

Forensic Psychology in Immigration and Criminal Legal Settings: A Discussion of Challenges and Changes in the Pandemic Era

Elizabeth Madsen J.D.

Sharon Howard Ph.D.

Brittany Cunningham Ph.D.

Karla Marchbanks Onofre Psy.D.

Outline

- Immigration Law
- Criminal Law
 - Competency
 - Not Guilty by Reason of Insanity
- The Continuum of Care and Treatment
- Attorney/Evaluator Roles and Ethical Obligations
- Playing in the Legal Sandbox
- Discussion

Immigration Law

- It's complicated
- It's ever changing
- Heavily dependent on executive branch
- Many cases are administrative
- Rule of LESS

Immigration Law

- Types of Evaluations
 - Asylum
 - Asylum competency (Franco)
 - T-Visas
 - U-Visas
 - VAWA
 - Cancellation of deportation
 - Competency for cancellation of deportation (Franco)
 - 601-A Hardship Waivers
 - Parole-in-place
 - Waiver for Citizenship Test (N-648)
 - Unaccompanied Minors
 - Special Immigrant Juvenile Status
 - Bond hearings
 - “Extreme cruelty”

Immigration Law

- Process
 - Contact with an attorney
 - Hone the referral question
 - Interview and testing
 - Report
 - Testimony is rare!

Immigration Law

- Pro Tips
 - Consider cultural issues before clinical issues
 - Edit reports carefully and avoid jargon
 - Note Resiliency
 - Prep and debrief the interpreter, if one is used
 - Build/join consultation team
 - Practice self-care

Not Guilty by Reason of Insanity

- PC 25(b)
 - Any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.
- Insanity defense cannot be based solely on a personality disorder, adjustment disorder, seizure disorder, or an addiction to or abuse of intoxicating substances
- The term “insanity” connotes a legal definition, not a clinical diagnosis

Not Guilty by Reason of Insanity

- NGRI Evaluation
 - PC 1027
- Must be psychiatrists or licensed psychologists with a doctorate in psychology and at least 5 years postgraduate experience in the diagnosis and treatment of mental disorders
- Psychotherapist-client privilege does not apply to evaluators appointed under PC 1027
- Evaluator cannot have been competency evaluator on same charges
- Jury Instructions Calcrim 3450
- Burden is on defense- preponderance of the evidence

Not Guilty by Reason of Insanity

- Commitment to Department of State Hospitals (DSH)
 - For how long?
- PC 1026.5: Extensions of Commitment
 - As a result of mental disease, defect, or disorder, defendant poses a substantial danger of physical harm to others and has serious difficulty in controlling dangerous behavior
 - Asserted by prosecution
 - Jury or bench trial
 - Burden is preponderance of the evidence
- Standard for release is not determined by a patient's mental status, but by whether the patient would present a substantial danger to the community as a result of their mental condition

Not Guilty by Reason of Insanity

- Continuum of Care and Treatment
- Path to Discharge
- Conditional Release Program (CONREP)
- PC 1600: Court Ordered Outpatient Status
- PC 1026.2: Restoration of Sanity Process
 - Application for release may be made to the superior court of the county of commitment by either the patient once per year (i.e. writ) or by the DSH Medical Director
 - Restoration of sanity does not necessarily mean a patient has recovered from their mental disorder
 - No longer represents a substantial danger to the community if placed under CONREP supervision
 - Restoration of sanity trial after one year on CONREP

Competency to Stand Trial

- PC 1367-1372
 - Felony IST: PC 1370
 - Misdemeanor IST: 1370.01
 - Developmental Disabilities: 1370.02
- Doubt can be declared by defense counsel or judge
- Burden of proof is preponderance of the evidence on whomever is asserting IST
- Defendant is considered competent until burden of proof is met
- Being rude or difficult is not enough
- Amnesia is not enough: People v. Amador (1988) 200 Cal. App. 3d 1449

Competency to Stand Trial

- Dusky v. United States, (1960) 362 U.S. 402
 - The “Dusky Standard”

- Indiana v. Edwards, (2008) 554 U.S. 164
 - Went on to explain what is now known as the two-prong standard

- Dusky defines the competency standard as including both
 - 1) ‘whether’ the defendant has ‘a rational as well as factual understanding of the proceedings against him’ *and*
 - 2) whether the defendant ‘has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.’”

Competency to Stand Trial

- Defense counsel ethics and role
 - protect defendant's right to be competent
 - protect from incriminating information that is not relevant to competency
 - protect attorney client privilege while managing ability to assist
 - protecting defendant from statements or past history irrelevant to competency that court would not normally see (i.e., as criminal history)
 - statements of defendant in competency report may be used for impeachment

Competency to Stand Trial

- Mental disorder does not have to be a “mental illness”
- “Although this statute requires that the defendant show that, because of a mental disorder or developmental disability, he or she is unable to understand the nature of the proceedings or to rationally assist in his or her own defense, it does not require that the defendant's mental disorder fit neatly within the standard diagnostic taxonomy.” (People v. Buenrostro (2018) 6 Cal.5th, 367, 389.)
- Competency is about the present-not irrelevant past history
 - Past diagnosis, past criminal history relevant only as it speaks to defendant’s ability to understand criminal procedures
 - Past incarcerations or hospitalizations relevant only regarding their understanding of procedures and familiarity with institutional/legal process

Competency to Stand Trial

- Appointment of evaluators differs by county
- Defendant is allowed two evaluations
- Jury or bench trial held on competency issues
- If deemed IST, the Director of Behavioral Health provides placement recommendation within two weeks
 - For felonies, typically DSH commitment
 - DSH determines whether JBCT program or DSH commitment is appropriate
 - Misdemeanors now require diversion assessment then Assisted Outpatient Treatment (AOT), or if professional believes “gravely disabled” then conservatorship investigation, or dismiss.

Competency to Stand Trial

- As of July 1, 2023, consider community-based treatment first for all felonies
- Felony alternatives to DSH commitment
 - DSH grant-based Diversion
 - PC 1001.36 Diversion
 - Outpatient IST treatment through CONREP
- Issues for Felony IST commitments
 - Involuntary medication orders
 - DSH re-evaluations pursuant to WIC 4335.2 and 2nd prong of competency

Contact Information

- Brittany A. Cunningham, Ph.D.
 - Drcunningham@nps-ca.com
- Sharon Howard, Ph.D.
 - Sharonphoward@hushmail.com
- Karla Marchbanks Onofre, Psy.D.
 - Dr.Marchbanks-onofre@therapysecure.com
- Elizabeth Madsen, J.D.
 - Emadsen@placerpublicdefender.com