

# JUVENILE COMPETENCY

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# OVERVIEW

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- Law on Competency
- Procedure of raising competency
- Procedure after finding of incompetence
- Impact of *In the Interest of A.L.*

# LAW OF COMPETENCY TO STAND TRIAL

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Whether the person “has sufficient present ability to consult with [their] lawyer with a reasonable degree of rational understanding - and whether [they have] a rational as well as factual understanding of the proceedings against [them.]”

- *DUSKY V. U.S.*, 362 U.S. 402, 403 (1960)

# LAW OF COMPETENCE TO STAND TRIAL

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But why must a person be competent to stand trial?

- Persons should not be tried in *absentia*;
- Incompetent person cannot defend themselves, and
  - As a consequence they cannot exercise their constitutional rights to be informed of the accusation, cannot confront their accusers; and the court lacks jurisdiction over them.

# WHY IS COMPETENCE NECESSARY AND REQUIRED?

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- To preserve the integrity and credibility of the justice system process
- To reduce the risk of erroneous convictions
- To protect the youth's decision-making autonomy
- Fairness

# UNDER WI LAW...

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- Who can raise the issue?
- Is there a presumption (competent or incompetent)?
- Who has the burden of proof?
- What is the standard of proof?

# UNDER WI LAW...

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- Who can raise the issue?
  - Defense counsel
  - Judge?
  - Prosecutor?

# UNDER WI LAW...

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- Who **must** raise the issue?

If there is “reason to doubt” competence, counsel *must* raise it:

- Failure to raise renders counsel’s representation unreasonable.  
*Johnson*, 133 Wis.2d 207
- Failure to raise renders counsel’s representation deficient.  
*Haskins* 139 Wis.2d 257
- Strategic considerations do not eliminate counsel’s duty to raise competence. *Johnson*, 133 Wis.2d 207

# PRACTICAL APPLICATION

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- It does not mean only cases where the juvenile “doesn’t have a clue what is going on.”
- It does not require definitive proof that the juvenile does not understand the proceedings.
- All that is required is “some evidence raising doubt as to his competence.” ***State v. McKnight***, 65 Wis.2d 582, 223 N.W.2d 550 (1974).

# FACTORS SUPPORTING A “REASON TO DOUBT”?

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- Young age
- Difficulty communicating, especially about the case
- Limited intellectual functioning
- Poor academic record
- Receives special education services
- History of emotional or behavioral issues

# HOW MUCH DO YOU HAVE TO TELL THE COURT?

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**“an attorney’s opinions, perceptions, and impressions of a client’s competency to proceed are protected by the attorney-client privilege.” *Meeks*, 263 Wis.2d 794**

# REASON TO DOUBT

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- Wis. Stat. § 938.30(5)(a):if probable cause exists that the juvenile committed the alleged offense and “there is **reason to doubt** the juvenile’s competency to proceed” the court shall order a competency evaluation

# UNDER WI LAW...

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- Is there a presumption (competent or incompetent)?

# UNDER WI LAW...

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- Who has the burden of proof in raising issue?
  - Party raising the issue bears the burden
  - Suggestion of incompetency must be supported by facts giving rise to the doubt. *McKnight*, 65 Wis.2d 582

# UNDER WI LAW...

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- Who has the BOP in *proving* competence?
  - The State (generally)
- What is the standard of proof?
  - If the defendant claims to be incompetent, the state bears the burden of proving by the greater weight of the credible evidence that the defendant is competent.
  - If the defendant claims to be competent, the state must prove by clear and convincing evidence that the defendant is incompetent.

# PROCESS: COURT APPOINTS AN EXPERT TO EVALUATE YOUR CLIENT

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- Wis. Stat. §938.295(a):expert appointed and exam conducted.
- Wis. Stat. §938.295(b)3:If you object to the examiner the court shall appoint a different examiner

# ISSUES TO RAISE WITH THE EVALUATOR

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- plea bargaining is likely to be involved
- the evidence is uncertain so that the child's ability to provide a coherent, personal account of events is likely to be relevant
- the trial likely will involve many witnesses
- the trial likely will require a complex legal defense
- the child will likely have to testify
- the trial is likely to be lengthy
- the child has few sources of social support

# EVALUATOR'S REPORT

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Wis. Stat. § 938.295(2)(b)3

- Report must include:
  - opinion regarding the juvenile's present mental capacity to understand the proceedings and assist in his or her defense;
  - if conclusion is that the juvenile is incompetent, the examiner's opinion regarding the likelihood that the juvenile, if provided with treatment, may be restored to competency within time frame of 938.30(5)(e)1 [within 12 months or the length of the max sentence if that's shorter]

# HEARING

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Wis. Stat. § 938.30(5)(a)3

- must be held within 10 days of plea hearing if juvenile in secure custody
- within 30 days of plea hearing if juvenile is not in secure

# COURT'S OPTIONS AT THE HEARING

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Wis. Stat. § 938.30(5)(d)2

If the court determines the juvenile is not competent to proceed, the court shall suspend the proceedings and

- order the district attorney to file a JIPS petition *or*
- order the county to file a chapter 51 petition

# PROCEDURE AFTER FINDING OF INCOMPETENCE

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Wis. Stat. § 938.30(5)(e):

- juvenile shall be periodically reexamined
- written report filed every 3 months and within 30 days before the expiration of the Ch. 51 commitment order or JIPS dispositional order
- If the report says juvenile is competent, court shall hold a hearing within 10 days after the court receives the report
- if after the hearing the court determines that the juvenile is competent then the court shall terminate the commitment or dispositional order and resume the delinquency proceeding

# JIPS PROCEDURE

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- PLEA: If a petition alleges that a juvenile is in need of protection or services under everything, but (12), the non-petitioning parties and the juvenile, if he or she is 12 years of age or older or is otherwise competent to do so, shall state whether they desire to contest the petition. (938.30(3)).
- Both the child and the parents can contest the JIPS finding.
- Court Trial
- Burden of Proof – Clear and Convincing Evidence
- Consent Decree is available

# JIPS DISPOSITION

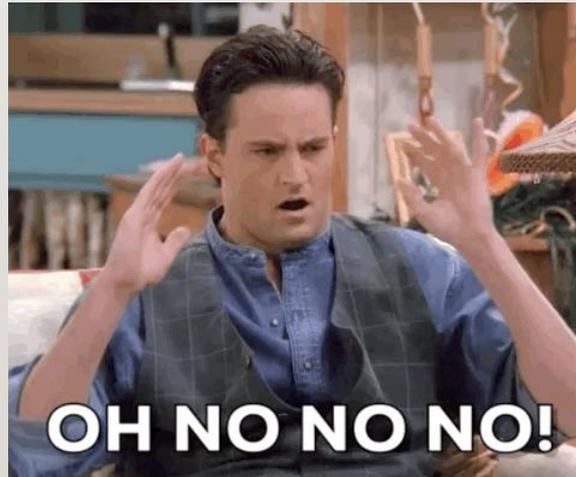
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Dispositional options are the same as for a delinquency case except:

- 1. No SJO, DOC or secured RCC.
- 2. No forfeiture or surcharge
- 3. No restriction or suspension of driving privileges, except in certain circumstances for cases of school dropout or habitual truancy.
- 4. No placement in a facility for developmental disabilities or a mental illness without proper diagnosis and finding.
- 5. No placement in juvenile detention as a dispositional placement.

# SEX OFFENDER REGISTRATION

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This is for 938.13(12). DO NOT let prosecutors or judges mistake this provision to apply in cases of incompetent juveniles whose underlying offense was a sexual assault.

# THE INCOMPETENT CLIENT AND THE JIPS CASE

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# THE INCOMPETENT CLIENT

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## FAQs of JIPS incompetent cases

- How do I enter a plea for an incompetent client?
- What services, treatment, evaluations should we agree to?
- Isn't it unfair that the kid has to do JIPS supervision when they are denying the underlying offense?
- What do I need to know about the impact of *In the Interest of A.L.*?

# IN THE INTEREST OF A.L.

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The Supreme Court held that:

- 1) The circuit court can resume suspended juvenile delinquency proceedings to reexamine the competency of a juvenile who was initially found not competent and not likely to become competent within the statutory time frame; and
- 2) A circuit court retains competency over juvenile delinquency proceedings even after an accompanying JIPS order has expired.

# THINGS TO THINK ABOUT REGARDING A.L.

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- Ethical Obligations in light of the decision in A.L.
- What will trigger reevaluation?
- What will happen when the case is unsuspended?
- Can a person over the age of 18 be put on a dispositional order?
- Waiver
- Procedural considerations and new case closure policy for suspended cases

# ETHICAL CONSIDERATIONS

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Are we ethically required to raise an issue that might eventually cause our client to be subjected to adult prosecution?

- Unfortunately, yes.

# WHAT WILL TRIGGER REEVALUATION?

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- New charges, and finding of competent.
- Over zealous prosecutors.
- Vocal victims who find out about the possibility of reevaluation in the course of proceedings.
  - The State labelled its motion "State's Motion to Recall Suspended Case." Such a motion would be the procedural mechanism triggering a circuit court to order a competency evaluation. See *In the Interest of A.L.*, ¶ 12, n. 5.

# WHAT WILL HAPPEN ONCE THE CASE IS UNSUSPENDED?

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- New plea hearing scheduled.
- DA should have to present reasons for believing the client is now competent.
- Raise competency if still reason to doubt.
- If client is found competent, the options depend on the age of your client at that time.

# COURT'S DISCRETION TO ORDER REEVALUATION

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- Quick note:
  - A.L. does not give guidance on this.
  - The prosecutor could be totally unreasonable and ask for reevaluations once a month. It seems clear the court would have discretion to deny
  - Case with this issue currently pending, but may not be decided.
  
- Let me know how this plays out in Eau Claire.

# CLIENTS STILL UNDER AGE 18

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- Competency for a new case doesn't necessarily mean competent to deal with all cases, especially if there are many.
- DA may or may not be able to file a waiver petition (more on this later).
- If competent and no waiver, case proceeds as if it had not been suspended. However, there may be speedy trial and constitutional issues to raise. (See *In the Interest of A.L.*, ¶ 22, n. 8.

# CLIENTS OVER AGE 18

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- A.L. says the options are
  - 1) Waiver (or)
  - 2) Dismiss with prejudice

“If A.L. is ultimately found competent, the circuit court could then resume the proceedings in the November 2012 juvenile delinquency case. The circuit court would then have two options: dismissal of the action with prejudice or waiver of jurisdiction pursuant to Wis. Stat. § 938.18.” *In the Interest of A.L.*, ¶ 12, n. 5.

# CAN A PERSON OVER THE AGE OF 18 BE PUT ON A DISPO ORDER?

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- No.

In *State v. Kleser*, the Court said that, under Wis. Stat. § 938.12(2), the juvenile court retains jurisdiction over a juvenile as long as the delinquency petition is filed before the juvenile turns 17. *Kleser*, 328 Wis. 2d 42, ¶ 119. However, under Wis. Stat. § 938.355(4), the juvenile court has no authority to issue a dispositional order after the juvenile turns 18. *Id.*

# SOME GOOD NEWS ABOUT WAIVER

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- The applicability of waiver relates to **age at the time of the offense**. Therefore if you have a charge from when the client was under 14, then they cannot be waived. If your client was age 14 at the time of the offense, then only certain offenses will allow the State to seek waiver. These include:
  - 940.03 - Felony murder
  - 940.06 – Second-degree reckless homicide
  - 940.225(1) – First Degree Sexual Assault
  - 940.225(2) – Second Degree Sexual Assault
  - 940.305 – Taking hostages
  - 940.31 – Kidnapping
  - 943.10(2) – Armed Burglary
  - 943.32(2) – Armed Robbery
  - 943.87 – Robbery of a financial institution
  - 961.41 – Manufacture, Distribution or Delivery of certain controlled substances

# SO WHAT IF THE CLIENT IS OVER 18, BUT NOT ELIGIBLE FOR WAIVER?

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- This is not directly addressed in *A.L.*, but based on footnotes 5, and 8, the case would have to be dismissed.

# BAD NEWS ABOUT WAIVER

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- For clients who are age 15 or 16 at the time the offense occurred, they are subject to waiver for any offense.
- For clients older than 18, the waiver factors pursuant to Wis. Stat. § 938.18(5) weigh heavily in favor of waiver when the court has no juvenile court option.
  - Thus, Speedy trial and constitutional issues should be raised early and often.

# TRY TO GET CASES DISMISSED

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- If a client is found incompetent and not likely to become competent, we should be asking the DA's office to consider dismissal rather than suspension.
- Potential arguments – this case is not serious, parent is victim, but doesn't want the delinquency hanging over their head, JIPS supervision is enough.
- You could also ask the court to consider dismissal, and perhaps a judge would be willing to press the State on why not to dismiss, but case law suggests that the court cannot dismiss over the State's objection.

# A COUPLE MORE THINGS ON THAT NOTE...

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- Prosecutors might say they won't bring it back anyway, and maybe don't even know about it, but they are not going to be around forever so there's a risk.
- Maybe consider seeing if they would set a date at the end of dispo order on the JIPS to consider dismissal if the client has done well.

# NEW CASE CLOSURE POLICY FOR SUSPENDED CASES

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- In the cases where a client is found incompetent and not likely to become competent, lawyers should be keeping the cases open for 180 days after the case is suspended before closing the case. This is just a short precautionary period in the event that the client has another case arise in that period and the State requests another evaluation on the new case. Also, we will have a new category added to the closing form so that we can track these cases. These cases will be stored separately, as well.
- If a client is found incompetent, but likely to become competent within the statutory time period, as was the case before, we should be keeping these cases open until the client is later found competent within the reevaluation period and the case is resolved, or until 180 days after a finding that no more reevaluations shall occur, because the client is not likely to be competent in the time left.
- The cases will be stored in admin at some point, but not until after this COVID-19 situation is resolved.