCHWITZGEBEL, LEGAL ASPECTS OF THE ENFORCED TREATMENT OF OFFENDERS (DHEW Pub. No. 79-831, 1979); Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U.L. REV. 461 (1977); Winick, *Legal Limitations on Correctional Therapy and Research*, 65 MINN. L. REV. 331 (1981). The right to refuse treatment

can be derived from a variety of constitutional sources: a First Amendment right to be free of interference with mental processes, the right to privacy protected by Fourteenth Amendment substantive due process, the equal protection clause of the Fourteenth Amendment, Fourteenth Amendment procedural due process, the First Amendment right to the free exercise of religion in the case of religious-based refusals, and the right to be free of cruel and unusual punishment protected by the Eighth Amendment.

Winick, *supra* note 8, at 811-12.

have the right to refuse treatment;<sup>172</sup> for patients not competent to consent, the Act permits treatment only after a hearing officer has found the patient incompetent and has appointed a "guardian advocate" to act on the patient's behalf in consenting to treatment.<sup>173</sup>

These constitutional and statutory rights to refuse treatment seem generally applicable to the defendant who has regained his capacity and who desires to discontinue psychotropic medication.<sup>174</sup> Indeed, the rights may even apply to the defendant found incompetent to stand trial who has not yet regained trial capacity, in view of Florida Rule of Criminal Procedure 3.214(b), which states that an adjudication of incompetence to stand trial "shall not operate as an adjudication of incompetency to consent to medical treatment or for any other purpose unless such other adjudication is specifically set forth in the order." As a result, in the court order adjudicating a defendant incompetent to stand trial, the judge may include a finding that the defendant is also incompetent to consent to treatment.<sup>175</sup> Most defendants who are incompetent to stand trial will also be incompetent to consent to treatment; but some who lack trial capacity under the *Dusky* standard will nonetheless retain capacity to participate in treatment decisions. An automatic finding of incompetence to consent therefore seems inappropriate; rather, due process will require that the court base its finding on an adequate record made at a hearing at which the defendant's counsel has had an opportunity to assert the competency of his client to consent to treatment.<sup>176</sup>

Even if a judicial determination of incompetency to consent to treatment renders inapplicable the statutory right to refuse,<sup>177</sup> defendants may assert a constitutional right to resist medication,

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172. FLA. STAT. § 394.459(3)(a) (Supp. 1980).

173. *Id.* A limited exception exists for emergency treatment, which may be administered "in the least restrictive manner" upon written order of a mental health professional who determines that such treatment "is necessary for the safety of the patient or others." *Id.*

174. Winick, *supra* note 8, at 811.

175. The Baker Act provisions are incorporated by reference in FLA. R. CRIM. P. 3.212(b)(1) and in 1980 Fla. Laws ch. 80-75, § 2 (to be codified at FLA. STAT. § 916.18). See note 132 *supra*.

176. *Cf. Winters v. Miller*, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971) (procedural due process violated by subjecting mental patient involuntarily committed in civil proceedings to involuntary psychotropic medication, absent a hearing on the patient's competence to consent).

177. The statutory right to refuse seems unimpaired for the rare defendant who is competent to consent to treatment, although incompetent to stand trial. See note 173 and accompanying text *supra*.

under a first amendment right to be free from interference with mental processes,<sup>178</sup> and the due process right to bodily privacy.<sup>179</sup> Although these are fundamental constitutional rights, the courts will likely find them outweighed by the state's interest in restoring the defendant to competence or in retaining him in a competent condition. The state's interest in bringing to trial defendants accused in good faith and on probable cause of violating its laws lies at the very core of its police power, and would therefore probably satisfy the requirement of a compelling state interest.<sup>180</sup>

By invoking the least restrictive alternative principle, however, the defendant may successfully challenge the forced administration of drugs on the basis that the facility should try alternative treatment methods before using such intrusive techniques as psychotropic medication.<sup>181</sup> Furthermore, a defendant restored to competence by medication could assert a right to discontinue that medication and waive in advance his due process objection to any incompetence at trial induced by that discontinuation.<sup>182</sup>

## VI. SPEEDY TRIAL AND DUE PROCESS LIMITS ON INCOMPETENCY COMMITMENT

### A. *Florida Rule of Criminal Procedure 3.191*

Under Florida Rule of Criminal Procedure 3.191, the state must bring every defendant to trial, without demand, within

178. See *Scott v. Plante*, 532 F.2d 939 (3d Cir. 1976); *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part*, 634 F.2d 650 (1st Cir. 1980).

179. See *Davis v. Hubbard*, 49 U.S.L.W. 2215 (N.D. Ohio Sept. 30, 1980); *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part*, 634 F.2d 650 (1st Cir. 1980); *Rennie v. Klein*, 462 F. Supp. 1131 (D.N.J. 1978); *In re K.K.B.*, 609 P.2d 747 (Okla. 1980).

180. Winick, *supra* note 8, at 812-13.

181. *Id.* at 813; *Rogers v. Okin*, 634 F.2d 650, 656-57 (1st Cir. 1980); *Romeo v. Youngberg*, 5 MENTAL DISABILITY L. REP. 22, 24 (3d Cir. Nov. 24, 1980); *Rennie v. Klein*, 462 F. Supp. 1131, 1146 (D.N.J. 1978) (lithium and antidepressant medication less intrusive than antipsychotic medication); *In re Boyd*, 403 A.2d 744, 753 n.15 (D.C. 1979). Applying the "least restrictive alternative" principle to choices of therapy involves difficult empirical questions about the efficacy of the various treatment techniques, as well as substantial value judgments about the ranking of techniques according to their respective intrusions on constitutional rights. For an attempt to rank the various therapies on a continuum of intrusiveness, see Winick, *supra* note 171. Of course, in choosing the least restrictive alternative, the courts should consider as sufficient to satisfy the state's compelling interest only those therapies thought likely to restore the defendant's competency. Winick, *supra* note 8, at 813 n.248. Thus, psychotherapy and behavior modification techniques, which are considerably less effective than medication in treating the typical psychiatric disorders causing trial incapacity, will generally not be required even though one may consider them less restrictive than most psychotropic drugs.

182. *State v. Hayes*, 118 N.H. 458, 389 A.2d 1379 (1978); Winick, *supra* note 8, at 814.

ninety days if the crime charged is a misdemeanor, or 180 days if the crime charged is a felony.<sup>183</sup> The rule provides, however, that these time periods "may at any time be waived or extended by order of the court . . . [for] a period of reasonable and necessary delay resulting from proceedings . . . to determine the mental competency or physical ability of the defendant to stand trial."<sup>184</sup> Prior law exhibited some confusion about whether the speedy trial time periods were waived (in which case the time periods are inapplicable) or extended (in which case the time periods are applicable but tolled) for such periods of evaluation or treatment relating to competence to stand trial.<sup>185</sup> When the court orders a competency evaluation, to avoid possible waiver of the rule, defense counsel should seek a specific order tolling the speedy trial period for a reasonable and necessary period of evaluation, after which the time periods will continue to run.<sup>186</sup> Rule 3.214(d) partially resolves this confusion by providing that the speedy trial periods contained in rule 3.191 shall not apply to a defendant adjudged incompetent to stand trial until "the date the defendant is again adjudged competent to stand trial or, in the case of a defendant whose charges have been dismissed without prejudice, the date the charges are again filed."<sup>187</sup>

### B. *Constitutional Speedy Trial*

Even when Florida Rule of Criminal Procedure 3.191 is inapplicable, a lengthy period of delay in bringing an incompetent defendant to trial may violate the defendant's right to a speedy trial under the United States and Florida Constitutions.<sup>188</sup> In the leading speedy trial decision, *Barker v. Wingo*,<sup>189</sup> the Supreme Court adopted a balancing test for determining violation of the sixth amendment right to a speedy trial, which applies to the states under the fourteenth amendment. The Court identified four fac-

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183. FLA. R. CRIM. P. 3.191(a)(1).

184. *Id.* 3.191(d)(2)(iv).

185. Compare *Miller v. State*, 332 So. 2d 65 (Fla. 1976); *State ex rel. Butler v. Cullen*, 253 So. 2d 861 (Fla. 1971); *Flicker v. State*, 352 So. 2d 165 (Fla. 1st DCA 1977); *Davis v. State*, 302 So. 2d 464 (Fla. 3d DCA 1974), and *Chester v. State*, 298 So. 2d 529 (Fla. 3d DCA 1974) with *Yetter*, *The Florida Rules of Criminal Procedure: 1977 Amendments*, 5 FLA. ST. U.L. REV. 241, 285-87 (1977).

186. See *Yetter*, *supra* note 185, at 285.

187. FLA. R. CRIM. P. 3.214(d).

188. See *Barker v. Wingo*, 407 U.S. 514 (1972); *Chester v. State*, 298 So. 2d 529 (Fla. 3d DCA 1974).

189. 407 U.S. 514 (1972).

tors for consideration on a case-by-case basis: the length of the delay; the reason for the delay; the defendant's assertion of his right; and the prejudice to the defendant. Florida courts have recognized and applied the *Barker* factors in determining whether a delay violates the Florida constitutional speedy trial protections.<sup>190</sup>

The first factor cited by the *Barker* Court requires a sufficient period of delay to trigger further inquiry. A period in excess of one year certainly appears sufficient. Once such a period of delay has passed, the courts, under the second *Barker* factor, must scrutinize the reason for the delay. In this regard, the *Barker* Court noted that "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily. . . ."<sup>191</sup> A "valid reason, such as a missing witness, should serve to justify appropriate delay."<sup>192</sup> Traditionally, a reasonable period of evaluation and treatment for competence to stand trial provides a valid reason excusing delay.<sup>193</sup> The courts, however, should not excuse unreasonable periods of delay. A competency evaluation can reasonably be performed within several days or weeks.<sup>194</sup> The court should charge against the state any delay that exceeds the twenty-day period specified in rule 3.210(b) for evaluation and scheduling the hearing. Once treatment has restored the defendant's competency, the facility should expeditiously return him to court for a competency determination. If the facility administrator fails to file the reports required under rule 3.212(b), or if the court fails to hold hearings on these reports within thirty days of their receipt, as required by rule 3.212(b)(4),<sup>195</sup> the resulting periods of delay should also count against the state.

Florida courts have recognized that the state is primarily responsible for providing a defendant with a speedy trial, and that although a defendant's request for a competency evaluation pro-

190. See, e.g., *Chester v. State*, 298 So. 2d 529 (Fla. 3d DCA 1974).

191. *Barker v. Wingo*, 407 U.S. at 531.

192. *Id.*; see *Winick*, *supra* note 8, at 803-04.

193. See *United States v. Cartano*, 420 F.2d 362 (1st Cir.), *cert. denied*, 397 U.S. 1054 (1970); *Johnson v. United States*, 333 F.2d 371 (10th Cir. 1964); *Germany v. Hudspeth*, 209 F.2d 15 (10th Cir.), *cert. denied*, 347 U.S. 946 (1954); *United States v. Lancaster*, 408 F. Supp. 225 (D.D.C. 1976); Speedy Trial Act of 1974, 18 U.S.C. § 3161(h)(4) (1976); A.B.A. STANDARDS RELATING TO SPEEDY TRIAL § 23(a) (approved draft, 1968).

194. See *Bluestone & Melella, A Study of Criminal Defendants Referred for Competency to Stand Trial in New York*, 7 BULL. AM. ACAD. PSYCH. & L. 166, 176 (1979); *Burt & Morris*, *supra* note 95, at 88; *Yetter*, *supra* note 185, at 285.

195. FLA. R. CRIM. P. 3.212(b)(4).

longs the proceedings, it does not alleviate the state's continuing responsibility to try the defendant speedily.<sup>196</sup> The Fifth Circuit has held that the prosecution has a "constitutionally imposed duty to take affirmative action to secure [the defendant's] return for trial."<sup>197</sup> The state has "the special obligation . . . to press the case to trial as the period of unavoidable delay mounts."<sup>198</sup> Moreover, the prosecution "may not justify a delay merely by citing the defendant's incompetence."<sup>199</sup> "The Government must carefully and vigilantly protect the interests of both the incompetent individual and society."<sup>200</sup> As the period of hospitalization for incompetence lengthens, the prosecutor's burden increases.<sup>201</sup>

The third *Barker* factor is the defendant's assertion of his right to a speedy trial. Although nonassertion of the right does not constitute waiver, the Court recognized that failure to assert the right "will make it difficult for a defendant to prove that he was denied a speedy trial."<sup>202</sup>

The final factor cited in *Barker* is prejudice to the defendant.<sup>203</sup> The Court, however, "expressly rejected the notion that an affirmative demonstration of prejudice [is] necessary to prove a denial of the constitutional right to a speedy trial."<sup>204</sup> "[W]here the defendant has established a prima facie case of denial of the speedy trial right, the burden is upon the State to show that the defendant has not been prejudiced by the delay."<sup>205</sup> "[P]rejudice is immaterial where consideration of the other three factors—length of delay, defendant's assertion of his right, and reasons for the delay—coalesce in the defendant's favor . . . ."<sup>206</sup>

*Barker* identified three types of prejudice against which the right to a speedy trial guards: oppressive pre-trial incarceration; anxiety and concern of the accused; and the possibility that delay will impair the defense.<sup>207</sup> Clearly, any periods of unnecessary hospitalization constitute oppressive pre-trial detention within the

196. *McGraw v. State*, 330 So. 2d 48, 50 (Fla. 1st DCA), *overruled on other grounds*, 332 So. 2d 705 (Fla. 1976).

197. *Prince v. Alabama*, 507 F.2d 693, 705 (5th Cir.), *cert. denied*, 423 U.S. 876 (1975).

198. *United States v. Brown*, 520 F.2d 1106, 1108 (D.C. Cir. 1975).

199. *United States v. Geelan*, 520 F.2d 585, 588 (9th Cir. 1975).

200. *Id.*

201. *Id.* at 589.

202. *Barker v. Wingo*, 407 U.S. 514, 532 (1972).

203. *Id.* at 532-33.

204. *Moore v. Arizona*, 414 U.S. 25, 26 (1973).

205. *Prince v. Alabama*, 507 F.2d 693, 707 (5th Cir.), *cert. denied*, 423 U.S. 876 (1975).

206. *Id.*; *Hoskins v. Wainwright*, 485 F.2d 1186, 1191-92 (5th Cir. 1973).

207. *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972).

meaning of *Barker*. The "hospitals" in Florida for incompetent defendants, similar to maximum security facilities for the criminally insane in other states, are "typically the worst institutions in the state."<sup>208</sup> They are little more than grim storehouses in which treatment, if any, is grossly inadequate.<sup>209</sup> They frequently provide such poor care, restrictive custody, deprivations, hardships, and indignities that many inmates would prefer incarceration in a prison.<sup>210</sup>

Moreover, periods of unnecessary hospitalization certainly provoke considerable anxiety and concern. The incompetent defendant's concern over the outcome of pending charges against him is anti-therapeutic and poses a potentially overwhelming obstacle to the patient's improvement.<sup>211</sup> Several cases have acknowledged that mental conditions developed during the pendency of prolonged confinement awaiting trial, even when the state did nothing to cause such conditions, may violate the sixth amendment right to speedy trial.<sup>212</sup>

Although the final kind of prejudice mentioned in *Barker*—the possibility of impairment of the defense—is usually the most serious, the defendant need not show such prejudice in order to demonstrate a violation of the speedy trial right.<sup>213</sup> Lengthy incompetency commitment that hospitalizes the defendant far from family, friends, or counsel, however, may impair his ability to defend, hindering the gathering of evidence and the locating and interviewing of witnesses.<sup>214</sup> The passage of time especially hampers a defense of insanity, often appropriate for the mentally ill defendant adjudicated incompetent, by making difficult the proof of defendant's mental state at the time of the crime.<sup>215</sup> As a result of such factors, some courts have granted dismissals for violation of the right to speedy trial in cases involving

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208. A. STONE, *supra* note 9, at 209.

209. A. BROOKS, LAW, PSYCHIATRY, AND THE MENTAL HEALTH SYSTEM 397-99 (1974); A. MATTHEWS, JR., *supra* note 26, at 134; Note, *supra* note 11, at 524.

210. See *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2d Cir. 1969); S. BRAKEL & R. ROCK, *supra* note 3, at 407; H. STEADMAN, *supra* note 106, at 8-9.

211. MISUSE OF PSYCHIATRY, *supra* note 2, at 905.

212. *E.g.*, *United States v. Dreyer*, 533 F.2d 112, 116 (3d Cir. 1976); *United States ex rel. Stukes v. Shovlin*, 464 F.2d 1211, 1214-15 (3d Cir. 1972).

213. *Moore v. Arizona*, 414 U.S. 25, 26-27 (1973).

214. Winick, *supra* note 8, at 804.

215. *United States v. Morgan*, 567 F.2d 479, 497-98 (D.C. Cir. 1977); *United States v. Geelan*, 520 F.2d 585, 589 (9th Cir. 1975); *Williams v. United States*, 250 F.2d 19, 22-24 (D.C. Cir. 1957); Winick, *supra* note 8, at 804.

incompetent defendants confined for lengthy periods.<sup>216</sup>

### C. *Due Process*

In a recent case involving more than six years of oppressive pre-trial delay during which an incompetent defendant underwent repeated periods of remission and relapse, the District Court of Appeal, Third District, avoided the speedy trial question, but ordered a dismissal of charges on due process grounds.<sup>217</sup> *Jackson v. Indiana*<sup>218</sup> had previously recognized that dismissal of charges against an incompetent accused may rest not only on speedy trial grounds, but also on "the denial of due process inherent in holding pending criminal charges indefinitely over the head of one who will never have a chance to prove his innocence."<sup>219</sup> In *Garrett v. State*,<sup>220</sup> the Third District cited *Jackson's* requirement that an incompetent defendant "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future,"<sup>221</sup> and found that the defendant's lengthy commitment without restoration to competency or determination of the likelihood of his eventual ability to stand trial violated this "reasonable period" requirement. The court reversed the defendant's conviction and ordered his discharge unless the state elected to initiate civil commitment proceedings.<sup>222</sup> *Garrett* thus recognizes due process limitations on the duration of the incompetency commitment, as well as the possibility that due process, in extreme cases, may justify dismissal of charges apart from speedy trial considerations.

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216. *Williams v. United States*, 250 F.2d 19 (D.C. Cir. 1957); *United States v. Pardue*, 354 F. Supp. 1377 (D. Conn. 1973); see *Jackson v. Indiana*, 406 U.S. 715, 740 (1972); *United States ex rel. von Wolfersdorf v. Johnston*, 317 F. Supp. 66 (S.D.N.Y. 1970); *United States v. Jackson*, 306 F. Supp. 4 (N.D. Cal. 1969); *People ex rel. Myers v. Briggs*, 46 Ill. 2d 281, 263 N.E.2d 109 (1970).

217. *Garrett v. State*, 390 So. 2d 95 (Fla. 3d DCA 1980), *review denied*, No. 60,065 (Fla. Apr. 10, 1981).

218. 406 U.S. 715 (1972).

219. *Id.* at 739. In another context—pre-accusation delay not covered by the sixth amendment right to a speedy trial, *United States v. Marion*, 404 U.S. 307 (1971)—the Court has reiterated that due process may serve as a separate constitutional limitation on oppressive and prejudicial delay. *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (lengthy pre-indictment delay may violate "fundamental conceptions of justice which lie at the base of our civil and political institutions . . . [and] define the community's sense of fair play and decency").

220. 390 So. 2d 95 (Fla. 3d DCA 1980), *review denied*, No. 60,065 (Fla. Apr. 10, 1981).

221. *Id.* at 97 (citing *Jackson*, 406 U.S. at 738).

222. *Id.*



## VII. RESPONSIBILITY OF DEFENDANT'S ATTORNEY AFTER A FINDING OF INCOMPETENCE

When a court declares a criminal defendant incompetent to stand trial, the state may not try him and must suspend the criminal proceedings against him.<sup>223</sup> Nonetheless, counsel has a continuing responsibility to protect his client's rights.<sup>224</sup> In *Jackson v. Indiana*,<sup>225</sup> the Supreme Court recognized counsel's continuing responsibility and refused to read previous decisions "to preclude the states from allowing, at a minimum, an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pre-trial motions through counsel."<sup>226</sup> Counsel for an incompetent defendant should therefore make all motions on his client's behalf that are susceptible of determination without his client's personal participation and presence.<sup>227</sup> Whenever possible, counsel should raise all purely legal issues that the court may consider on pre-trial motion, such as sufficiency of the indictment or information, the constitutionality of the statute under which the state charged the defendant, and challenges to the composition of the grand jury.<sup>228</sup> Moreover, a court may entertain and resolve motions to suppress evidence, to controvert a search warrant, or to challenge identification testimony without the defendant's personal participation. Such motions may result in the dismissal of charges against the defendant, which would deprive the state of its basis for hospitalizing him or treating him in an outpatient facility, and require that the state either release the defendant from treatment or civilly commit him.<sup>229</sup>

In Florida, as throughout the United States, ethical considerations obligate an attorney to exert his best efforts on his client's behalf and to represent those interests zealously.<sup>230</sup> Moreover, "any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibility upon his lawyer."<sup>231</sup> An attorney representing

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223. *Brown v. State*, 245 So. 2d 68, 70 (Fla. 1971), *modified*, 408 U.S. 938 (1972).

224. See FLA. BAR CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-31; ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-31.

225. 406 U.S. 715 (1972).

226. *Id.* at 741.

227. MODEL PENAL CODE § 4.06(3) (1962).

228. See Foote, *supra* note 2, at 841.

229. See Janis, *supra* note 68, at 731.

230. See FLA. BAR CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7; ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7.

231. See FLA. BAR CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-12; ABA CODE OF PRO-

an incompetent defendant should therefore exercise special care to make all motions on behalf of his client on which the court can rule notwithstanding his client's incapacity.<sup>232</sup>

### VIII. COMPETENCE TO PARTICIPATE IN OTHER ASPECTS OF CRIMINAL PROCEEDINGS

Even if a defendant is competent to stand trial, the issue of his competence to participate at other stages of the criminal proceeding may arise. Florida has long recognized that "if at any time while criminal proceedings are pending against a person accused of crime, whether before or during or after the trial, the trial court . . . has facts brought to its attention which raise a doubt of the sanity of the defendant, the question should be settled before further steps are taken."<sup>233</sup> Thus, if a reasonable doubt arises about a defendant's competence, the court must hold a hearing on the issue before accepting a plea of guilty<sup>234</sup> or nolo contendere.<sup>235</sup> Although Florida cases do not discuss whether courts should apply a different standard in determining competence to plead guilty as opposed to competence to stand trial, the majority of courts have rejected the adoption of differing standards.<sup>236</sup>

A competent defendant has a constitutional right to waive counsel and represent himself,<sup>237</sup> but courts must conduct an in-

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#### PROFESSIONAL RESPONSIBILITY, EC 7-12.

232. See generally Golten, *supra* note 59, at 408-09. For discussion of the tactical and ethical considerations faced by defense counsel representing an incompetent client, see Chernoff & Schaffer, *Defending the Mentally Ill: Ethical Quicksand*, 10 AM. CRIM. L. REV. 505 (1972); Pizzi, *supra* note 115, at 57-64.

233. *Brown v. State*, 245 So. 2d 68, 68-70 (Fla. 1971), *modified*, 408 U.S. 938 (1972).

234. *Suggs v. La Vallee*, 570 F.2d 1092, 1116-17 (2d Cir. 1978); *United States v. Masters*, 539 F.2d 721, 725-26 (D.C. Cir. 1976); *Osborne v. Thompson*, 481 F. Supp. 162 (M.D. Tenn. 1976), *aff'd*, 610 F.2d 461 (6th Cir. 1979); *Quesada v. State*, 321 So. 2d 442 (Fla. 3d DCA 1975); *People v. Matheson*, 70 Mich. App. 172, 183-84, 245 N.W.2d 51, 70 (1976).

235. *Saxton v. State*, 284 So. 2d 232 (Fla. 2d DCA 1973).

236. *E.g.*, *Allard v. Helgemoe*, 572 F.2d 1 (1st Cir. 1978); *United States ex rel. McGough v. Hewitt*, 528 F.2d 339 (3d Cir. 1975); *Malinauskas v. United States*, 505 F.2d 649 (5th Cir. 1974); *United States v. Harlan*, 480 F.2d 515 (6th Cir.), *cert. denied*, 414 U.S. 1006 (1973); *Wolcott v. United States*, 407 F.2d 1149 (10th Cir.), *cert. denied*, 396 U.S. 879 (1969); *Grennett v. United States*, 403 F.2d 928 (D.C. Cir. 1968); *Clayton v. United States*, 302 F.2d 30 (8th Cir. 1962); *United States v. Valentino*, 283 F.2d 634 (2d Cir. 1960); *State v. Contreras*, 112 Ariz. 358, 542 P.2d 17 (1975); *People v. Heral*, 62 Ill. 2d 329, 342 N.E.2d 34 (1976); *People v. Belanger*, 73 Mich. App. 438, 252 N.W.2d 472 (1977); *Commonwealth v. Miller*, 454 Pa. 67, 309 A.2d 705 (1973). *Contra*, *United States v. Masters*, 539 F.2d 721, 726 (D.C. Cir. 1976); *Sieling v. Eyman*, 478 F.2d 211 (9th Cir. 1973) (higher standard of competence required to plead); see *Competence to Plead Guilty: A New Standard*, 1974 DUKE L.J. 149.

237. *Faretta v. California*, 422 U.S. 806 (1975).

quiry to ensure that the defendant knowingly and voluntarily waived the right while mentally competent.<sup>238</sup> The courts have recognized that a defendant may be competent to stand trial and yet lack sufficient competence to proceed without counsel.<sup>239</sup> The standard of competence to waive counsel is generally considered stricter than the standard for competence to stand trial.<sup>240</sup>

A defendant competent to stand trial at the commencement of his trial may well become incompetent during the proceedings. The Supreme Court has cautioned that "a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."<sup>241</sup> Indeed, rule 3.210(b) requires a competency determination if reasonable grounds to question defendant's competence emerge before or during the trial. Moreover, a defendant competent to stand trial may nonetheless become incompetent after his conviction but before sentencing. The court may not sentence a defendant while he is incompetent,<sup>242</sup> and if the court or either party raises reasonable grounds to doubt the defendant's competence for sentencing, the court must inquire into the issue.<sup>243</sup> Such an inquiry should focus on whether the defendant can meaningfully exercise his right of allocution, or comprehend the nature of the sentencing proceedings.<sup>244</sup> Under rule 3.740, when the court has reasonable grounds to believe that the defendant may be incompetent for sentencing, it must postpone sentencing and "immediately fix a time for a hearing to determine the defendant's mental condition."<sup>245</sup> It may appoint experts to examine the defendant for this purpose and to testify at the hearing. In addition, the parties may introduce other evidence on the defendant's mental

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238. *Ausby v. State*, 359 So. 2d 562 (Fla. 1st DCA 1978); *McCain v. State*, 275 So. 2d 596 (Fla. 2d DCA 1973); *State v. Bauer*, 310 Minn. 103, 104, 245 N.W.2d 848, 849 (1976).

239. *Massey v. Moore*, 348 U.S. 105 (1954).

240. *Westbrook v. Arizona*, 384 U.S. 150 (1966) (per curiam); *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131 (2d Cir. 1975), cert. denied, 426 U.S. 937 (1976); *Silten & Tullis, Mental Competency in Criminal Proceedings*, 28 HASTINGS L.J. 1053, 1065-72 (1977). *Contra*, *People v. Reason*, 37 N.Y.2d 351, 334 N.E.2d 573, 372 N.Y.S.2d 614 (1975).

241. *Drope v. Missouri*, 420 U.S. 162, 181 (1975).

242. *Perkins v. Mayo*, 92 So. 2d 641, 644 (Fla. 1957); *Cioli v. State*, 303 So. 2d 82, 83 (Fla. 4th DCA 1974).

243. *Wojtowicz v. United States*, 550 F.2d 786, 796 (2d Cir.), cert. denied, 431 U.S. 972 (1977); *Saddler v. United States*, 531 F.2d 83, 86 (2d Cir. 1976); *People v. Catapano*, 73 A.D.2d 975, 424 N.Y.S.2d 242 (1980).

244. *Wojtowicz v. United States*, 550 F.2d at 790.

245. FLA. R. CRIM. P. 3.740(a).

condition.<sup>246</sup>

The state may not carry out a defendant's death sentence while he is insane.<sup>247</sup> Thus, the Florida Statutes provide a similar procedure to determine the defendant's capacity for execution.<sup>248</sup> This section provides that when he receives information that a defendant under sentence of death may be insane, the governor must stay execution of the sentence and appoint a commission of three psychiatrists to examine the defendant to determine whether he understands the nature and effect of the death penalty and the reasons for imposing it on him.<sup>249</sup> If after reviewing the report of the psychiatrists, the governor finds that the defendant lacks this capacity, he will order the defendant committed to a state hospital until he is capable of such understanding.<sup>250</sup>

If a reasonable doubt arises about the defendant's competence at any other point in the criminal proceedings—for example, for revocation of probation,<sup>251</sup> or revocation of parole<sup>252</sup>—the court must hold a hearing to determine the defendant's competence to participate. Even at a pre-trial suppression hearing involving the voluntariness of a confession, if anyone raises a reasonable doubt concerning the defendant's mental competence to waive his rights, the court must hold a hearing on the issue.<sup>253</sup> A defendant in extradition proceedings has also successfully asserted his incompetence to assist counsel in challenging extradition.<sup>254</sup>

#### IX. NO SENTENCE CREDIT FOR INVOLUNTARY COMMITMENT TIME

A defendant adjudged incompetent to stand trial and committed for treatment to a hospital or retardation facility may spend a considerable period of time in the facility before he regains his

246. *Id.*

247. *Horace v. Culver*, 111 So. 2d 670 (Fla. 1959); *Perkins v. Mayo*, 92 So. 2d 641, 644 (Fla. 1957); *State ex rel. Deeb v. Fabisinski*, 111 Fla. 454, 465-67, 152 So. 207, 211 (1933). See generally Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 (1980); Note, *Insanity of the Condemned*, 88 YALE L.J. 533 (1979).

248. FLA. STAT. § 922.07 (1979).

249. *Id.* § 922.07(1).

250. *Id.* §§ 922.07(3)-(4).

251. *Sailer v. Gunn*, 548 F.2d 271, 274 (9th Cir. 1977); *Hayes v. State*, 343 So. 2d 672 (Fla. 2d DCA 1977).

252. *Newcomb v. Metz*, 64 A.D.2d 219, 409 N.Y.S.2d 554 (1978).

253. *United States v. Silva*, 418 F.2d 328 (2d Cir. 1969). See also *Jones v. District Court*, 617 P.2d 803, 807 (Colo. 1980) (competency at pre-trial motion stage).

254. *Jones v. Warmuth*, 272 S.E.2d 446 (W. Va. 1980); *Kostic v. Smedley*, 522 P.2d 535 (Alaska 1974).

competence and returns for trial. In Florida, however, the courts do not credit such a period of hospitalization or placement against the defendant's subsequent sentence.<sup>255</sup> A number of other jurisdictions follow a contrary practice, crediting such time spent hospitalized against sentence.<sup>256</sup> Although Florida does not formally provide such sentence credit, it is likely that at least some sentencing judges and parole boards will take this factor into account.<sup>257</sup>

## X. CONCLUSION

The new Florida provisions on competence to stand trial contain a number of significant reforms and innovations. To achieve these reforms, however, defense attorneys must more vigorously assert the rights of their incompetent clients, and working closely with the district offices of the Department of Health and Rehabilitative Services, county mental health boards must plan and press for funding for new community-based programs to serve mentally ill defendants.

Defendants and their attorneys involved in the incompetency process rarely assert many of the legal rights that such defendants possess. Although almost nine years has passed since the landmark decision in *Jackson v. Indiana*,<sup>258</sup> in many areas the states have not faithfully followed the constitutional limits that the Supreme Court placed on their power to commit incompetent defendants.<sup>259</sup> Neither judicial decisions nor rules adopted by legislatures or courts are self-executing. Incompetent defendants are rarely aware of their rights, and are uniquely unable to assert them. Defense counsel, particularly busy public defenders, all too frequently neglect their incompetent clients after commitment.<sup>260</sup>

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255. *Dalton v. State*, 362 So. 2d 457 (Fla. 4th DCA 1978); *cf. Dorman v. State*, 351 So. 2d 954 (Fla. 1977) (period of hospitalization as mentally disordered sex offender under prior statute not credited against sentence).

256. *E.g.*, CAL. PENAL CODE § 1375.5 (West Supp. 1980); OHIO REV. CODE ANN. § 2945.38(I) (Page Supp. 1979).

257. Henry Steadman's empirical study of the incompetency process in New York included a comparison of the sentences received by a sample of defendants restored to competency and subsequently convicted with a sample of defendants convicted for similar offenses who had never been found incompetent. H. STEADMAN, *supra* note 106, at 98-99. Steadman found a "strong tendency" by judges to consider in their sentencing decisions the time spent by incompetent defendants in maximum security mental hospitals, even though New York law did not require that such time be deducted from the sentence. *Id.* See also Note, *supra* note 4, at 678.

258. 406 U.S. 715 (1972).

259. S. HALLECK, *supra* note 25, at 143; Slovenko, *supra* note 2, at 174.

260. See Gobert, *supra* note 6, at 666; Golten, *supra* note 59, at 408.

As a result, many of the rights of the incompetent defendant remain only theoretical. Defense lawyers need to master the intricacies of the new provisions and assume responsibility for implementing reforms and expediting the competency process. They can accomplish these goals not only through the filing of motions and lawsuits, but through lobbying and organizing as well. There is a need to develop and expand special programs for mental health advocacy, programs combining specially trained attorneys with social workers and other clinical and paraprofessional staff.

The new reforms, particularly those permitting outpatient competency evaluation and treatment, will require vigorous legal prodding of every appropriate decisionmaker if they are to be implemented. In addition to asserting their clients' rights in court, mental health lawyers must become sophisticated lobbyists, urging local mental health boards and departments to develop and expand specialized forensic psychiatric services or court clinics to perform outpatient competency evaluation. Because of the basic economies of outpatient evaluation, such changes should receive broad acceptance without the necessity of litigation.<sup>261</sup>

Outpatient treatment for the nondangerous incompetent defendant in community settings, rather than state hospital wards, has many advantages. Legal requirements combine with considerations of therapeutic efficacy and economy to favor outpatient treatment for many incompetent defendants presently hospitalized. Defense attorneys should help persuade community mental health centers and outpatient hospital programs to accept the criminal patients they have traditionally shunned. More funding is needed for group homes and other specialized therapeutic residential programs for forensic patients. The process of deinstitutionalization, recently having gained momentum in the civil mental health delivery system, should not bypass the forensic hospitals.<sup>262</sup> The partial deinstitutionalizing of the overcrowded state hospital forensic wards can only improve these facilities, permitting them to use their limited resources more effectively to restore competence more rapidly for defendants requiring hospitalization.

The new reforms, if implemented with enthusiasm, can thus transform the competency process, moving competency evaluation and treatment from the state hospitals to the communities. This

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261. See D. WEXLER, *supra* note 6, at 39-41; Statement by Bruce J. Winick Before New York State Legislature Select Committee on Mental and Physical Handicap 1-2 (Jan. 17, 1974) (unpublished report located at University of Miami School of Law).

262. See D. WEXLER, *supra* note 6, at 4-6.

movement can greatly improve the efficiency and quality of evaluation and treatment, expediting the return of incompetent defendants to court, where they may face their charges. Rather than the typical lengthy competency commitment, expeditious return to court will serve the best interests both of defendants and of the state.