

TITLE 7: POLICY OPTIONS AND POTENTIAL STATUTE CHANGES

At the meeting of the Joint Subcommittee on Title 25 Issues on August 30, 2016, the subcommittee requested examples of statutory language from other states to streamline court-ordered forensic evaluation processes in Wyoming. Timely, appropriate evaluations are essential to protect civil rights of defendants, manage the courts' dockets, and ensure effective and efficient use of State resources. This brief summarizes Wyoming State Hospital (WSH) policy initiatives and options, supporting data, and specific barriers to timely and appropriate evaluations. Also included are strategies and sample statutory language from other states.

Wyoming State Hospital Policies

This section summarizes current initiatives at the WSH as well as policy options for future consideration.

Current Initiatives

- Title 7 queue: electronic system for ongoing data management and reporting
- Court order templates: working with the Attorneys General and the Supreme Court to separate the 303 (fitness to proceed) and 304 orders (criminal responsibility) pursuant to existing statute, as well as clarifying procedural elements such as provision of collateral, transportation of defendants for inpatient evaluation, and information sharing between the courts and Designated Examiners

Policy Options

These options do not require statutory change but would represent significant departures from current WSH policies and procedures with potentially significant impacts to the judicial system.

- Limiting the number of evaluations the WSH conducts each year. This policy is similar to the unofficial policy of the state Human Services Center in South Dakota, which performs only 36 evaluations per year, meeting approximately one-quarter of the demand for forensic mental health evaluations; counties employ private evaluators to meet remaining demand.¹ Existing Title 7 statute does not limit evaluations to the WSH in the definition of "Designated Examiner."
- Limiting the type of evaluations the WSH conducts. The WSH could conduct all initial or all misdemeanor evaluations on an outpatient basis. For example, Wisconsin conducts all competency evaluations on an outpatient basis unless extenuating circumstances, as determined by the Department of Health Services, exist.² Another option is for the WSH to only accept evaluation requests for felony charges and inpatient restorations at the WSH. For example, the state of New York drops all misdemeanor charges and converts the individual to a civil commitment if they are found incompetent to stand trial at the initial evaluation; no criminal responsibility evaluations are conducted for misdemeanor charges.³

¹ Walker, M. 16 November 2015. "Mentally ill overwhelming budgets for courts, jails." *Argus Leader*. Retrieved from: <http://www.argusleader.com/story/news/2015/11/16/mentally-ill-overwhelming-budgets-courts-jails/75493400/>

² Wisconsin Department of Health Services, Community Forensics Program. Retrieved from: <https://www.dhs.wisconsin.gov/ocep/procedure-competencyexams.htm>

³ New York State Office of Mental Health, Division of Forensic Services, "Populations Served in OMH Forensic and SOTP Facilities." Retrieved from: https://www.omh.ny.gov/omhweb/forensic/Populations_served.htm

- Charging for evaluations at the WSH, either a flat rate, hourly, or some combination thereof. The WSH does not currently charge a fee for forensic mental health evaluations, creating a significant financial disincentive to utilizing private evaluators, even in the presence of wait times at the WSH due to increasing demand; existing statute does not prohibit the WSH from charging an evaluation fee.
- Processing evaluation requests. The policies below would clarify the first-come, first-served system at the WSH by specifying when an order is placed into the queue for processing:
 - Returning incorrectly worded court orders (those ordering both a 303 and a 304 evaluation simultaneously) to the court for correction prior to processing the evaluation request.
 - Processing court orders only when all collateral has been received from both prosecution and defense. Alternatively, the WSH could file contempt of court motions when collateral is not received in a timely fashion from either the defense or the prosecution.
 - Closing cases in which the defendant refused to cooperate or failed to appear for a scheduled outpatient evaluation with a report to the court that the defendant could not be evaluated due to failure to cooperate or appear as scheduled.

Table 1 and Table 2, below, summarize WSH data on process times for fitness to proceed and criminal responsibility evaluations, the two most common court-ordered evaluations.

Table 1: Process Times for ‘Fitness to Proceed’ & ‘Criminal Responsibility’ Evaluations

	Court Orders Received		Court Orders Completed			
	Average # of days from File Date to Receipt at the WSH	% of orders received concurrently with Collateral	% of cases with no Collateral from Prosecution	Average # of days to receive Collateral from Prosecution	% of cases with no Collateral from Defense	Average # of days to receive Collateral from Defense
September	5.2	24%	17%	10.7	56%	10.0
August	2.4	30%	4%	8.2	15%	17.7
July	3.6	33%	5%	12.5	0%	24.3

Restoration, NGMI, and Risk Assessments are not included, because they are long-term cases in which the Designated Examiner is likely to already have collateral on hand from prior evaluations, thus skewing the averages.

Table 2: Other Outcomes for ‘Fitness to Proceed’ & ‘Criminal Responsibility Evaluations’

	Court Orders Received		Court Orders Completed	
	% Cases Filed for Misdemeanor Charges	# of DUI/Alcohol Related Cases	% of all Cases Found Competent	% of Misdemeanor Cases Found Competent
September	29%	1	50%	40%
August	35%	2	59%	40%
July	33%	6	72%	71%
June	32%	0	61%	71%
May	36%	3	69%	50%

Restoration, NGMI, and Risk Assessments are not included, because they are long-term cases in which the Designated Examiner may conduct multiple evaluations on a single individual until they are found competent, thus skewing the averages.

The remainder of this brief summarizes specific barriers to timely and appropriate evaluations with accompanying strategies and examples of statutory language from other states.

Submitting Collateral Information

Problem

Collateral, e.g. charging documents and relevant medical records necessary to evaluate the defendant's mental status, is not provided in a timely manner, if at all. This requires WSH staff time to locate and request the necessary information and can delay evaluations and report writing.

Strategies to Address the Problem

Collateral is already required, by statute, from both prosecution and defense; however, statute could increase enforcement through specific timelines and/or requirements to complete the evaluation before making a plea of NGMI. Additionally, statute changes could introduce penalties for failure to comply with the law, and explicitly grant access to medical records to the Designated Examiner.

Sample Statutory Language

Colorado

- CRS 16-8-103.6 Waiver of privilege. “(2) (a) A defendant who places his or her mental condition at issue by pleading not guilty by reason of insanity... (3) waives any claim of confidentiality or privilege as to communications made by the defendant to a physician or psychologist in the course of an examination or treatment for such mental condition for the purpose of any trial, hearing on the issue of such mental condition, or sentencing hearing conducted pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. The court shall order both the prosecutor and the defendant to exchange the names, addresses, reports, and statements of any physician or psychologist who has examined or treated the defendant for such mental condition.”

Oregon

- ORS 161.309 “(1) The defendant may not introduce evidence on the issue of insanity under ORS 161.295 (Effect of mental disease or defect), unless the defendant: (a) Gives notice of intent to do so in the manner provided in subsection (3) of this section; and (b) Files with the court a report of a psychiatric or psychological evaluation, conducted by a certified evaluator, in the manner provided in subsection (4) of this section... (4) A defendant who is required under subsection (1) of this section to file a report of a psychiatric or psychological evaluation shall file the report before trial. The report must be based on an evaluation conducted after the date of the alleged offense and must address the issue of insanity under ORS 161.295 (Effect of mental disease or defect) and the dispositional determination described in ORS 161.325 (Entry of judgment of guilty except for insanity). If the defendant fails to file a complete report before trial, the defendant may not introduce evidence for the establishment of a defense under ORS 161.295 (Effect of mental disease or defect) unless: (a) The court, in its discretion, permits the evidence to be introduced when just cause for failure to file the report is shown; and (b) If the defendant is charged with a felony, the defendant is tried by a jury.”

Wisconsin

- 971.14(2)(e) “The examiner shall personally observe and examine the defendant and shall have access to his or her past or present treatment records, as defined under s. 51.30 (1) (b).”

Wyoming

- Title 14 provides for specific penalties related to contempt of court due to noncompliance with provisions of the court orders.

W.S. §14-4-242. Liability for contempt; penalties. “Notwithstanding any other provision of law, the court upon its own motion or upon the motion of the district or county attorney, or guardian ad litem, may find that the child, child's parent, parents, or guardian or any other person who willfully violates, or neglects or refuses to obey or perform any order or provision of this act is liable for contempt of court and may be fined not more than five hundred dollars (\$500.00) or incarcerated not more than ninety (90) days, or both.”

Scheduling Outpatient Evaluations

Problem

“No-shows” for outpatient evaluations cost evaluators’ travel time and expenses as well as the opportunity cost of completing other evaluations that have been requested.

Strategies to Address the Problem

Statute could make attendance a condition of release, introducing penalties for no-shows.

Sample Statutory Language

Colorado

- CRS 16-8.5-105 (b) (2) “The defendant shall cooperate with the competency evaluator and with other personnel providing ancillary services, such as testing and radiological services. Statements made by the defendant in the course of the evaluation shall be protected as provided in section 16-8.5-108. If the defendant does not cooperate with the competency evaluator and other personnel providing ancillary services and the lack of cooperation is not the result of a developmental disability or a mental disability, the fact of the defendant's noncooperation with the competency evaluator and other personnel providing ancillary services may be admissible in the defendant's competency or restoration hearing to rebut any evidence introduced by the defendant with regard to the defendant's competency. (3) To aid in forming an opinion as to the competency of the defendant, it is permissible in the course of an evaluation under this section to use confessions and admissions of the defendant and any other evidence of the circumstances surrounding the commission of the offense, as well as the medical and social history of the defendant, in questioning the defendant. When the defendant is noncooperative with the competency evaluator or personnel providing ancillary services, an opinion of the competency of the defendant may be rendered by the competency evaluator based upon confessions, admissions, and any other evidence of the circumstances surrounding the commission of Colorado Revised Statutes 2013 135 Title 16 the offense, as well as the known medical and social history of the defendant, and the opinion may be admissible into evidence at the defendant's competency or restoration hearing.”
- CRS 16-8-106 (NGMI plea) “(c) The defendant shall cooperate with psychiatrists, forensic psychologists, and other personnel conducting any examination ordered by the court pursuant to this section. Statements made by the defendant in the course of such examination shall be protected as provided in section 16-8-107. If the defendant does not cooperate with psychiatrists, forensic psychologists, and other personnel conducting the examination, the court shall not allow the defendant to call any psychiatrist, forensic psychologist, or other expert witness to provide evidence at the defendant's trial concerning the defendant's mental condition including, but not limited to, providing evidence on the issue of insanity or at any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. In addition, the fact of the defendant's noncooperation with psychiatrists, forensic psychologists, and other personnel conducting the examination may be admissible in the defendant's trial to rebut any evidence introduced by the defendant with regard to the defendant's mental condition including, but not limited to, the issue of insanity and in any sentencing hearing held pursuant to section 18-1.3-1201 or 18-1.4-102, C.R.S. This paragraph (c) shall apply to offenses committed on or after July 1, 1999.”

Michigan

- 330.2026 Sec “If the defendant, after being notified, fails to make himself available for the examination, the court may order his commitment to the center or other facility without a hearing.”

Minnesota

Criminal Procedure, Rule 20

- The report shall include: (4) If the examination could not be conducted because of the defendant's unwillingness to participate, an opinion, if possible, as to whether the unwillingness resulted from mental illness or deficiency.
- If the defendant is entitled to release, and the examination can be done on an outpatient basis, the court cannot order the defendant to be confined for the examination. The court may make appearance for the examination a condition of release.
- Subd. 3 “If the defendant does not participate in the examination and thereby prevents the examiner from making an adequate report to the court, the court may:
 - (a) prohibit the defendant from introducing evidence of the defendant's mental condition;
 - (b) strike any previously introduced evidence of the defendant's mental condition;
 - (c) permit any party to introduce evidence of the defendant's refusal to cooperate and to comment on it to the trier of fact;
 - (d) make any other ruling as it deems just.”

Montana

- 46-14-206. “(2) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate in the examination, the report must state that fact and must include, if possible, an opinion as to whether the unwillingness of the defendant was the result of the mental disease or disorder or developmental disability.”

Oregon

- ORS 161.365 (4) “If the examination by the psychiatrist or psychologist cannot be conducted by reason of the unwillingness of the defendant to participate in the examination, the report shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental disease or defect affecting capacity to proceed.”

Appropriateness of Evaluation Requests

Problem

Relatively high numbers of evaluations are for misdemeanor charges, most frequently breach of peace, DUI, or interference with police. There are also a large number of cases where the defendant is found competent.

Additionally, existing statute places no limits on commitment length in relation to time that would have been served had the defendant been convicted. For example, breach of peace is a misdemeanor carrying a maximum sentence of not more than six months imprisonment, a fine of \$750, or both (W.S. 6-6-102). Longer commitments, particularly those for restoration, reduce the availability of beds and staff time at the WSH to conduct evaluations, thereby increasing wait times.

Strategies to Address the Problem

Many states do not pursue misdemeanor charges for defendants found incompetent and explicitly limit commitments to no more than the length of time the defendant would have served if convicted of the charges, including credit for the time held for evaluation.

Sample Statutory Language

Colorado

- CSR 16-8.5-116. “Commitment - termination of proceedings. (1) A defendant committed to the department or otherwise confined as a result of a determination of incompetency to proceed shall not remain confined for a period in excess of the maximum term of confinement that could be imposed for the offenses with which the defendant is charged, less any earned time to which the defendant would be entitled under article 22.5 of title 17, C.R.S.”

Michigan

- 330.2034 Sec 1034 (1) No order or combination of orders issued under section 1032 or 1040, or both, shall have force and effect for a total period in excess of 15 months or 1/3 of the maximum sentence the defendant could receive if convicted of the charges against him, whichever is lesser; nor after the charges against the defendant are dismissed.

Minnesota

- Criminal Procedure, Rule 20, Competency to stand trial: “(b) Finding of Incompetency. If the court finds the defendant incompetent, and the charge is a misdemeanor, the charge must be dismissed. If the court finds the defendant incompetent, and the charge is a felony or gross misdemeanor, the proceedings must be suspended except as provided in Rule 20.01, subd. 8.
- Finding of Mental Illness. If the court finds the defendant mentally ill so as to be incapable of understanding the criminal proceedings or participating in the defense, and the defendant is under civil commitment as mentally ill, the court must order the commitment to continue. If the defendant is not under commitment, the court must commence a civil commitment proceeding. The court must supervise the commitment as provided in Rule 20.01, subd. 7.

Montana

- 46-14-222. Proceedings if fitness regained. “When the court, on its own motion or upon the application of the director of the department of public health and human services, the prosecution, or the defendant or the defendant's legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding must be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from serious mental illness, order the defendant committed to an appropriate facility of the department of public health and human services.”

Wisconsin

- 971.14(5)(a)(1) “If the court determines that the defendant is not competent but is likely to become competent within the period specified in this paragraph if provided with appropriate treatment, the court shall suspend the proceedings and commit the defendant to the custody of the department for treatment for a period not to exceed 12 months, or the maximum sentence specified for the most serious offense with which the defendant is charged, whichever is less.”
- 971.14(5)(d) “If a defendant who has been restored to competency thereafter again becomes incompetent, the maximum commitment period under par. (a) shall be 18 months minus the days spent in previous commitments under this subsection, or 12 months, whichever is less.”
- 971.17 (1)(b) Felonies committed on or after July 30, 2002. Except as provided in par. (c), when a defendant is found not guilty by reason of mental disease or mental defect of a felony committed on or after July 30, 2002, the court shall commit the person to the department of health services for a

specified period not exceeding the maximum term of confinement in prison that could be imposed on an offender convicted of the same felony, plus imprisonment authorized by any applicable penalty enhancement statutes, subject to the credit provisions of s. 973.155.

(c) Felonies punishable by life imprisonment. If a defendant is found not guilty by reason of mental disease or mental defect of a felony that is punishable by life imprisonment, the commitment period specified by the court may be life, subject to termination under sub. (5).

(d) Misdemeanors. When a defendant is found not guilty by reason of mental disease or mental defect of a misdemeanor, the court shall commit the person to the department of health services for a specified period not exceeding two-thirds of the maximum term of imprisonment that could be imposed against an offender convicted of the same misdemeanor, including imprisonment authorized by any applicable penalty enhancement statutes, subject to the credit provisions of s. 973.155.

Costs of Evaluation

Problem

While current statute allows the Courts to consider the availability of an outside, non-State evaluator and the use of any qualified forensic psychologist or forensic psychiatrist, this option is rarely used. The lack of fees charged by the WSH likely incentivizes courts to utilize the lowest cost option regardless of evaluator availability and wait times, rather than pay for a private evaluator.

Strategies to Address the Problem

Implement fees for evaluation services at the WSH and designate responsibility for those costs.

Sample Statutory Language

Colorado

- 16-8.5-107. “Counsel and evaluators for indigent defendants. In all proceedings under this article, the court shall appoint competency evaluators or attorneys for a defendant at state expense upon motion of the defendant with proof that he or she is indigent and without funds to employ competency evaluators or attorneys to which he or she is entitled under this article. If a second evaluation is requested by an indigent defendant, it shall be paid for by the court.”

Oregon

- ORS 161.365 (6) “(a) When upon motion of the court or a financially eligible defendant, the court has ordered a psychiatric or psychological examination of the defendant, a county or justice court shall order the county to pay, and a circuit court shall order the public defense services executive director to pay from funds available for the purpose: (A) A reasonable fee if the examination of the defendant is conducted by a psychiatrist or psychologist in private practice; and (B) All costs including transportation of the defendant if the examination is conducted by a psychiatrist or psychologist in the employ of the Oregon Health Authority or a community mental health program established under ORS 430.610 (Legislative policy) to 430.670 (Contracts to provide services). (b) When an examination is ordered at the request or with the acquiescence of a defendant who is determined not to be financially eligible, the examination shall be performed at the defendants expense. When an examination is ordered at the request of the prosecution, the county shall pay for the expense of the examination.”

Wisconsin

- Criminal Responsibility, 971.16(2) “The compensation of the physicians or psychologists shall be fixed by the court and paid by the county upon the order of the court as part of the costs of the action.”