



CRIMINAL SENTENCING COMMISSION

# Adult Competency Reference Guide

## What is Competency<sup>11</sup> to Stand Trial?

A defendant is not competent to stand trial if either or both of these are true: (1) the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or (2) the defendant is incapable of assisting in the defendant's own defense. [R.C. 2945.37(G)]

- An individual who is found incompetent may not be tried or convicted unless and until the individual attains competency.
- An individual must be competent before waiving the right to counsel or entering a guilty or no-contest plea.

## How is Competency Different from a Not Guilty by Reason of Insanity Plea?

Competency to stand trial is a determination by the judge about a defendant's present mental condition and about the defendant's capacity to understand the proceedings and assist in the defendant's own defense. [R.C. 2945.37(G)]

A plea of not guilty by reason of insanity (NGRI) asserts an affirmative defense regarding defendant's mental condition at the time of the offense and focuses on the defendant's capacity to know the wrongfulness of the defendant's actions at that time. [R.C. 2901.01(A)(14)]

*Competency to Stand Trial and NGRI are separate and independent issues in a case. While both issues may be raised in the same case and the court can request joint evaluations, if both are raised the trial court will likely want to resolve the competency issue prior to addressing the NGRI issue. If only one issue is present in a case, then that is the only evaluation that needs to be conducted.*

## Raising the Issue of Competency

Defendants are presumed to be competent. [R.C. 2945.37(G)]

- This is a rebuttable presumption. The court is the final arbiter as to the defendant's competency.

Who Can Raise Competency? [R.C. 2945.37(B)]

The defense or the prosecutor or the court itself can each raise the issue of competency by motion in adult court.

### Appeal Of Competency Determinations

A finding that a defendant is incompetent to stand trial accompanied by an order that the defendant undergo inpatient competency-restoration treatment is a final appealable order. [\*State v. Upshaw\*, 100 Ohio St.3d 189, 2006-Ohio-4253.](#)

Other types of competency orders are subject to review under R.C. 2505.02(B)(4) to determine if the orders constitute final appealable orders. [\*In re JW\*, 2010-Ohio-707 \(11th Dist.\)](#).

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### When Can Competency be Raised? [R.C. 2945.37(B)]

The issue of competency can be raised before or after a trial begins. If raised before trial, the court must hold a hearing on the issue. If competency is raised after a trial begins, the court may choose to hold a competency hearing and should if good cause is shown.

- Types of factors relevant to good-cause finding (not exclusive)<sup>2</sup>:
- Medical reports related to competency.
- Evidence of irrational behavior.
- The defendant's demeanor during trial.
- Doubts about the defendant's competency raised by defense counsel.

### Competency Hearings

At any hearing on the issue of competency, the defendant must be represented by counsel. [R.C. 2945.37(D)] See *State v. Bock*, 28 Ohio St.3d 108 (1986) for the holding that failure to hold a hearing may be considered harmless error where there are insufficient "indicia of incompetency" present on the record.

### Timing of Hearing [R.C. 2945.37(C)]

Any competency hearing must be held within:

- 30 days after the issue of competency is raised, or;
- If the defendant is referred for an evaluation before the hearing, within 10 days after the filing of the evaluation report, or;
- If the initial examiner's report recommends further evaluation for intellectual disability, 10 days after the filing of that additional, separate report.

The hearing may be continued by the court for good cause shown. In the case of multiple evaluations, the statute is silent as to whether the 10-day time period starts when one evaluation or all evaluations are filed. Given the good-cause exception, courts are likely safe to wait to schedule the hearing until all evaluations are complete.<sup>3</sup>

### Levels of Movement<sup>4</sup> and Forensic Status

Once a defendant has been committed to an Ohio Department of Mental Health and Addiction Services (OMHAS) facility, depending on the defendant's forensic status, various levels of movement are permitted within the facility:

- Level 1 – restricted to unit placement.
- Level 2 – supervised on-grounds movement.
- Level 3 – unsupervised on-grounds movement.
- Level 4 – supervised off-grounds movement.
- Level 5 – unsupervised off-grounds movement.
- Trial Visit – unsupervised community contact with expectation to return.
- Conditional release – treatment in community for a period of time, not to exceed maximum term of imprisonment for most serious offense.
- Medical movement - emergency and non-emergency. Hospitals may move an individual from Level One to Level Two with an attending psychiatrist's order. Approval of levels 3-5 and conditional release may be granted only by court order. [R.C. 2945.401(D)(1)]

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## How is Competency Determined?

Courts have authority to order competency evaluations under R.C. 2945.371, and the prosecution or defense may submit relevant evidence at the hearing.

The court cannot find incompetency solely based on the defendant's: [R.C. 2945.37(F)]

- Current or previous treatment for mental illness under R.C. Chapter 5122.
- Institutionalization or treatment for intellectual disability under R.C. Chapter 5123.
- Or because the defendant is receiving medication, even if incompetence may occur without the medication.

[R.C. 2945.37(C)]: Any finding of incompetency must be grounded in the court's finding that by a preponderance of the evidence and due to a present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings OR is incapable of assisting in the defendant's own defense.

## Waiver of Competency Hearing

A stipulation by the parties to the expertise of the examiner and the contents of the examiner's report may alleviate the requirement for a formal hearing.<sup>5</sup>

## Statutory Speedy Trial Tolling

From the date the defense files a motion challenging competency to stand trial, the right-to-a-speedy-trial clock is tolled. [R.C. 2945.72(B)] The clock begins again only after the trial court makes a competency determination, regardless of whether the examiner fails to issue a report within the prescribed time limits.<sup>6</sup>

## Court-Ordered Competency Evaluations [R.C. 2945.371]

Courts may order one or more professional evaluations of the defendant's competency for the court's consideration in making a competency determination.

## Who Conducts the Evaluation? [R.C. 2945.371]

If the court orders an evaluation, it must be conducted by an "examiner" as defined by R.C. 2945.37(A)(2) of the court's choosing. The examiner must be a qualified psychiatrist or clinical psychologist or be one employed by the OMHAS to conduct such examinations.

## Levels of Movement and Forensic Status, Continued

### Forensic Status

1. Jail transfers and police holds - (Level 1).
2. Competency/sanity evaluation [R.C. 2945.371(H)(3) and (4)] - (Level 1).
3. Incompetent, restorable [R.C. 2945.38(B)] - (Levels 1-2).
4. Incompetent, unrestorable, probate court jurisdiction [R.C. 2945.38(H)(4)] - (Levels 1-5).
5. Maintain competency [R.C. 2945.38(A)] - (Levels 1-2).
6. Incompetent, unrestorable, criminal court jurisdiction [R.C. 2945.39(A)] - (Levels 1-5).
7. Not Guilty by Reason of Insanity [R.C. 2945.40] - (Levels 1-5).
8. Mentally-ill probationer or parolee [R.C. 2967.22 and Chapter 5122] - (Levels 1-5).



### **In Municipal Courts:**

Except as provided in R.C. 2945.371, evaluations must be performed through community resources and not at any hospital operated by the Ohio Department of Mental Health and Addiction Services. [R.C. 2945.37(H)]

#### Is Participation with Court-Ordered Competency Evaluations Mandatory?

Yes. If a court orders an examination, the defendant must submit to the evaluation. [R.C. 2945.371(C)] An incarcerated or uncooperative defendant charged with a felony or an offense of violence, or who has been determined to be in need of immediate hospitalization, may be held for evaluation for a reasonable time not to exceed 20 days at a facility operated or certified by the Department of Mental Health and Addiction Services or the Department of Developmental Disabilities. [R.C. 2945.371(C-D)]

- Municipal courts may make such an order only at the request of a certified forensic center examiner, unless the defendant requires immediate hospitalization or is charged with an offense of violence. [R.C. 2945.371(D)(2)]

A defendant who has not been released on bail or recognizance may be evaluated at the defendant's place of detention. [R.C. 2945.371(D)(1)]

#### What is the timeframe and format for an evaluation?

An examiner must send a report to the court within 30 days after the court orders the evaluation under R.C. 2945.371(H). Those evaluations may take place electronically. [R.C. 2945.37(H) and R.C. 2945.371(A)]

#### What must be included in the evaluation report? [R.C. 2945.371(H)]

The report must lay out the examiner's findings as well as the facts upon which the findings were based. Findings and recommendations in the report should include:

- Is the defendant capable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's own defense?
- If the defendant is not competent, in the examiner's opinion, does the defendant have a mental illness or intellectual disability?
- If there is an intellectual disability, is the defendant subject to institutionalization by court order?<sup>7</sup>
- If the defendant is not competent, what is the likelihood<sup>8</sup> that the defendant can be restored to competency in one year<sup>9</sup>?
- If the defendant is not competent, what is the least restrictive placement or commitment alternative that can provide the means for restoration without endangering the safety of the community?



Can statements made to examiners during competency evaluations or hearings be used against the defendant?

No. Statements made by the defendant during evaluations or hearings cannot be used to determine guilt. [R.C. 2945.371(J)]

What about a second opinion?

Courts may order multiple evaluations in adult cases, including by examiners recommended by the prosecution or the defendant. [R.C. 2945.371(A) & (B)]. There is no statutory right to a second competency evaluation, or to an evaluation by a doctor of the parties' choosing, and denial of such a request is reviewed on an abuse-of-discretion standard. On review, the record will be reviewed to determine if sufficient indicia of competency existed, with deference given to the trial court.<sup>10</sup>

*A second-opinion evaluation should be ordered in the same manner as the first. Use of the 20-day- observation provisions under R.C. 2945.371(C-D) is not the correct avenue and often causes a longer wait for an evaluation to be conducted.*

*Defendants may request an independent evaluation of an NGRI claim by an evaluator of the defendant's choice, with the cost paid at public expense for indigent defendants. [R.C. 2945.371(B)]*

Who pays the cost of the evaluations?

Competency examiners are paid a reasonable amount. Costs are borne by the court<sup>11</sup> and may be taxed as costs in the case. [R.C. 2945.371(L)]

## Competency Determinations

Once a hearing on competency has been conducted, and any and all evaluations are in evidence, the court then makes the final determination as to competency. What are the types of competency determinations?

### 1. Competent to stand trial: [R.C. 2945.38(A)]

After consideration of all evidence, the court determines that the defendant is competent to stand trial.<sup>12</sup>

*Result: Defendant is competent to stand trial. Case proceeds as normal.*

### 2. Incompetent, but restorable: [R.C. 2945.38(B)(1)(a)(i)]

The court finds that defendant is currently incompetent but that there is a substantial probability<sup>13</sup> that competency will be restored within 1 year if provided treatment.<sup>14</sup>

*Result: Court orders defendant to treatment to restore competency. See time limits on following page.*

## Forced Medication Hearings [R.C. 2945.38(B)(1)(c)]

A treatment center may petition the court for involuntary administration of drugs if it determines they are needed to restore the defendant's competency and the defendant lacks the capacity or refuses to consent.

Time Frame for hearings:

**Misdemeanor:** The hearing is within 5 days of the filing of the petition.

**Felony:** The hearing is within 10 days of the filing of the petition.

**Elements:** When authorizing for the purpose of competency restoration, the court determines that treatment is:

1. Medically appropriate.
2. Substantially unlikely to have side effects that may undermine the fairness of the trial.
3. Necessary to further important governmental trial related interests, considering less-intrusive alternatives.

*Sell v. United States*, 539 U.S. 166 (2003).

**Tolling Effect:** The 1-year time period for restoring a defendant's competency is tolled during any appeal of an order granting involuntary administration of medication. *State v. Barker*, 2007-Ohio-4612 (2nd Dist.).



The court should choose the least restrictive option available, consistent with public safety and treatment needs.

### 3. Incompetent, additional time needed to determine if restorable:<sup>15</sup>

**For felony offenses** – The defendant is currently incompetent, and the court is unable to determine if a substantial probability exists that competency can be restored within 1 year if treatment is provided. [R.C. 2945.38(B)(1)(a)(ii)]

*Result: The court may order up to 4 months of continued evaluation and treatment of the defendant to determine if competency can be restored. An additional hearing will be necessary in accordance with timelines below.*

**For misdemeanor offenses of violence** – The defendant is currently incompetent, and the court is unable to determine if a substantial probability exists that competency will be restored within the applicable time period provided by R.C. 2945.38(C) if treatment is provided. [R.C. 2945.38(B)(1)(a)(iii)]

*Result: The court may order continued evaluation and treatment of the defendant to determine if competency can be restored up to the statutory limits provided in R.C. 2945.38(C). An additional hearing will be necessary in accordance with timelines below.*

**For all other misdemeanor offenses** – The defendant is currently incompetent, and the court is unable to determine if a substantial probability exists that competency can be restored within the applicable time period provided by R.C. 2945.38(C) if treatment is provided. [R.C. 2945.38(B)(1)(a)(iv)]

*Result: The court must dismiss the charges and proceed under R.C. 2945.38(B)(1)(a)(v)(I): discharge the defendant unless the prosecutor files a probate affidavit alleging that the defendant is a mentally-ill person subject to court order or a person with an intellectual disability subject to institutionalization by court order.*

### 4. Incompetent, unrestorable: For Felony Cases:

Currently incompetent and there is not a substantial probability that competency can be restored within 1 year. [R.C. 2945.38(B)(2)]

*Result: The Court must dismiss the charges and discharge the defendant unless:*

- The Court or prosecution files an affidavit in probate court for civil commitment<sup>16</sup> of the defendant under R.C. 2945.38(B)(2).
- The Court on its own or at the request of the prosecutor may retain jurisdiction over the defendant under R.C. 2945.38(B)(2) or R.C. 2945.39(A)(2).<sup>17</sup>

### Legal Guardians and Criminal Competency Proceedings

Courts may encounter criminal defendants who have had a legal guardian appointed for them by a probate court. It is important to note that a criminal competency determination is separate and distinct from that of the probate court, and the defendant's probate guardian does not have statutory authority to intervene in a criminal case. [See *State v. Brooks*, 1992 Ohio App. LEXIS 357, 1992 WL 15961 (9th Dist.) and *State v. Calabrese*, 2017-Ohio-7316 (8th Dist.). See also R.C. 2111.13.]





### For Misdemeanor Cases:

Currently incompetent and there is not a substantial probability that competency will be restored within statutory timeframe.

[R.C. 2945.38(B)(1)(a)(v)(I)]

- *Result: The Court must dismiss the charges and discharge the defendant unless: the Court or prosecution files an affidavit in probate court for civil commitment<sup>18</sup> of the defendant under R.C. 2945.38(B)(1)(a)(v)(I).<sup>19</sup>*

Does a defendant receive credit for confinement time while under evaluation, treatment, or commitment for competency?

If a defendant is convicted and sentenced to incarceration, the defendant must receive credit for the total number of days confined for any evaluation, treatment, and commitment. [R.C. 2945.38(I) and R.C. 2967.191]

What effect does a dismissal for incompetency have on future prosecution for the offense(s)?

A dismissal due to incompetency does not bar future prosecution for those offenses. Prosecutor may re-indict the defendant for the same charges if the defendant is restored within the statute of limitations. [R.C. 2945.38(H)(4)]

### Maximum Length of Competency-Restoration Treatment [R.C. 2945.38]

When a criminal defendant is incompetent to stand trial, the court must determine whether there is a substantial probability that the defendant can be restored within this timeframe set by R.C. 2945.38(C):

Offense	Maximum Time Allowed in Treatment
<ul style="list-style-type: none"> <li>• Aggravated murder</li> <li>• Murder</li> <li>• First- or second-degree felony offenses of violence</li> <li>• First- or second-degree attempt, complicity, or conspiracy in committing an offense above</li> </ul>	1 year
<ul style="list-style-type: none"> <li>• All other felonies</li> </ul>	6 months
<ul style="list-style-type: none"> <li>• First- or second-degree misdemeanors</li> </ul>	60 days
<ul style="list-style-type: none"> <li>• All other misdemeanors</li> </ul>	30 days

### Time Clock for Competency-Restoration

Treatment Courts have generally held that the time clock for the competency restoration begins once the treatment has started, and not when the judge makes the order.

- See [City of Cleveland v. Allen, 2009-Ohio-860 \(8th Dist.\)](#), [State v. Barker, 2007-Ohio-4612 \(2nd Dist.\)](#).

### Decompensation and Restoration Timelines

What happens when a defendant is restored to competency within the statutory timeframe, but then the defendant's circumstances change, and the defendant is found no longer competent to stand trial?

- [State v. Hudkins, 2022-Ohio-249 \(12th Dist.\)](#) held that the time period for restorative treatment does not begin anew or "restart" when there is a period of competency in between incompetency findings.



- [\*State v. Henderson, 2014-Ohio-2991\*](#) (5th Dist.) held that an entirely new restoration period commenced and the deadline for continuing jurisdiction was extended.
- [\*Hudkins\*](#) distinguished [\*Henderson\*](#) by finding that Henderson was a unique and unusual fact pattern, and therefore no certified question was submitted to the Supreme Court.

## Competency-Treatment-Review Hearings

When an individual is not competent to stand trial but has been found to be restorable and is undergoing treatment, the Revised Code dictates timeframes for required written reporting by treatment providers and deadlines for hearings after those reports are received.

When must treatment providers report to the court? [R.C. 2945.38(F)]

Whenever the treatment provider believes that the defendant is capable of understanding the nature and objective of the proceedings against the defendant and of assisting in the defendant's defense and:

- At a minimum, after each 6 months of treatment.
- For a felony offense, 14 days before expiration of the maximum time for treatment or 14 days before the expiration of the maximum time for continuing evaluation and treatment.
- For a misdemeanor offense, 10 days before the expiration of the maximum time for treatment.
- Whenever the treatment provider believes that there is not a substantial probability that the defendant can be restored even if the defendant is provided with a course of treatment.

When must additional competency hearings be conducted? [R.C. 2945.38(H)]

Additional competency hearings are conducted during the following times:

- Within 10 days after the treatment center advises that there is no substantial probability that the defendant will regain competency within one year.
- Within 10 days after the expiration of the maximum time allowed for the longest possible sentence defendant is facing.
- Within 10 days after expiration of the maximum time allowed for continued evaluation.
- Within 30 days after the defendant requests a hearing after receiving 6 months or more of treatment.
- Within 30 days after a treatment provider advises that the defendant is competent.





What determinations can be made at an additional competency hearing? [R.C. 2945.38(H)(1)-(4)]

- Defendant's competency has been restored.
- Defendant remains incompetent, but a substantial probability of restoration exists and time is still left to achieve it. The court can order the defendant to continue treatment.
- Defendant is incompetent and a substantial probability that competency can be restored exists, but time has expired for restoration. The court then has the same options as with an incompetent, unrestorable defendant above.
- Defendant is incompetent and even with treatment there is not a substantial probability that competency will be restored within 1 year. The court then has the same options as with an incompetent, unrestorable defendant above.

## Motion to Retain Jurisdiction [R.C. 2945.38, 2945.39, 2945.401]

When is a hearing to maintain jurisdiction allowed?

A motion for the trial court to maintain jurisdiction over an incompetent, unrestorable defendant is permitted only when:

1. A defendant is charged with aggravated murder, murder, first- or second-degree felony offenses of violence, or first or second-degree attempt, complicity, or conspiracy in committing one of those offenses, AND
2. The defendant has been found to be incompetent and either cannot be restored or the time period to restore competency has expired.

Who requests a hearing to maintain jurisdiction?

The prosecutor may request one, or the court may schedule one on its own.

What are the elements for maintaining jurisdiction?

The prosecutor has the burden to prove by clear and convincing evidence that the defendant both committed the offense and is a mentally ill person subject to court order and/or an intellectually disabled person subject to institutionalization by court order.<sup>20</sup>

What if the state fails to meet its burden?

The case must be dismissed and the defendant discharged unless the court or prosecutor file for civil commitment of the defendant. That dismissal is not a bar to future prosecution should the defendant be restored to competency. [R.C. 2945.39(C)]

## Common Pleas vs Probate Court Competency Definitions

It is important to note that competency to stand trial is a separate and distinct determination from the definition of incompetency in probate court. R.C. 2111.021(D) defines "incompetent" for probate court statutes as:

1. Any person who is so mentally impaired, as a result of a mental or physical illness or disability, as a result of intellectual disability, or as a result of chronic substance abuse, that the person is incapable of taking proper care of the person's self or property or fails to provide for the person's family or other persons for whom the person is charged by law to provide;
2. Any person confined to a correctional institution within this state.



Is a commitment ordered through this process considered a civil commitment?

Yes. An involuntary commitment under R.C. 2945.39 does not violate equal protection or due process because it is a civil commitment that does not grant the same constitutional protections as criminal prosecutions do.<sup>21</sup>

How long can a defendant be involuntarily committed? [R.C. 2945.401(J)]

A defendant will remain under the court's jurisdiction and involuntarily committed until:

- The trial court finds that the defendant is no longer a mentally ill person subject to court order or a person with an intellectual disability subject to institutionalization by court order,
- The expiration of the maximum sentence<sup>22</sup> that the defendant could have received if the defendant was convicted of the highest offense that was charged, or
- After another competency hearing, the trial court finds the defendant competent and orders termination of the commitment.

What are the reporting requirements? [R.C. 2945.401(C)]

The facility in which the defendant is committed must report to the trial court as to whether defendant remains subject to court order and/or whether defendant remains incompetent at the following times:

- After the initial 6 months of treatment,
- Every two years after the initial report is made,
- When the facility recommends termination of the defendant's commitment or recommends for the first time any nonsecured status for the defendant.

What factors are relevant when evaluating whether to terminate commitment or change the commitment to nonsecured status? [R.C. 2945.401(E)]

The court must consider:

- Whether the defendant currently represents a substantial risk of physical harm to self or others.
- Psychiatric and medical testimony regarding the defendant's current mental and physical conditions.
- Whether the defendant has the insight to continue treatment as prescribed or seek assistance when needed.

## Relevant Case Law

[Rance v. Watson, Slip Opinion No. 2022-Ohio-1822](#). Competency provisions of R.C. 2945.37(B) were not triggered where the trial court's statements showed that the judge ordered a psychological report, pursuant to R.C. 2947.06, as part of the presentence investigation, not as an inquiry into defendant's competency to stand trial.

[State v. Ferguson, 108 Ohio St.3d 451, 2006-Ohio-1502](#). Competency evaluation by a clinical psychologist properly considered the psychotropic medications the defendant had taken or was taking, his medical diagnoses, his suicide attempts, and his hospitalizations. Greater scrutiny is not required in conducting a competency evaluation merely because a defendant seeks to receive the death penalty.

[Weaver v. Gill, 633 F.2d 737 \(6th Cir. 1980\)](#). A defendant is not entitled to the assistance of counsel or to *Miranda* warnings at a psychiatric examination into his competency to stand trial where the results of the examination are not used against him at trial.

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- Grounds upon which the state relies for the proposed commitment.
- The defendant's history relevant to following rules and laws.
- Evidence that the defendant's mental illness is in remission and the probability that the defendant will continue treatment to maintain remissive state.

Who has the burden of proof in hearings regarding terminating or changing a commitment? [R.C. 2945.401(G)]

**Re: facility's recommendation of termination of commitment:**

To maintain the court's jurisdiction, the prosecutor must show by clear and convincing evidence that the defendant remains mentally ill or intellectually disabled subject to court order.

**Re: facility's recommendation to a less restrictive status:**

The prosecutor must show by clear and convincing evidence that the proposed changes are a threat to public safety or a threat to any person.

What are a defendant's rights at hearings regarding commitment terminations or changes? [R.C. 2945.40(C)(1)-(5)]

Defendant has a right:

- To attend hearings.
- To counsel.
- To independent expert evaluation.
- To subpoena witnesses and documents.
- To present evidence.
- To cross-examine witnesses.
- To testify or not be compelled to testify.
- To have copies of any relevant medical or mental health document in the custody of the state, unless release of such a document would create substantial risk of harm to any person.

**Relevant Case Law, Continued**

*State v. Montgomery*, 148 Ohio St.3d 347, 2016-Ohio-5487.

Three-judge panel in a capital case did not err by failing to sua sponte order defendant to undergo a competency evaluation, as no request was made to evaluate defendant's competency before or during the plea hearing, and defendant's behavior throughout the plea colloquy and hearing was not outrageous, irrational, or confused.

*State v. Craig*, 159 Ohio St.3d 398, 2020-Ohio-455.

When a criminal defendant is convicted and sentenced on fewer than all counts of a multicount indictment and the state is prevented from retrying the defendant on the remaining counts after a mistrial due to a later finding that the defendant is incompetent to stand trial, the incompetency finding operates to sever the charges, and the defendant may appeal his conviction and sentence.

*State v. Hix*, 38 Ohio St.3d 129, 527 N.E.2d 784 (1988).

A defendant does not have the right to an independent psychiatric examiner, pursuant to R.C. 2945.39(C), unless the trial court has ordered more than one psychiatric evaluation and the trial court has refused to appoint an examiner recommended by the defendant.



## Endnotes

- 1 See *State v. Bock*, 28 Ohio St. 3d 108, 110 (1986) – “Incompetency must not be equated with mere mental or emotional instability or even with outright insanity. A defendant may be emotionally disturbed or even psychotic and still be capable of understanding the charges against him and of assisting his counsel.”
- 2 *State v. Chapin*, 67 Ohio St. 2d 437, 439 (1981) citing *Pate v. Robinson*, 383 U.S. 375 (1966), and *Drope v. Missouri*, 420 U.S. 162 (1975).
- 3 These statutory timelines have been held to be “directory rather than mandatory.” See *State v. Brown*, 2018-Ohio-2635 (4th Dist.) ¶26, citing *State v. Hilyard*, 2005-Ohio-4957 (4th Dist.).
- 4 See Appendix D <https://mha.ohio.gov/static/AboutUs/MediaCenter/PublicationsandFactSheets/ohio-forensic-manual.pdf> or for more guidance contact OMHAS Director of Forensic Services, Lisa Gordish, PsyD, [lisa.gordish@mha.ohio.gov](mailto:lisa.gordish@mha.ohio.gov).
- 5 *State v. Lewis*, 2017-Ohio-461, ¶29 (8th Dist.)
- 6 *State v. Palmer*, 84 Ohio St.3d 103 (1998)
- 7 A “person with an intellectual disability subject to institutionalization by court order” is defined by R.C. 5123.01(O) as “a person eighteen years of age or older with at least a moderate level of intellectual disability and in relation to whom, because of the person’s disability, either of the following conditions exists:
  - a. The person represents a very substantial risk of physical impairment or injury to self as manifested by evidence that the person is unable to provide for and is not providing for the person’s most basic physical needs and that provision for those needs is not available in the community.
  - b. The person needs and is susceptible to significant habilitation in an institution.” Under R.C. 2945.371(I), a defendant who suffers from an intellectual disability, and who, in the opinion of the competency examiner appears to be subject to institutionalization by court order, must have a separate intellectual disability evaluation performed before a final competency hearing is held under R.C. 2945.37(B-H).
- 8 R.C. 2945.371 uses different language than R.C. 2945.38. Under these statutes, the trial court makes a finding of “substantial probability” of restoration, whereas the examiner’s report opines on “likelihood” of restoration.
- 9 A defendant may be required to undergo treatment for the purpose of restoration of competency to stand trial for a period of 6 months to 1 year, depending on the severity of the felony offense, and 30 days to 60 days depending on the severity of the misdemeanor offense. R.C. 2945.38(C).
- 10 See *State v. Neyland*, 139 Ohio St.3d 353, 2014-Ohio-1914, ¶59, citing *State v. Cowans*, 87 Ohio St.3d 68, 84, 1999-Ohio-250.
- 11 OMHAS has been funding initial competency evaluations in common-pleas courts.
- 12 Adult defendants found competent who are receiving medication to maintain competence may be ordered by the court to submit to continued administration of the medication (see “Forced Medication Hearings” on page 5).
- 13 R.C. 2945.371 uses different language than R.C. 2945.38. Under these statutes the trial court makes a finding of “substantial probability” of restoration, whereas the examiner’s report opines on “likelihood” of restoration.
- 14 A defendant may be required to undergo treatment for the purpose of restoration of competency to stand trial for a period of 6 months to 1 year, depending upon the severity of the felony offense, and 30 days to 60 days depending on the severity of the misdemeanor offense. R.C. 2945.38(C).
- 15 R.C. 2945.38(B)(1)(a)(ii) – this additional 4-month evaluation period is available only for defendants facing felony charges.
- 16 As provided for under R.C. Chapters 5122 or 5123.
- 17 Only applies to R.C. 2945.38(C)(1) offenses: aggravated murder, murder, first- or second-degree felony offenses of violence, or first- or second-degree attempt, complicity, or conspiracy in committing one of those offenses.



## Endnotes, Continued

- 18 As provided for under R.C. Chapters 5122 or 5123.
- 19 There is a discrepancy in R.C. 2945.38(B) (1) (a) (v) (II). The accepted interpretation and usual practice is to choose dismissal or file the affidavit for probate.
- 20 For an in-depth review of the elements required in a continuing-jurisdiction finding, as well as its distinctions from the competency finding itself, see [\*State v. Decker\*, 2017-Ohio-4266](#) (10th Dist.). *Decker* was reconsidered on ineffective-assistance grounds in [\*State v. Decker\*, 2020-Ohio-1464](#).
- 21 [\*State v. Williams\*, 126 Ohio St.3d 65, 2010-Ohio-2453](#).
- 22 R.C. 2945.401(J) (1) (b) places the limit at the maximum prison term that the defendant could have received for the most serious offense charged. The statute is unclear if this is the “maximum term” under Ohio’s non-life felony indefinite sentencing scheme instituted by 132 GA SB 201 in 2019.