

*Implications for Law, Policy, Clinical Practice*

# Incompetent to Proceed and Sexual Offender Civil Commitment

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Twenty states and the federal government currently have statutes allowing for the indefinite, involuntary commitment of sexual offenders who meet certain criteria, and other states continue to consider enacting similar legislation. Sexual offender civil commitment (SOCC) is predicated on the idea that certain offenders pose such an inordinate and unmanageable risk to the community that they must be preventively detained while they attend treatment designed to address identified criminogenic needs and risk factors.

This article focuses on a unique and specific subset of those held in SOCC treatment facilities, specifically, those with medical, psychiatric, or other symptoms that render them incompetent to stand trial (IST) in their civil commitment proceedings. This subpopulation presents a unique array of challenges for legal and mental health practitioners, not only due to their complex and multifaceted treatment needs, but also considering that the civil nature of their pending commitment differentiates them from the more typical IST cases carried out in the context of criminal proceedings. This article addresses the legal, policy, and clinical issues associated with competency to stand trial and sexual offender civil commitment, focusing on the competency

restoration program offered at the Florida Civil Commitment Center.

## **Competency to Stand Trial in Criminal Proceedings**

In cases in which a person accused of criminal wrongdoing presents medical, psychiatric, or other limitations that may serve to impede their ability to understand or fully participate in legal proceedings, the court will consider evidence as to the accused's competency to stand trial. While adjudicative competence may have some high degree of concordance with medical, psychiatric, or psychological perspectives, it is actually a legal construct, ultimately decided by a judge or other trier-of-fact. Indeed, it is common for the court to hear expert evidence from psychiatrists or other professionals that the individual is unable to fully comprehend the legal process or is unable to assist counsel, but still judge the accused to be competent to stand trial.

## **Typical Procedures: Competency Restoration in Forensic Settings**

In Florida, as in most other jurisdictions, a finding of incompetent to proceed to trial due to mental illness typically triggers a transfer to a state mental hospital or forensic treatment center. Under the terms of the commitment, the defendant is engaged in treatment designed to restore him or her to competency, so that the trial may eventually proceed. (Florida Department of Children and Families Operating Procedures, CFOP 155-19.) This operating procedure applies to all individuals committed involuntarily for treatment to the Department as incompetent to proceed under Florida statutes.

Accordingly, competency restoration programs are commonplace in public mental health facilities, with competency typically restored via the administration of medication and exposure to various group treatment options (e.g., illness awareness, medication management, anger management, spirituality, substance abuse, etc.), and participation in competency groups. These treatment processes require involvement of and encouragement by recovery team

members (e.g., rehabilitation specialists, recovery specialists, social workers, and substance abuse counselors, as well as mental health technicians). Continuous assessment is also an important component, as the ultimate goal is to restore competency as quickly as possible.

Under typical IST competency restoration protocols, a licensed psychologist evaluates Florida competency restoration candidates within five days of admission using a variation of a Competency Assessment Tool (CAT) specified in CFOP 155-19. (For an example, see Jeffrey S. Janofsky, Richard J. McCarthy, and Marshal F. Foistein, "The Hopkins Competency Assessment Test: A Brief Method for Evaluating Patients' Capacity to Give Informed Consent," 43 Hosp. Comm. Psych. 132-36 (1992).) Following this assessment, the resident is formally introduced to the recovery team and placed into appropriate groups, in which attendance is mandatory. Although residents in the program are continuously assessed for competency, formal reassessment using the CAT occurs every 30 days. Clinical staff members are encouraged to communicate even minimal progress to the psychologist on the resident's recovery team, so that they can follow up immediately, as a CAT may be completed at any time. If the psychologist finds a resident competent, a competency report is written within five business days and submitted to the presiding judge in the case.

## **Competency and Sexual Offender Civil Commitment: Statutory "Gray Zone"**

As suggested above, the rules of civil procedure are clear regarding competency to stand trial as it relates to criminal proceedings. In general forensic conditions, the accused must have an understanding of the charges against him or her and must be able to appreciate the seriousness of the charges. However, this does not necessarily apply to rules of civil procedure regarding competency and SOCC.

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In Florida (F.S. §§ 916, 2010), competency in regard to criminal proceedings is defined as follows:

“Incompetent to proceed” means unable to proceed at any material stage of a criminal proceeding, which shall include trial of the case, pre-trial hearings involving questions of fact on which the defendant might be expected to testify, entry of a plea, proceedings for violation of probation or violation of community control, sentencing, and hearings on issues regarding a defendant’s failure to comply with court orders or conditions or other matters in which the mental competence of the defendant is necessary for a just resolution of the issues being considered.

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The statute further stated that persons found by the court to be incompetent to stand trial are sent to a forensic facility to undergo treatment to address their incompetent status. “Forensic facility” is defined as:

[a] separate and secure facility established within the department or agency to serve forensic clients. A separate and secure facility means a security-grade building for the purpose of separately housing persons who have mental illness from persons with retardation or autism and separately housing persons who have been involuntarily committed pursuant to this chapter from non-forensic residents.

**SOC defense Not Specifically Referenced.** While these criteria are fairly well defined, F.S. § 916 does not specifically reference sex offender civil commitment. The laws were designed specifically for application to persons facing criminal prosecution, which is not the case in regard to SOCC (a civil proceeding in which those before the court have already satisfied their criminal sanction). Practical experience in Florida

suggests that the court presumes that persons facing SOCC will understand that they are facing involuntary civil commitment as a sexually violent predator, and that they also have an adequate understanding of the SVP statute (F.S. §§ 394.910–394.931) and the criteria for being so-designated.

**Competent to Challenge.** In a notable Florida appellate decision, however, the court determined that a respondent had to be competent to challenge, during the SVP trial, the presentation of evidence regarding previously unprosecuted sexual misconduct. (*In re Branch*, 890 So. 2d 322 (Fla. 2nd DCA, 2004).) The court also indicated that the criminal standard with respect to competency to stand trial did not hold, but failed to suggest an alternative formulation. (Amanda M. Fanniff, Randy K. Otto, and John Petrala, “Competence to Proceed in

Since January 1, 1999, all sexual offenders held in Florida prisons have been screened by the Florida Department of Children and Families for possible referral to the courts as candidates for involuntary civil commitment at the FCCC. Over the 12 years that the FCCC has been in existence, almost 39,000 sexual offenders have been screened, but fewer than 700 (1.7%) have been adjudicated as SVPs, which demonstrates the uniqueness of the class of offenders to which such laws have been applied.

**Mandated to Provide Competency Restoration Treatment.** For those FCCC residents whom the court has judged to be incompetent to proceed, the Florida Civil Commitment Center is mandated by the Department of Children and Families to provide competency restoration treatment. To our knowledge, we are the first and only SOCC center to formally take on this challenge. At the FCCC, we have designed a competency restoration program quite similar to that offered in Florida’s forensic treatment centers, where incompetent criminal defendants receive treatment.

The FCCC’s competency restoration program is offered in a group format three times a week for one hour. In addition to groups, all residents receive individual case management and integrated care planning services from their designated case managers. All competency restoration participants have an assigned psychiatrist who monitors their need for pharmacologic assistance. Typically, participants in this program have a diagnosis of a severe and persistent mental illness (SPMI) and are maintained in the residential mental health unit (RMHU). The RMHU is a locked inpatient psychiatric ward within the secure perimeter of the greater FCCC. RMHU residents are provided with intensive psychotherapy groups and other services, along with other SPMI residents who have not been judged as incompetent. Incompetent residents may participate in the incompetent to proceed (ITP) program as long as necessary.

**Periodic Competency Evaluations.** As with competency restoration programs operated on behalf of the criminal courts, the facilitators of the FCCC’s competency restoration program are trained and certified Florida forensic examiners. Competency evaluations are sent to the court every six months after the resident is judged incompetent to proceed, or as requested by the courts, until competency is restored or the resident is found nonrestorable and the court renders

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a decision. As noted above, Florida has no statute specific to the issue of competency as it applies to sexual offender civil commitment. As such, we use the same policies and procedures as those in place in forensic treatment centers. However, this presents difficulties.

### **FCCC's Application of F.S. § 916 to Program**

In general forensic settings, there are six factors generally targeted in competency restoration treatment protocols, namely:

1. Capacity to appreciate charges or allegations.
2. Capacity to appreciate the range and nature of possible penalties that may be imposed.
3. Capacity to understand the adversarial nature of the legal process.
4. Capacity to disclose to attorney facts pertinent to the proceedings.
5. Capacity to manifest appropriate court-room behavior.
6. Capacity to testify relevantly.

FCCC's competency restoration program has adapted F.S. § 916 in various ways since the program's implementation in December 2007. To accommodate the unique aspects of the SOCC process, the FCCC adjustments had to be made in the wording of some of the six factors for competency. For example, "Capacity to appreciate the range and nature of possible *penalties* which may be imposed" was adjusted to read "Capacity to appreciate the range and nature of possible *outcomes* which may be imposed." This is important when conceptualizing the difference between the criminal side of the legal system (i.e., pre-adjudication) and the civil side of the legal system (i.e., civil commitment as a sexually violent predator). The typical detainee at FCCC usually expresses frustration about why he is being "locked-up" for an offense he was already convicted of and served time for (hence, *penalties* versus *outcomes*). As such, the task of explaining the added complexities of competency and SVP civil commitment becomes extremely challenging. Notably, FCCC residents exhibit varying degrees of functioning, and have been deemed incompetent for various reasons. Subsequently, they would be appropriately viewed as a subset of FCCC's special needs population (e.g., those residents with intellectual disabilities, severe learning disabilities, or other cognitive

processing impediments), regardless of their restorability. Nonetheless, the majority of the six factors are applicable to FCCC and our efforts to address the issues posed by these clients. The main challenge lies in achieving both an adjudicative competence (basic knowledge about the legal system) and decisional competence (the ability to make rational decisions for oneself) within what can be referred to as a "hybrid application" of F.S. § 916 at FCCC.

### **Program Data and Outcomes**

Twenty residents have participated in the FCCC's competency restoration program since its inception in December 2007. Of those, 11 have been restored to competency, with seven pending a response from the court, two having been civilly committed as SVPs at trial, and two having been released from the facility. Four residents have been deemed nonrestorable by the competency restoration team, with final disposition by the court still pending as of this writing. Of the five remaining residents—all of whom were most recently assessed as still incompetent to proceed—one is deceased, one was released, and the other three are pending further competency evaluations. All FCCC residents who are or have been part of the competency restoration program, and who are not yet committed, are eligible to continue to attend group sessions. At present, 12 residents are eligible to participate, with attendance levels averaging nine to 10 per session.

### **Clinical and Legal Challenges, Issues**

With no precise legal framework regarding competency that applies specifically to sex offender civil commitment, a number of legal and practical issues impinge on resident care. These issues are most apparent in those cases in which the competency restoration team determines a resident to be nonrestorable. SOCC laws have two primary goals—preventive detention and provision of treatment intended to assist clients in preparing for eventual safe return to the community.

For those persons who are preventively detained but cannot proceed to their civil commitment trial, because of nonrestorable competency, case disposition emerges as a prominent legal and clinical issue. In typical forensic proceedings in Florida, patients adjudicated in court as nonrestorable are either transferred to a state civil hospital for involuntary inpatient placement, or are released to the community. At present, FCCC residents deemed nonrestorable continue to participate in our competency

restoration program at the civil commitment center. They may also attend other programming designed to improve overall mental health; however, they are generally unable to attend sexual behavior process group treatment. They are not typically referred to state civil hospitals, nor have any been released to the community.

The fact that FCCC residents deemed nonrestorable are not referred to state civil hospitals or released may present as a dilemma for some. Certainly, there are often deviations from standard practice when persons at high risk to engage in sexual violence are involved. However, it would be our contention that maintaining these patients at the FCCC may actually increase their standard of clinical care or general life circumstances.

First, it is unlikely that these patients would be released outright, given the complexities of their clinical and risk management profiles. Further, a nonrestorable FCCC resident sent to a state civil hospital would likely go there designated as a "sexual predator." This would necessarily highlight their presence at the facility to both staff and other patients. Regarding the former, staff at state civil facilities may not be fully aware of the unique treatment and risk management needs of persons with entrenched or paraphilic sexual deviance. As such, these patients may not receive appropriate treatment and, without appropriate risk management, sexual predators sent to state civil hospitals may ultimately represent a risk to other, more vulnerable patients in those facilities. Regarding other patients, the risks posed to sexual offenders by other residents or inmates in mixed detention populations are well known.

### **Procedures Not Yet Fully Delineated**

Competency restoration procedures in sexual offender civil commitment centers are as yet not fully delineated. To our knowledge, only the Florida Civil Commitment Center has formally established policy and practice in this regard. Our experience has been that such programming in the SOCC milieu is remarkably similar to that in traditional forensic hospitals, with the notable exception of what potentially occurs when an SOCC resident is judged "nonrestorable." To date, our program appears to have successfully addressed the competency restoration needs of some of our clients. Current practice is to maintain nonrestorable clients at the civil commitment center, where they continue to participate in programming pending review by the court. ■