

COMPETENCY/SANITY IN FEDERAL COURT
STRATEGIC CONSIDERATIONS

by

Stephen P. McCue

Federal Public Defender¹

111 Lomas NW, Suite 501, Albuquerque, NM

(505) 346-2489

FAX (505) 346-2494

November, 2010

stephen_mccue@fd.org

"If a madman were to come into this room with a stick in his hand, no doubt we should pity the state of his mind; but our primary consideration would be to take care of ourselves. We should knock him down first, and pity him afterwards."

Samuel Johnson, as quoted in Boswell, *Life of Johnson*, Vol. III, p.11, 3 April 1776

I. COMPETENCY/INSANITY: FACTORS TO CONSIDER IN FORMULATING A STRATEGY.

The bottom line in formulating a strategy is to insure the client does the least time in an institution and/or prison. As a rough guide, pursue incompetency vigorously as an issue where the insanity case for the defendant is weak and the consequences of a conviction are severe. For example, a horrible murder case with poor insanity facts is a case in which to raise incompetency in order to stave off a lengthy prison sentence.

On the other hand, a strong insanity defense (or other defense on the merits) in a relatively minor offense (short sentence), will best be handled by resisting a finding of incompetency and pushing to have the insanity issue decided by a jury.²

¹With special thanks to Peter Schoenburg, former Supervisory Assistant Federal Public Defender District of New Mexico.

²In deciding whether to raise insanity as a defense, the Sentencing Guidelines may not limit your client's exposure even if he is found guilty. Where the government files for hospitalization of a convicted person before sentencing under 18 U.S.C. §4244(a), the court must sentence "provisionally" to the maximum statutory sentence (not guideline sentence). *U.S. v. Roberts*, 915 F.2d 889 (4th Cir. 1990). *Cf. U.S. v. Diaz*, 989 F.2d 391 (10th Cir. 1993) ("one-third of original sentence" under 18 U.S.C. § 3565 means one-third of guideline sentence.); *U.S. v. R.L.C.*, 112 S.Ct. 1329 (1992) ("maximum term authorize by law" under 18 U.S.C. §5037 means maximum guidelines sentence.)

II. COMPETENCY.

1. Standard. In order to find a defendant competent, a court must find by a **preponderance of the evidence**³ that he or she has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding **and** that he has a rational as well as factual understanding of the proceedings against him. *Dusky v. U.S.*, 362 U.S. 402 (1960). This standard is stated slightly differently in 18 U.S.C. § 4241(d). Under the current federal statute, a defendant is incompetent if the court finds by a preponderance of the evidence that he or she “is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.” *See also, Incompetency to Stand Trial*, 81 Harv. L. Rev. 454 (1967); *Indiana v. Edwards*, ___ U.S. ___, 128 S.Ct. 2379 (2008).

2. Initial Competency Evaluation. 18 U.S.C. §4241, §4244, §4246, and §4247

a. The U.S. Attorney, the defense, or the court on its own motion, can move for a judicial determination of competency. 18 U.S.C. §4241(a). The motion must establish reasonable cause to believe the defendant presently may be suffering from mental disease or defect rendering him incompetent. If the motion establishes reasonable cause, the court "shall grant the motion" and may order an initial competency evaluation.

b. As part of a defense motion for competency evaluation or as a response to the government's motion for judicial determination:

(1) Request that the evaluation be done on an out-patient basis, or if defendant is in custody, by a local psychiatrist or psychologist.

³In *Cooper v. Oklahoma*, 116 S.Ct. 1373 (1996), the Supreme Court determined that it would violate due process to require a defendant to prove incompetence by clear and convincing evidence. The appropriate Constitutional standard is ‘preponderance of the evidence’.

⁴ For a discussion of one court’s view of some of the ethical issues involved in competency determinations, *see, U.S. v. Boigegrain*, 155 F.3d 1181 (10th Cir.1998) (Boigegrain II)(Defense counsel not ineffective for moving for competency evaluation against client’s wishes).

(2) This request should be routinely granted. Most districts have a panel of experts used to conduct local competency evaluations. Typically, the evaluation is paid for by the Court and the work product belongs to the Court, i.e. it is not confidential.

(3) The Department of Justice Manual 9-9.110 recommends that the initial competency evaluation be done locally, citing *In re Newchurch*, 807 F.2d 404 (5th Cir. 1986).

c. Defense Role in Choice of Expert. The defendant can have a role in picking the psychiatrist or psychologist involved:

(1) Keep a record of the performance of psychiatrists or psychologists in previous competency evaluations in other cases. Often, initial competency evaluations are extremely cursory. Some panel psychologists and psychiatrists have terrible track records. Trial judges, faced with clearly incompetent defendants at the next court proceeding in spite of a report declaring defendant competent, often have been forced to request further evaluations of the defendant. If this has happened to a psychiatrist or psychologist in the past, and you would prefer another expert, point this out to the judge and request a different expert be used.

(2) Most panels contain only psychiatrists (M.D.'s). Defendants who are mentally retarded, have language/cultural problems, or other mental issues better measured by psychometric analysis, are best examined by psychologists. Argue to the judge that the psychologist you have suggested has the tools to measure the effect of retardation or other, organic brain disorder, and can more adequately assess the competency of the defendant than can a psychiatrist in a short interview.

d. Competency Order:

(1) The language of the order requiring the examination is a critical consideration. Request that the competency order **limit the inquiry by the expert**. The only appropriate topic is whether the accused presently is suffering from a mental illness which renders her unable to comprehend the nature and consequences of the proceeding against her or reasonably to assist in her defense. *Godinez v. Moran*, 113 S.Ct. 2680 (1993). Counsel should attempt to restrict the examination to whether or not the defendant satisfies this test. The order should prohibit the expert from questioning the defendant about the offense, the defendant's activities before and after the offense, the defendant's medical history, her employment record, criminal history, prior bad acts, and any other area, which does not directly concern competency.

(2) Request that the expert specify the observations made of the accused and detail the type of examination made of the accused, as well as the expert's opinion on the ultimate issue of competency.

(3) Request a copy of the evaluation. 18 U.S.C. §4247(c) entitles you to one.

(4) Request that a time deadline be contained in the order to insure that the examination is done promptly (if your overall strategy is to get past the competency stage and have the case heard on the merits).

(5) Object to dual evaluations addressing competency and sanity in the same evaluation by the same doctor. Cite 18 U.S.C. §4241(f) in support of the importance of keeping the incompetency and insanity evaluations separate. *U.S. v. Madrid*, 673 F.2d 1114 (10th Cir. 1982), contains an excellent example of the problems that arise in dual purpose exams. *See also, Estelle v. Smith*, 451 U.S. 454 (1981) (Miranda rights necessary before competency interview can be used later against defendant); and *U.S. v. Vazquez-Pulido*, 155 F.3d 1213 (10th Cir 1998)(No per se rule bars cross examination of defense expert on diminished capacity with information developed during competency evaluation).

(6) Counsel may also wish to raise each of the additional issues listed under insanity below, including requesting the presence of counsel, a defense psychiatrist, or the videotaping of the competency evaluation. (See Section 10(e) below).

(7) If the competency evaluation is ordered at a Bureau of Prisons facility, address by motion whether or not the order will permit the use of psychotropic drugs as part of the competency evaluation. If you wish to have the defendant found competent, you may, after consultation with your client, agree to permit the use of psychotropic drugs. If not, you certainly should oppose it. In *Sell v. U.S.*, 539 U.S. 166, 123 S.Ct. 2174 (2003) the Supreme Court held that the Due Process clause of the Fifth Amendment permits involuntary administration of antipsychotic drugs to a mentally ill defendant facing serious charges in order to render the defendant competent **only** if the treatment is medically appropriate, is substantially unlikely to have side effect that may undermine the fairness of a trial and, taking account of of less intrusive alternatives, is necessary significantly to further important governmental trial related interests.

Under *Sell*, a defendant is entitled to a hearing and to a judicial determination of the propriety of involuntary administration of psychotropic drugs. The government bears the burden of proving the four *Sell* factors by clear and convincing evidence. *U.S. v. Bradley*, 417 F.3d 1107 (10th Cir. 2005); *U.S. v. Gomes*, 387 F.3d 157 (2nd Cir. 2004) *cert denied* 125 S.Ct. 1094 (2005)

See also; Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810 (1992) (forced administration of anti-psychotic medication during trial, although medically appropriate, violated due process); *Washington v. Harper*, 494 U.S. 210, 110 S.Ct. 1028 (1990) (an inmate has a "significant liberty interest in avoiding the unwanted administration of anti-psychotic drugs under the Due Process Clause of the Fourteenth Amendment.") 110 S.Ct. at 1036. *Cf., U.S. v. Morrison*, 415 F.3d 1180 (10th Cir. 2005) (Regarding the interplay of *Washington v. Harper* and *Sell*. *See, U.S. v. Charters*, 829 F.2d 479 (4th Cir. 1987), *vacated after reh'r en banc*, 863 F.2d 302 (4th Cir. 1988) for other ideas on constitutional issues raised by forced anti-psychotic medication of defendant found incompetent (pre-*Harper*, *Riggins* and *Sell*). *See also, Psychoactive Medication and Your Client: Better Living and (Maybe) Better Law Through Chemistry*, David M. Siegel, *The Champion*, December, 2003.

The *Riggins* court declined to decide whether the involuntary administration of drugs might deny the defendant the opportunity to show jurors his true mental condition. That issue survives *Riggins* even after the government has shown that forced medication is essential for the defendant's own safety or the safety of others, or that an adjudication of guilt or innocence cannot be obtained by using less intrusive means.

(8) If the evaluation is ordered at a BOP facility, seek to limit inquiry into sexual history or past sexual behavior. Information developed during a competency evaluation may later be used as the basis for an indefinite commitment as a sexually dangerous person under 18 U.S.C. § 4248. To the extent possible, avoid sending clients with problematic sexual history to BOP facilities.

3. Commitments after a judicial finding of incompetency.

a. Upon a judicial determination of reasonable cause to believe the defendant is incompetent, the court may order a 30 day in-patient examination under 18 U.S.C. §4241(b) and 18 U.S.C. §4247(b). The court cannot begin with a four month commitment under §4241(d) without this intermediary step. *U.S. v. White*, 887 F.2d 705, 710 (6th Cir. 1989). The four month commitment requires a finding of incompetency.

b. Once a court has determined, after a hearing, that a defendant is incompetent, 18 U.S.C. §4241(d) provides for a temporary commitment. The section permits custody and treatment for up to four months. 18 U.S.C. §4241(d)(1). The time may be extended an "additional reasonable period" if the court makes an explicit finding that there is a "substantial probability" that the defendant will attain competency within the additional time period. 18 U.S.C. §4241(d)(2).

c. The issue of psychotropic medication, or other unwanted medical procedures, is more likely to arise at this stage. *See, Sell, Riggins; Washington v. Harper*

Be sure to raise the issue of whether or not defendant may be competent to consent to or oppose the use of psychotropic medication. Counsel may wish to ask the court for an initial determination of the defendant's "medical competence" to consent or object to the forced use of psychotropic medication. If so, request an independent local psychiatric or psychological evaluation to address the threshold issue of "medical competency" before the court decides whether to order the use of psychotropic medications. In any case, defendants should be advised regarding their right to oppose psychotropic medication. The attorney may want to follow up on the client's decision to oppose psychotropic medication, in a case where the court has not provided for it in the order, by writing to the BOP facility informing them of the client's intention not to submit to psychotropic medication. Examine the institutional procedures for forcible medication to see if they satisfy the requirements of *Sell*.

d. The indefinite commitment of incompetent persons not likely to attain competency violates due process and equal protection. *Jackson v. Indiana*, 406 U.S. 715, 713-33 (1972). Extensions of time requested under 18 U.S.C. §4241(d) can be opposed with reference to these issues. Where there is clear evidence, from the beginning, that competency will never be attained (e.g., severe mental retardation), even an initial temporary commitment under 18 U.S.C. §4241(d) can be opposed under *Jackson v. Indiana*.

e. Appeal: There is a split in the circuits regarding whether an order of commitment for competency evaluation and treatment under 18 U.S.C. §4241(d) is appealable. The Tenth Circuit recently joined the Second, Sixth, Seventh and Eleventh Circuits in determining that such an order is an appealable collateral order. *U.S. v. Boigegrain*, 122 F.3d 1345 (10th Cir. 1997). The Second Circuit has held that such an order is not appealable. *U.S. v. Ohnick*, 803 F.2d 1485 (2nd Cir. 1986).

4. 18 U.S.C. §4246 Commitment. Under 18 U.S.C. §4241(d), if the court finds that there is no substantial probability that within an additional reasonable time the defendant will attain competency, the defendant then is subject to commitment under 18 U.S.C. §4246.

a. At this point, the Tenth Amendment argument that the federal government has no constitutional or inherent power to commit mentally incompetent persons should be raised. The arguments are summarized, although rejected, in *U.S. v. Cheama*, 730 F.2d 1383 (10th Cir. 1984)⁵. Also, consider raising the equal protection, due process, and trial by jury issues discussed and rejected in *U.S. v. Sahhar*, 917 F.2d 1197 (9th Cir. 1990).

⁵ Overruled by *U.S. v. Boigegrain*, 122 F.3d 1345 (10th Cir. 1997).

b. Counsel should hold the government to its burden to make "reasonable efforts" to place the defendant in a **state** facility. 18 U.S.C. §4246(d). Be familiar with state commitment procedures and statutes, educate the judge regarding the process, and push for a state commitment. This burden is usually placed, in practice, on the director of the staff of the BOP facility where defendant is housed. Those duties are detailed by Congress in the legislative history of 18 U.S.C. §4246.⁶

5. Right of Self Representation. The suspicion and paranoia experienced by clients suffering from mental illness often lead those clients to seek to represent themselves in federal criminal proceedings. The right to represent oneself in criminal proceedings was firmly established in *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525 (1975). Since *Faretta*, courts have struggled with the problematic nature of this right in cases involving clients with marginal competency. See, *Godinez v. Moran*, 509 U.S. 389, 113 S.Ct 2680 (1993)(Borderline competent defendant allowed to represent himself in order to plead guilty to capital offense). In *Indiana v. Edwards*, ___ U.S. ___, 128 S.Ct. 2379 (2008), the U.S. Supreme Court ruled that a competent defendant may be denied the right to represent him or her self at trial. Recognizing that "mental illness itself is not a unitary concept. It varies in degree, It can vary over time. It interferes with an individual's functioning at different times in different ways." The Court concluded that the Constitution permits states to insist on counsel for defendants competent enough to stand trial but not competent enough to conduct trial proceedings. See also, *U.S. v. Ferguson*, 566 F.3d 1060 (9th Cir. 2009).

II. INSANITY DEFENSE—NUTS & BOLTS

1. Definition. The defendant is insane when: (1) As a result of a severe mental disease or defect, the defendant (2) was unable to appreciate the nature and quality or the wrongfulness of his acts. 18 U.S.C. §17(a). *U.S. v. Ewing*, 484 F.3d 607 (7th Cir. 2007). See also, *Clark v. Arizona*, 126 S.Ct. 2709 (2006)(similar state insanity defense statute upheld).

⁶ Whenever the director of the facility determines that a person is presently suffering from a mental disease or defect as a result of which his release would create substantial risk of bodily injury to another person or serious damage to the property of another, he must determine whether other suitable arrangements for the care and custody of the person are available. In this context, it is expected that he will notify the proper authorities in the state in which the person maintains a residence or in which he was tried to determine if the state will assume responsibility of the defendant. If the state determines that he should be civilly committed, the director of the facility may transfer him upon expiration of his sentence to the proper state authorities.

S. Rep. No. 225, 98th Cong., 2nd Session. 251, reprinted in 19834 U.S. Code Cong. & Admin. News, 3182, 3433. (Emphasis added.)

2. Burden of Proof. The burden of proof is on the defendant to prove insanity by clear and convincing evidence. 18 U.S.C. §17(b).

3. Notice. Under Fed. R. Crim. P. 12.2, notice is due at the motions deadline. Rule 12.2(a) provides that the court may permit the defense to be raised later if good cause is shown for late notice. Notice is required under both 12.2(a) and 12.2(b) if an expert witness will be called in connection with the insanity defense. Note the conflict in the circuits as to whether Rule 12.2(b) applies to expert testimony going to issues other than insanity. *See, U.S. v. Hill*, 655 F.2d 512 (3rd Cir. 1981) (Notice requirement does not apply to expert testimony going to defendant's susceptibility for entrapment); *U.S. v. Webb*, 625 F.2d 709 (5th Cir. 1980) (Rule inapplicable where expert testimony offered to show lack of propensity to commit a violent act); *U.S. v. Ellsworth*, 738 F.2d 333 (8th Cir. 1984) (Rule inapplicable to proffered psychiatric testimony that taxpayer had a good faith belief income tax was voluntary); *contra, U.S. v. Sullivan*, 919 F.2d 1403 (10th Cir. 1990) (notice is required for expert testimony on susceptibility to entrapment). Notice does not require specification of a particular mental condition. *U.S. v. Fazzini*, 871 F.2d 635, 640 (7th Cir. 1989). *See also*, Rule 16(a)(1)(E), (b)(1)(C) regarding expert disclosure obligations.

An interesting situation arises when the client decides that he does not want to raise an insanity defense. In *U.S. v. Marble*, 940 F.2d 1543 (D.C. Cir. 1991) the court held that an insanity defense could not be imposed on a competent defendant. The court arrived at this conclusion by analyzing the issue in the context of the right of self representation of *Faretta v. California*, 422 U.S. 806 (1975) and the right of the client to plead guilty under *North Carolina v. Alford*, 400 U.S. 25 (1970)

4. Investigation. At the initial interview, look for recent changes in lifestyle, style of speech, jumpiness or flatness, change in sleep patterns, unusual behavior, statements like "I don't need to sleep any more", gaps in recounted life history, and recent life events involving high stress.

a. Investigation—get all prior medical, institutional, educational, military and psychiatric records.

b. Interview lay witnesses such as family or co-workers who have known defendant. (They are free to render opinions on the ultimate issue before the jury.)

5. Expert testimony. Fed. R. Evid. 704(b) prohibits experts from testifying as to their opinions on the ultimate issue raised by an insanity defense, i.e., whether as a result of severe mental disease or defect the defendant was unable to appreciate the nature

and quality or wrongfulness of his act.⁷ Experts can testify regarding their diagnosis, the manifestations of that disease or defect, the basis of their opinion (defendant's background, interviews with defendant, defendant's history of mental problems, etc.) and the effect of that disease on an individual's capacity to appreciate his actions. *U.S. v. Kristiansen*, 901 F.2d 1463, 1466 (8th Cir. 1990) (It is permissible to ask expert if the "mental disease would affect the individual's ability to appreciate the nature and quality or the wrongfulness of his acts"); *U.S. v. Hillsberg*, 812 F.2d 328 (7th Cir.) *cert. denied* 481 U.S. 1041 (1987) (not okay to ask whether defendant had capacity to form intent on the night of shooting); *U.S. v. Dennison*, 937 F.2d 559 (10th Cir. 1991); *U.S. v. Dixon*, 185 F.3d 393 (5th Cir. 1999). *See also, Clark v. Arizona*, ___ U.S. ___, 126 S.Ct. 2709 (2006)(Discussing state insanity defense statute and admissibility of evidence of insanity v. evidence of *mens rea*.)

Practical trial considerations for expert testimony include:

- a. Consider retaining a local expert. If needed, educate the local expert yourself regarding the specific issues in your case. A family physician can be a good starting point.
- b. Bring in a nationally known expert in that field as a backup only. Have your local doctor or expert make the referral. The purpose here is to avoid the "hired gun" line of impeachment.
- c. Be sure to give your expert everything you can about the case. It is important to give them harmful material from the very beginning. Have your lay witnesses write letters for the expert to review.
- d. Have your expert call their expert before their expert reaches an opinion.
- e. Be sure to have the expert include lots of direct quotes from your client in his report. Work with your expert on the content of the report. If the report is used on cross-examination, ask that the entire report be admitted into evidence. Fed. R. Evid. 106 and 612.
- f. Tell the expert to expect the prosecutor to be permitted to rummage through whatever the expert brings into court. *See, U.S. v. Dennison*, 937 F.2d 559, 565-67 (10th Cir. 1991) (error to allow government access to defense psychologist's notes during trial).

⁷ A due process and equal protection challenge to R. 704(b) was made and rejected in *U.S. v. Blumberg*, 961 F.2d 787 (8th Cir. 1992).

g. Consider using a psychologist whose testing methodology may present a broader basis for his opinions than a psychiatrist. Validity indexes are also very helpful with the jury to demonstrate the defendant is not "faking it". **Beware the MMPI:** the validity indexes and profiles produced by this test may reflect unfavorably on clients. The test is "normed" for a lifestyle that may be completely foreign and irrelevant to your client's life history. Prosecutors are increasingly adept at mining the MMPI for damaging cross examination material.

h. Don't forget that lay witnesses can testify on the ultimate issue of insanity. They also can testify about the defendant's weird behavior over a long period of time. Be sure to bring as many forward as you can.

6. Government's Motion in Limine to Preclude the Defense of Insanity:

a. Beware the government's motion in limine asking the court to find no insanity, as a matter of law, and bar the presentation of the defense to the jury. Be prepared to argue (consider a trial memorandum on this) that the defense has sufficiently met its burden in order to justify an insanity instruction. *U.S. v. Denny-Shafer*, 2 F.3d 999 (10th Cir. 1993); *U.S. v. Whitehead*, 896 F.2d 432 (9th Cir. 1990) (insanity instruction only proper where evidence would allow a reasonable jury to find that insanity has been shown with convincing clarity). If you lose, proffer your expert's entire report and testimony outside the presence of the jury to preserve the issue for appeal.

b. "Damn the torpedoes, full speed ahead."⁸ The judge should not be able to consider the expert's inadmissible (under FRE 704(b)) ultimate opinion on sanity in deciding whether a jury could reasonably find the defendant insane. *U.S. v. West*, 962 F.2d 1243, 1247 (7th Cir. 1992). This leaves open the possibility of presenting the defense even where all experts find a mentally ill defendant to be legally sane at the time of the offense. Ultimately, the issue is for the jury.

7. Instructions:

a. In *Shannon v. U.S.*, 114 S. Ct. 2419 (1994) Justice Thomas ruled that an instruction stating the consequences of a not guilty by reason of insanity verdict is not required as a matter of general federal criminal practice. However, such an instruction may be proper if the jury is misinformed that a defendant may go free if found NGI. 114 S.Ct. at 2428.

⁸ Admiral David Farragut, Mobile bay, 1864.

b. Also consider an instruction to explain to the jury that the expert can't say the defendant was legally insane at the time of the offense because of Fed. R. Evid. 704(b).

8. Guideline Considerations. Be sure to fashion an order that bars the use of any of the psychiatric information derived from the presentation of the insanity defense in calculating the guidelines. See Fed. R. Crim. P. 12.2(c). *Cf.*, §1B1.8 USSG (Information obtained as part of cooperation agreement may not be used at sentencing.) Raise as a pretrial motion before the defendant is interviewed by the government-retained expert.

9. Strategic Considerations

a. In retaining a defense expert on insanity,⁹ be careful to preserve an attorney-client privilege (work product) covering all of the expert's work.¹⁰ Your expert's

⁹ Note that the defense of lack of specific intent due to impaired mental condition (lack of mens rea) lives on despite the 18 U.S.C. §17 limitation. *U.S. v. Bartlett*, 856 F.2d 1071, 1077-1083 (8th Cir. 1988); *U.S. v. Cameron*, 907 F.2d 1051, 1060 (11th Cir. 1990); *U.S. v. Twine*, 853 F.2d 676 (9th Cir. 1988); *U.S. v. Newman*, 889 F.2d 88, 91 n.1 (6th Cir. 1989); *U.S. v. Pohlott*, 827 F.2d 889, 903 (3rd Cir. 1987); *U.S. v. Johnson*, 416 F.3d 464, 469 (6th Cir. 2005). Give notice under 12.2(b) if an expert will be called by defense.

¹⁰ Referral letter should include language along these lines:

(1) In connection with the appointment of our firm to render legal services to (name of client), we have express authority to retain an expert in the field of (name discipline) who shall work under our direction and report directly to us. This work contemplates services of a character and quality that are necessarily adjunct to our services as lawyers.

(2) In connection with this employment, all communications between you and our client, as well as communications between you and any attorney, agent, or employee acting in his behalf, shall be confidential and made solely for the purpose of assisting counsel in giving legal advice to the client. You will not disclose to anyone, without our written permission, the fact of your employment by us, or client's name or charge, and the nature or content of any oral or written communications nor any information gained from your work in connection with this referral. All work papers, records, or other documents, regardless of their nature and the source from which they emanate, shall be considered by you to be confidential, and shall be held by you solely for our convenience and subject to our unqualified right to instruct you with respect to possession and control.

(3) As part of the agreement to provide services in this matter, you will immediately notify the law firm if any of the following occurs: a) the exhibition or surrender of any documents or records prepared in connection with this referral; b) a request by anyone to speak with you about this matter or inspect documents or records; or c) any attempt to serve or the service of a court order, subpoena, or summons upon you that requires the production of any such documents or records.

(4) Kindly indicate your acceptance of the terms of this retainer and your agreement to act as our agent and employee for the purposes of the attorney-client privilege by signing the

work also may be privileged under the federal psychotherapist-patient privilege recognized by the Supreme Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996). All of these privileges are waived when you decide to use the expert at a hearing. At that point, Rule 16(b)(1)(C) of the Federal Rules of Criminal Procedure requires disclosure of the expert's "opinions, the bases and reasons for those opinions, and the witnesses' qualifications."

b. Once the defendant provides a notice of insanity defense under Fed. R. Crim. P. 12.2(a), the government will request a reciprocal evaluation. In response, the defense should request that the government evaluation be done locally instead of at a BOP facility. If the defendant is in a local jail, request that the psychiatric or psychological evaluation be done there. If defendant is out on bond, request an out-patient examination. An excellent case in support of local court ordered government evaluations is *In re Newchurch*, 807 F.2d 404 (5th Cir. 1986).

I. Request an evidentiary hearing in connection with the response. *Newchurch* outlines the kinds of evidence to present at the evidentiary hearing showing that a local evaluation would be feasible and adequate. 807 F.2d at 407.

ii. Photocopies of the telephone directory showing local psychologists and psychiatrists.

iii. Expert testimony on the lack of accuracy of in-prison evaluations.

iv. Local lawyer's affidavits on the use of local psychiatrists and psychologists for insanity evaluations.

v. Affidavit of local clinical psychologist appointed by federal court in the past.

vi. Note the legislative history and statutory analysis supporting a local evaluation in *Newchurch*, 807 F.2d at 410. *See also, Marcey v. Harris*, 400 F.2d 772 (D.C. Cir. 1968) (involving a competency commitment).

c. The defense also can challenge the adequacy of the proposed Bureau of Prisons' psychologist or psychiatrist if they are not licensed as required by 18 U.S.C. 4247(b).

d. If the defendant is in pre-trial custody under the Bail Reform Act, 18 U.S.C. §3142(I)(2) requires that persons in pre-trial custody "to the extent practicable" be housed separately from persons serving sentences. That provision was relied on by

enclosed copy of this letter agreement and returning the same to us.

Justice Rehnquist in *U.S. v. Salerno*, 481 U.S. 739, 748 (1987) in finding the Bail Reform Act constitutional. The defense can use this provision to further argue that the defendant not be shipped to a Bureau of Prisons facility where he will be housed together with persons serving sentences.

e. Regardless of where the insanity evaluation is done, the defense should respond to any government request for psychiatric evaluation (including out-patient exams) with requests for the following safeguards:

i. Request that Counsel be present. See, Response to Motion for Psychiatric Examination, attached, paragraphs 5-10. The defense should raise both the Fifth Amendment argument that the presence of defense counsel is indispensable to protect the privilege against self-incrimination and the Sixth Amendment argument that defense counsel's ability effectively to cross-examine the government's psychiatric witness is impaired by defense counsel's absence from a pre-trial confrontation between the defendant and that witness.

ii. In the alternative, request that the examination be observed by a defense psychiatrist. See, *U.S. v. Albright*, 388 F.2d 719, 726-727, fn. 11 (4th Cir. 1968) (suggesting, in dicta, that if examining psychiatrist raises no objection, attorney can be present and, if defendant demands it, defense psychiatrist must be present).

iii. Request that the examination by the government psychiatrist be recorded by video tape. Note the specific provision for this in 18 U.S.C. §4247(f).

iv. Request, at a minimum, that the only persons present during the interview be the defendant and the court-appointed psychiatrist.

11. Request discovery of all information relied upon the government psychiatrist. Fed. R. Crim. p. 16(a)(1)(C),(D), and (E).

1. Be sure to pursue disclosure of all information obtained by the government psychiatrist regarding the offense, the defendant, and the defendant's background, including hearsay evidence. *U.S. v. Lawson*, 653 F.2d 299, 302-303 (7th Cir.) cert. denied, 454 U.S. 1150 (1981) (criminal defendant must have access to hearsay information relied upon by an expert witness, citing Fed. R. Evid. 705).

12. Commitment after a not guilty only by reason of insanity verdict. 18 U.S.C. §4243 provides for a 40-day evaluation after the return of a verdict.

a. The defendant can "plead" not guilty by reason of insanity through a stipulated fact trial in the rare case where government agrees defendant is insane. 18

U.S.C. §4242(b). Merely present the insanity evidence through stipulated expert reports before the judge.

b. As a tactical consideration, if the defendant's illness is treatable and he or she is likely to improve markedly, an 18 U.S.C. §4243 commitment may be the best option. Once committed under 18 U.S.C. §4243, BOP appears anxious to move persons committed under this section into community based out-patient treatment programs.

c. Note that the burden is on the defendant to show by clear and convincing evidence that he is not a danger if the offense involved substantial risk of bodily injury or serious damage to property. For other offenses, the burden is merely by a preponderance. 18 U.S.C. §4243(d).

d. Other issues to be raised by the defense after a finding of NGI:

i. Motion to strike burden of proof under 18 U.S.C. §4243(d). Motion should raise both due process and equal protection challenges to placing the burden on the defense at a release hearing envisioned under 18 U.S.C. §4243(c). *Foucha v. Louisiana*, 112 S.Ct. 1780 (1992). *Contra, U.S. v. Wallace*, 845 F.2d 1471 (8th Cir. 1989); *U.S. v. Phelps*, 955 F.2d 1258 (9th Cir. 1992).

ii. Challenge the prolonged commitment of defendant under 18 U.S.C. §4243(e) on the grounds that the federal government has no constitutional or inherent power to commit mentally ill persons. *Foucha, supra*; *Kansas v. Hendricks*, 117 S.Ct. 2072 (1997)(Regarding state civil commitment of sexually violent predator).

iii. Try and make BOP's job easier by designing and presenting to BOP a conditional release proposal under 18 U.S.C. §4243(f)(2), including out-patient treatment follow up (including a place to live, group home or shelter, medication, counseling, and monitoring by local mental health personnel).

iv. At this stage, it may well be in the defendant's interest to specifically consent to the use of psychotropic medicine in order to attain the stability necessary for release under a prescribed regimen pursuant to 18 U.S.C. §4243(e)(2) or (f)(2). Determine the case worker and psychiatrist with primary responsibility for your client and try to meet their every concern regarding a conditional release. Note that 18 U.S.C. §4243(e)(2) and (f)(2) anticipate a broad range of treatment in connection with the conditional release. ("A prescribed regimen of medical, psychiatric, or psychological care or treatment".)

13. Sentencing. If the insanity defense fails, information developed regarding the defendant's mental condition may be the basis of a downward departure or *Booker* variance at sentencing. *See, U.S. v. McBroom*, 124 F.3d 533 (3rd Cir. 1997); *U.S. v.*

Lara, 905 F.2d 599 (2nd Cir. 1990); Sentencing Memorandum, attached. While § 5H1.3 USSG, Mental and Emotional Conditions, states that mental or emotional condition ordinarily is not a basis for imposing a sentence outside the guideline range, **extraordinary** mental health conditions may be a basis or one of a unique combination of factors that justify departure. *Koon v. U.S.*, 116 S.Ct. 2035 (1996). §5K2.13 USSG, Diminished Capacity, also may provide a legal basis for a departure based on mental health problems.¹¹*See, U.S. v. Sheehan*, 371 F.3d. 1213 (10th Cir. 2004)(Diminished capacity departure prohibited because robbery is a crime of violence. §5K2.0 does not provide alternative basis for diminished capacity departure.).

14. Appeal. One court has held that when a defendant is found not guilty by reason of insanity an appeal by the defense may be possible. *U.S. v. Vela, Jr.*, 2010 WL 4188983 (9th Cir. 10/26/10). The defendant in *Vela* contended that the court's elements instructions were defective and that the court erroneously denied him a diminished capacity instruction. As a result, the defendant contended that he was denied an opportunity for outright acquittal. The court found that the lack of a traditional "sentence" does not preclude appellate jurisdiction.

¹¹The PROTECT Act, Public Law 108-21, directly amended §5K2.13 to add subsection (4) prohibiting use of this section to depart in cases involving sexual offenses.