

Are You Stuck In The Waiting Place?

How To Keep Things Moving (And Maybe Even Win Release)
For Your Incompetent Clients

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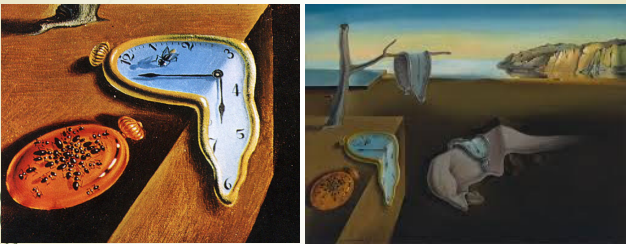
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Overview

- What is the problem?
- What is the process that should be followed for resolving competency issues in criminal cases?
- When is the Government authorized to file a civil commitment certificate under 4246 or 4248?
- When does that authority run out?
- How can I keep my client's case moving, avoid civil commitment, and maybe even secure his release or a dismissal?

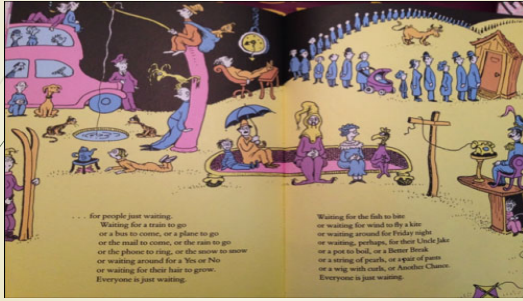
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Have you ever felt like this?



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Like you're in the Waiting Place?



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Working With Incompetent Clients Can Feel Hopeless Sometimes

- Some examples:
 - Eldrick McNeal: more than five years from complaint to certification (M.D. Ala.)
 - Sean Wayda: more than three years from indictment to certification (D. Md.)
 - Orlando Billie: more than three years from indictment to certification (D. Ariz.)
 - Eric Brian Brown: nearly three years from indictment to certification (E.D. Va.)
 - Thanh Cong Phan: nearly two and a half years from complaint to certification (W.D. Wash.)
 - Duane Berry: more than five months from dismissal of indictment to certification (E.D. Mich.)

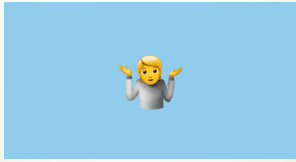
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But don't despair! This is one of those cases where the law is actually good for us

- Start by reading the mental health chapter (Chapter 313) of the U.S. Code
- Recognize that these issues can emerge in a variety of contexts
 - Revocation proceedings
 - Misdemeanor cases on federal land
 - Felony cases
- Remember why these cases are special
 - Incompetent clients who have not been convicted of anything
 - More vulnerable, more susceptible to negative outcomes from waiting and isolation, changes to environment, changes to support network, etc.

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What is supposed to happen when you have an incompetent client in a criminal case?



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18 U.S.C. § 4241(d)

- (d) **DETERMINATION AND DISPOSITION.**—If, after the hearing, the court finds by a preponderance of the evidence that the defendant 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, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—
 - (1) for such a reasonable period of time, **not to exceed** four months, as is necessary to determine whether there is a substantial probability that in the **foreseeable future** he will attain the capacity to permit the proceedings to go forward; and
 - (2) for an additional reasonable period of time until—
 - (A) his mental condition is so improved that trial may proceed, if the court finds that there is a **substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward;** or
 - (B) the pending charges against him are disposed of according to law;
 - whichever is earlier.
- If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the proceedings to go forward, the defendant is subject to the provisions of sections 4246 and 4248.

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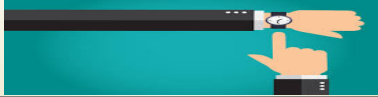
First, someone (you, the Government, the Court) suspects your client may be incompetent

- A motion for a competency evaluation is filed (usually uncontested)
- THIS IS NOT THE TIME TO GO INTO CRUISE CONTROL MODE
- By statute, BOP has 30 days to conduct a competency evaluation (18 U.S.C. § 4247(b))
- BOP can seek and get ONE 15-day extension by statute (18 U.S.C. § 4247(b))
- Fight for an outpatient evaluation. *United States v. Sung*, 530 F. App'x 255 (4th Cir. 2013).
- THE STATUTE DOES NOT ADD TIME FOR TRANSPORT
 - At worst, look at Speedy Trial, where more than ten days for transport is presumptively unreasonable (Section 3161(h)(1)(F))
 - Note that a "suitable facility" can be broadly defined, *see* 28 CFR 549.41 (nonexclusive list). Be creative! Consider inpatient or outpatient private facilities or a nearby county jail.

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What can you do during this month?

- Enforce these timelines: Ask the court to set a competency hearing within 30 days of ordering the evaluation and on day 31 (or 46), file a motion for an immediate competency hearing if one has not yet been held.
- Seek an expert evaluation and report if you think you will contest competency
- Create "observation memos," gather records, and talk to people close to your client
- Look ahead to restoration and consider whether your client is obviously unrestorable (intellectual disability, TBI, etc.) and, if not, whether an MD can be prepared to testify/prepare a report about what medication is likely to restore him, how long it will take to reach a therapeutic dose and determine whether restoration is imminent.
- You're the educator!



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Competency hearing

- If Court finds your client competent, you are back in a standard criminal case and go forward as usual
- If Court finds your client incompetent, turn IMMEDIATELY to 18 USC § 4241(d)
- Court should commit your client to the custody of the Attorney General under this provision
- For a period NOT TO EXCEED FOUR MONTHS
- DOES NOT ADD TIME FOR TRANSPORT. *But see United States v. Donnelly*, 41 F.4th 1102 (9th Cir. 2022)
- May last only as long as necessary to determine whether there is a SUBSTANTIAL PROBABILITY THAT IN THE FORESEEABLE FUTURE HE WILL ATTAIN THE CAPACITY TO PERMIT THE PROCEEDINGS TO GO FORWARD
- Consider whether any restoration period is necessary to make this determination, e.g. intellectual disability, etc., and perhaps prepare an expert to testify/prepare report that restoration is impossible.
 - Though language seems mandatory, in some cases zero days are the reasonable period to make such a determination and commitment to custody is not authorized (this is correct given the canon of constitutional doubt). *See Carr v. State*, 815 S.E.2d 903 (Ga. 2018).

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Let's break that down



- What is a substantial probability finding and when must it be made?
 - Court finding must be made no later than four months from date of order committing client to the custody of the Attorney General
 - We run time from court finding to court finding (no additional time for transport, administrative delay). Statute says NOT TO EXCEED FOUR MONTHS, time frame must be "reasonable." *But see United States v. Donnelly*, 41 F.4th 1102 (9th Cir. 2022)
 - Longest time frame in mental health chapter
 - Unlike other time frames in Section 4247, no allowance for extension on good cause showing

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Let's break it down some more

- "Substantial probability" finding must be specific
 - Not just that client is responding to medication
 - Not an ordinary probability
 - Not that BOP doctors are busy, want more time, or beds are unavailable
 - Must be tied to restoration for trial in the FORSEEABLE FUTURE



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And some more

- What is a reasonable time and how do we know?
 - Consider nature of client's diagnosis: Is he even restorable? Medicable? Teachable?
 - Consider historical and current response to medication
 - Consider seriousness of charged offense (maximum punishment, likely guideline range)



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What are you doing during this time?

- Are you contesting any possible substantial probability finding?
 - Consider consulting with an expert
 - What is the nature of your client's diagnosis? Is restoration even possible? Medicable? Teachable? *See e.g.,* intellectual disability, delusional disorder, organic brain issue, etc.
 - NB: you don't have to wait four months if you know you are going to challenge restorability! Move for a hearing
 - Keep things moving! Keep an eye on whether your client has been transported for restoration and when the court has scheduled a hearing to determine whether there is a substantial probability your client can be restored
 - File a motion, seek show cause, move for a hearing, call the marshal, etc. etc.
 - No allowance for transport; at worst, look at Speedy Trial, where more than ten days for transport is presumptively unreasonable (Section 3161(b)(1)(F))

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What if your client refuses medication?

- If your client refuses medication, the Government may seek to force medicate him under *Jaffin, United States*, 539 U.S. 166 (2003).
 - Are there important governmental interests at stake?
 - Consider the nature of charges, stat max, likely guideline range, any detainers or other restrictions on your client's liberty
 - Will involuntary medication significantly further those interests?
 - Are the drugs substantially likely to restore him? And substantially unlikely to cause side effects that will interfere with his ability to assist counsel?
 - Is involuntary medication necessary to further those interests?
 - Are alternative, less intrusive treatments available? Are there less intrusive means for administering the drugs?
 - Is administration of these drugs medically appropriate?
 - Consult with psychiatrists on whether condition and history suggest this medication creates the substantial probability your client can be restored in the foreseeable future
- NB: Extended *Jaffin* litigation does not absolve the court of its duty to make a timely substantial probability determination!

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What if the Court does not make a timely finding about restorability?

- Move for immediate release!
- If the Court has not made a timely finding, pretrial detention under 4241 is no longer authorized and violates due process under *Jackson v. Indiana*
- NB: Your client may be detained under 3142/the Bail Reform Act. If so, argue that with trial no longer imminent, 3142 does not provide a basis for ongoing detention and/or that a detention hearing can't be conducted against an incompetent person



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What if the Court makes a timely finding on restorability?

- If Court finds your client is restored, you are back in an ordinary criminal case
- If Court finds your client is unrestorable, move for immediate release
 - Pretrial detention is no longer authorized under 4241 and violates due process under *Jackson v. Indiana*
 - NB: Your client may be subject to a detention order under the Bail Reform Act. If so, argue that with trial no longer imminent, 3142 does not provide a basis for ongoing detention
- Once client is found unrestorable, Section 4241(d) commitment ends and it is TOO LATE for the Government to file a civil commitment certificate under 4246 or 4248, even if charges are dismissed
- If Court makes a proper substantial probability finding, argue about what additional time period is "reasonable"; ask the Court to set a hearing before end of "additional reasonable period"
 - Consider consulting with an expert on restorability
 - Keep things moving! Keep an eye on whether your client has been transported and when the court has scheduled a hearing to determine whether there is a substantial probability your client can be restored
 - File motions to keep everyone on track

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The Court is not authorized to order a Section 4246 or 4248 evaluation

- *United States v. Wayda*, 966 F.3d 294 (4th Cir. 2020)
- *United States v. Locklear*, 483 F. App'x 842 (4th Cir. 2012)
- *United States v. Summers*, No. 5:19-HC-2281-BR, ECF No. 20 (E.D.N.C. Sept. 29, 2020)
- *United States v. Lane*, No. 5:19-HC-2217-BR, ECF No. 23 (E.D.N.C. Sept. 25, 2020)
- These evaluations are contemplated *after* the filing of a certificate, which must be filed by the Government (18 U.S.C. §§ 4246, 4247, 4248)

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What if I don't raise these issues? *Curbow* and waiver

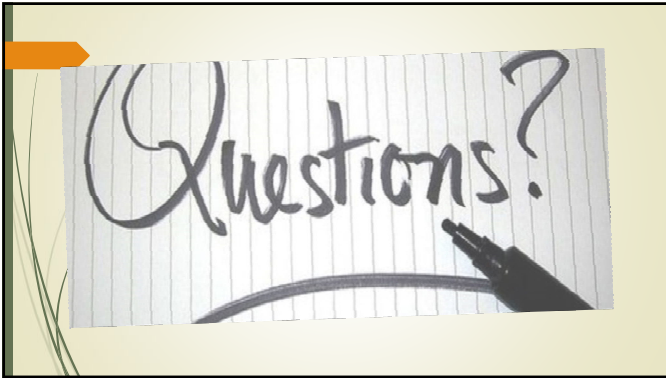
- You gotta raise these issues.
 - First, you might be able to get your client released or, at least, keep him from languishing.
 - Second, if you don't, they may be deemed **WAIVED**.
- Waived?! But my client is incompetent.
 - Yes, but see *Curbow*
 - Argue against a waiver holding, even if client was counseled. See *Pate v. Robinson*: "But it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."
- Judge King's preservation suggestions
 - Request release from confinement. If denied, seek interlocutory appeal.
 - Seek mandamus relief in the court of appeals.

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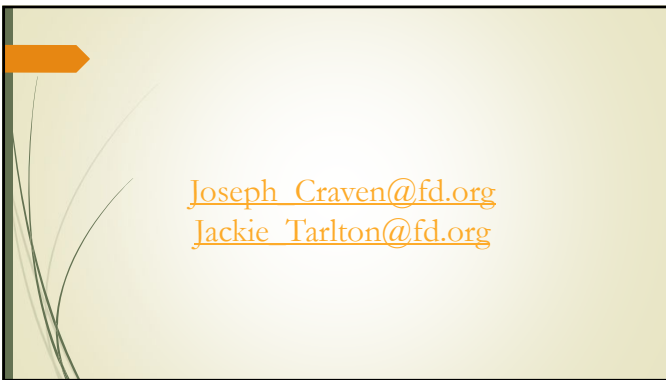
Please make use of our resources!

- Box.com: Email Carl_Adams@fd.org and write: "Please add me as a 'viewer' to the box folder 'Competency and Restoration Delays'"
- Listserv: Email Gloria_Gould@fd.org with the subject line: "Subscribe to NCE_Competency_Restoration_Delays Listserv"

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