CHAPTER 5

Evaluation and Commitment of Criminal Defendants and Insanity Acquittees

Scope Note

This chapter covers the substantive law and procedural requirements applicable in criminal proceedings when a defendant's competence to stand trial or criminal responsibility is at issue.

§ 5.1 INTRODUCTION

If the competence or criminal responsibility of a defendant in a criminal case is at issue, criminal defense attorneys must have a working knowledge of the substantive and procedural mental health law applicable in criminal proceedings. Some of the basics of forensic mental health practice are not widely known, and there may be people in the courtroom, including judges, who lack a clear understanding of the process. There are several explanations for this, including the relative few forensic mental health cases, the complexity of the procedures, and the mystique of psychiatry. However, one seems particularly apt: defendants who are thought to have mental illness or intellectual disability are often seen as problems for the human services and mental health system and not the criminal justice system. This is one of the focuses of the movement for specialty courts and diversion programs.

Caution must be used when a client has the option to participate in a diversion program or specialty court. While individuals with serious mental illness are grossly overrepresented in the criminal justice system, they are also disproportionally likely to fail under correctional supervision. Skeem, et al., "Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction," 35 *Law & Hum. Behav.* 110 (2010); Peters, et al., "Evidence-based treatment and supervision practices for co-

occurring mental and substance use disorders in the criminal justice system." 43 The American Journal of Drug and Alcohol Abuse 475 (2017). As probationers and parolees, they are more likely to have their community supervision suspended or revoked. Skeem, et al., "Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction," 35 *Law & Hum. Behav.* at 110. Skeem and her colleagues concluded that "system bias and stigma—not criminal behavior—plays a role in community supervision failure." Skeem, et al., "Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction," 35 *Law & Hum. Behav.* at 111. The option of inpatient psychiatric treatment may be no less inviting; especially confinement at the Department of Correction–operated Bridgewater State Hospital. This has been made obvious by a series of articles in the *Boston Globe* (*see* http://www.bostonglobe.com/metro/2014/05/01/patients-file-class-action-lawsuit-against-troubled-bridgewater-state-hospital/LDMqqoAsR924Ga5G1hiL7I/story.html) and a report from the Disability Law Center (*see* https://www.dlc-ma.org/wp-content/uploads/2018/05/May-18-2018-Report-to-the-Legislature-FINAL.pdf).

§ 5.2 PRELIMINARY EXAMINATION

Pursuant to G.L. c. 123, § 15(a), at any time after indictment or complaint, if the court doubts that a defendant is competent to stand trial, or, under the limited circumstances it doubts that a defendant is criminally responsible, it may order an examination to be conducted by one or more qualified physicians or psychologists. Preliminary Section 15(a) examinations, which are usually conducted by a court clinician, should be more than cursory. *See* Massachusetts Department of Mental Health Forensic Services G.L. c. 123, § 15(a) Report Writing Guidelines (2008), *available at* https://www.mass.gov/files/documents/2016/07/mq/mgl-guidelines.pdf. They require a written report that includes a review and discussion of identifying data, structure of the evaluation, background information and clinical data, mental status and observations of the defendant, data relevant to competence to stand trial and criminal responsibility, and a final section with an assessment and recommendations. The latter section should include opinions regarding

- mental illness or defect,
- the need for further evaluations of competence,
- the need for further evaluation for criminal responsibility,
- recommended disposition, and
- whether there is a need for treatment.

The report should state the reasons for further treatment, whether it needs to be inpatient, and, if inpatient and at Bridgewater State Hospital, the reasons the defendant needs strict security. If the evaluator believes that "further evaluation is not necessary because the defendant is clearly incompetent to stand trial, and appears in need of hospital level care, the evaluator may" recommend proceeding to a commitment under G.L. c. 123, § 16.

If, following the preliminary examination under Section 15(a), there is a need for further evaluation, counsel may request an extended Section 15(a) evaluation. This takes place in the community, in lieu of a Section 15(b) inpatient evaluation in which the client is held as an inpatient at a DMH facility or Bridgewater for at least twenty and potentially forty days. Avoiding the twenty- or forty-day inpatient evaluation helps ensure that the client is not at risk of losing housing, employment, and community connections they may have. If the client is held on bail or held without bail, it is also possible to request an extended Section 15(a) evaluation at the jail, as opposed to in a DMH facility or Bridgewater. These options should be thoroughly explored and discussed with the client.

§ 5.3 COMPETENCE TO STAND TRIAL VERSUS CRIMINAL RESPONSIBILITY EXAMINATIONS

A preliminary competence examination under G.L. c. 123, § 15(a) must be ordered if the court has substantial doubt as to a defendant's competence to stand trial. *Commonwealth v. Hill*, 375 Mass. 50, 54 (1978). The court must revisit the issue whenever the defendant's conduct during trial raises a "substantial question of possible doubt as to competence." *Commonwealth v. Martin*, 35 Mass. App. Ct. 96, 98 (1993). Conversely, the court may deny a defendant's request for a competence examination even if the defendant is behaving irrationally during trial. *Commonwealth v. Burkett*, 5 Mass. App. Ct. 901, 902 (1977) (judge believed defendant's actions in removing his clothes and crawling around dock were not due to mental illness, but instead were ruse to obtain better chance of escape; defendant previously escaped from furlough); *Commonwealth v. Robidoux*, 450 Mass. 144, 153 (2007) (defendant's refusal to pursue plausible lack of responsibility defense does not alone raise substantial question of possible doubt as to competence to stand trial).

General Laws c. 123, §§ 15(a) and 15(b) appear to permit the court to order a criminal responsibility examination whenever it questions the defendant's responsibility. However, such an examination may be ordered only if the defense intends to raise, or the court finds that it is reasonably likely that the defense will raise, lack of responsibility as an affirmative defense, and the defendant's expert will rely on the defendant's statements in whole or in part. Mass. R. Crim. P. 14(b)(2); *Blaisdell v. Commonwealth*, 372 Mass. 753, 766 (1977). The prosecution is entitled to notice of the defendant's intention to raise a defense of lack of criminal responsibility. Mass. R. Crim. P. 14(b)(2)(A). Discovery by the prosecution of the contents of a court-ordered criminal responsibility examination and report is strictly limited under *Blaisdell* and Mass. R. Crim. P. 14.

The Supreme Judicial Court has extended the scope of Rule 14(b)(2) to cover other defense claims based on mental impairment or lack of capacity. *Commonwealth v. Diaz*, 431 Mass. 822 (2000) (capacity to entertain mens rea); *Commonwealth v. Ostrander*, 441 Mass. 344 (2004) (capacity to voluntarily waive Miranda rights); *Commonwealth v. Grey*, 399 Mass. 469 (1987) (capacity to form specific intent); *see also* Mass. R. Crim. P. 14(b)(2) and reporter's note (2016), *available at* https://www.mass.gov/rules-of-criminal-procedure/criminal-procedure-rule-14-pretrial-discovery#-b-

special-procedures; *cf. Commonwealth v. Contos*, 435 Mass. 19, 23–25 (2001) (Commonwealth's scheduling of psychiatric exam, without notice, did not violate defendant's right to counsel).

§ 5.4 FORENSIC EXAMINATIONS

A qualified physician, for purposes of examinations under Sections 15(a) and 15(b), is a physician certified as a designated forensic psychiatrist pursuant to the Department of Mental Health (DMH) Regulations at 104 C.M.R. § 33.03. Similarly, a qualified psychologist is a psychologist certified as a designated forensic psychologist pursuant to 104 C.M.R. § 33.03. Both are referred to as forensic clinicians. Social workers, rehabilitation counselors, and others with similar positions may not perform forensic evaluations under the statute.

The forensic clinician's Section 15(a) report must be written and must include clinical findings as to the defendant's competence to stand trial, the defendant's criminal responsibility, or both, as well as the clinician's opinion as to whether the defendant is in need of mental health care and treatment. G.L. c. 123, § 15(c).

The decision as to whether to submit to a court-ordered competence to stand trial or criminal responsibility examination is a critical stage of the criminal proceeding and, therefore, the right to counsel attaches. *Estelle v. Smith*, 451 U.S. 454 (1981). Thus, a defendant must be afforded the opportunity to consult with their attorney prior to the examination.

§ 5.4.1 Practice Advisory

Prior to the ordering of an evaluation under G.L. c. 123, § 15(a), counsel must be appointed if the defendant is indigent. Counsel must be afforded the opportunity to consult with and advise the defendant and be heard concerning the necessity of the evaluation. *Estelle v. Smith*, 451 U.S. 454 (1981) (forensic evaluation is critical stage of criminal proceeding; court must inform defendant and counsel of purpose of evaluation and afford defendant and counsel opportunity to consult as to whether defendant should submit thereto). Where appropriate, the record should indicate counsel's opposition to the preliminary evaluation. Where an affirmative defense of lack of criminal responsibility is not contemplated, counsel should object to a court-ordered responsibility examination. If an examination is ordered despite objection, counsel should advise the defendant not to discuss anything concerning the alleged crime or the defendant's mental condition at the time of the alleged crime.

Counsel has a duty to raise competence, if there are substantial indications that the defendant is not competent to stand trial or enter a plea. This is not a strategic choice, "but counsel has a settled obligation under Massachusetts law (citations omitted) and under federal law as well to raise the issue with the trial judge and ordinarily to seek a competency examination." *Robidoux v. O'Brien*, 643 F.3d 334, 338–39 (1st Cir. Mass. 2011); *see Commonwealth v. Vailes*, 360 Mass. 522 (1971) (incompetent defendant

cannot be tried); *Commonwealth v. DelVerde*, 398 Mass. 288 (1986) (incompetent defendant cannot enter into plea agreement); *ABA Criminal Justice Mental Health Standards*, Standard 7-4.2(c), "Responsibility for raising the issue of incompetence to stand trial."

Whenever a defendant's competence to stand trial or criminal responsibility is likely to be at issue, counsel should obtain a signed release from the defendant authorizing counsel to review all medical and mental health records and to talk with therapists, counselors, and others having pertinent information. Where the defendant is unable to provide such authorization, counsel should seek court authorization to do so. An authorization to release records or court authorization may not be necessary for counsel to access a client's records or to elicit information from mental health providers. *See* G.L. c. 123, § 36. However, obtaining a release will further counsel's efforts to establish a trusting and cooperative relationship with their client, while having a court order in hand will speed the process of obtaining hospital records and gleaning information from reluctant and wary hospital staff.

Counsel should advise the defendant of

- the purpose of the examination;
- the right to refuse to speak with the forensic clinician (*cf. Sheridan, petitioner*, 412 Mass. 599, 604 (1992));
- the use to which information will be put, and that the communications are not privileged; and
- counsel's recommendation regarding whether the defendant should speak with the forensic clinician.

Counsel, with the defendant's consent, should seek to be present during a court-ordered competence and responsibility examination. The court has discretion as to whether to allow counsel's attendance. *Commonwealth v. Trapp*, 423 Mass. 356, 358–59 (1996) (decision to undergo psychiatric evaluation is critical stage in criminal proceeding, therefore right to counsel attaches; however, interview itself is not, therefore no right to presence of counsel). Where counsel's attendance is denied, counsel should consider seeking permission to record audio or video of the examinations. Again, the court has discretion over whether to allow any such recording. *Commonwealth v. Baldwin*, 426 Mass. 105, 113 (1997) (audiotaping); *Commonwealth v. Lo*, 428 Mass. 45, 47–48 (1998) (videotaping).

Rarely should a forensic clinician seek to elicit the defendant's version of the facts surrounding the alleged criminal conduct during a competence to stand trial evaluation. To do so implicates the defendant's rights under the Fifth Amendment to the U.S. Constitution and Article 12 of the Massachusetts Constitution. In all but the most unusual cases, such information is not clinically necessary. Unlike a criminal responsibility evaluation, where the defendant's thoughts, mood, and perceptions at the time of the alleged crime are of necessity the primary focus of the clinician's inquiry, for purposes of a competence evaluation, such information is irrelevant. The only information concerning the alleged crime that a clinician need elicit from the defendant in

the competence to stand trial context is whether the defendant understands what crime has been charged and what the potential consequences may be. *Cf. Seng v. Commonwealth*, 445 Mass. 536 (2005).

Any statement made by a defendant to a forensic clinician during a competence or criminal responsibility evaluation may be admitted in evidence only for those purposes. Any statement that constitutes an admission of guilt of the crime charged is inadmissible for any purpose. G.L. c. 233, § 23B; Mass. R. Crim. P. 14(5)(2)(B)(iii). Further, inculpatory statements constituting admissions short of a full acknowledgment of guilt, as well as evidence discovered as fruits of such statements, are also inadmissible. "In the circumstances of a competency examination, G.L. c. 233, § 23B, together with the judge-imposed strictures of rule 14(b)(2)(B)(ii), protects the defendant's privilege against self-incrimination." *Seng v. Commonwealth*, 445 Mass. at 548. However, if a defendant gives notice of their intent to offer expert testimony regarding a mental impairment, based in part on the defendant's statements, and then offers expert testimony at trial, the defendant waives the constitutional privilege against self-incrimination and opens the door for rebuttal evidence on the issue of mental impairment. *Commonwealth v. Harris*, 468 Mass. 429, 448–49 (2014).

Where strategically helpful, and with the defendant's consent, counsel should provide the forensic clinician with pertinent information concerning the mental health history and preferences as to treatment and placement. Counsel's impressions as to the defendant's ability to communicate with and assist counsel will be of particular significance. Counsel also should ask the forensic clinician to assess the defendant's ability to undergo a more extensive competence or criminal responsibility examination on an outpatient basis and that a recommendation to that effect is incorporated into the forensic clinician's report. Counsel should discuss the forensic clinician's findings and recommendations with the forensic clinician and, if appropriate, ask that the report indicate the defendant's inability to await trial in a penal setting.

As soon as counsel determines that competence to stand trial or criminal responsibility may be at issue, they should discuss with the defendant the appropriateness of securing the services of an independent clinician to assist in the preparation and presentation of the defense. If counsel and client concur with the forensic clinician's findings as to competence, counsel can enter into a stipulation on the issue. If counsel and client do not concur, a motion for funds for an independent evaluation pursuant to G.L. c. 261, § 27B should be filed.

§ 5.5 FURTHER EXAMINATION

Pursuant to G.L. c. 123, § 15(b), the court may order a further, more comprehensive examination of the defendant's competence to stand trial if it is unable to make a finding as to competence on the basis of the preliminary examination conducted pursuant to G.L. c. 123, § 15(a). Similarly, the court may, in limited circumstances, order a further examination of criminal responsibility.

§ 5.6 INPATIENT EXAMINATIONS

Where the court finds that an inpatient examination is necessary, it may order the defendant hospitalized at a DMH or private mental health facility or, if the defendant is male and requires strict security, at the Bridgewater State Hospital (Bridgewater). While a finding of the need for strict security is required before ordering a defendant to Bridgewater, strict security is not defined in the statute or case law. The defendant may be held at the facility for a period not to exceed twenty days. The court may extend the inpatient examination for an additional twenty days on written request of the facility. G.L. c. 123, § 15(b). *See* Massachusetts Department of Mental Health Forensic Services G.L. c. 123, § 15(b) Report Writing Guidelines, *available at* https://www.mass.gov/files/documents/2016/07/vw/15b-report-writing-manual-cst-cr-appendix.pdf. While inpatient forensic examinations may be conducted at appropriately licensed private mental health facilities, virtually all such examinations are conducted at DMH facilities or at Bridgewater. Copies of the preliminary Section 15(a) report and the complaint or indictment should accompany the defendant to the facility or Bridgewater.

After the Section 15(b) evaluation is completed, the defendant may request to remain at the facility during the pendency of the criminal proceedings. The court may grant such a request (often referred to as a "Section 15(b) remand") only if the director of the facility or Bridgewater agrees. G.L. c. 123, § 15(b). During an inpatient admission, the facility or Bridgewater may petition for the defendant's commitment under G.L. c. 123, § 16(b).

§ 5.7 DISSEMINATION OF REPORTS

After the competency evaluation is completed, the forensic psychiatrist or psychologist must file with the court a signed, written report of clinical findings bearing on the issue of competence to stand trial or criminal responsibility and an opinion, supported by clinical findings, as to whether the defendant is in need of treatment and care. G.L. c. 123, § 15(c). Copies of the competence report should be available to both defense counsel and the Commonwealth. As with preliminary Section 15(a) examinations, any statement made by a defendant to a clinician during a competence or criminal responsibility evaluation may be admitted in evidence only for the purposes of determining competence or criminal responsibility. Any statement that constitutes an admission of guilt of the crime charged is inadmissible for any purpose. G.L. c. 233, § 23B; Mass. R. Crim. P. 14(b)(2)(B)(ii). Further, inculpatory statements constituting admissions short of a full acknowledgment of guilt, as well as evidence discovered as fruits of such statements, are also inadmissible. *Seng v. Commonwealth*, 445 Mass. 536 (2005). If the report contains such admissions or inculpatory statements, counsel should move to purge them from the report prior to its dissemination to the Commonwealth. Counsel may also want to consider whether to file a motion for a protective order to prohibit the Commonwealth from further disclosure of the report.

Criminal responsibility reports are sealed and not available to either party (*Blaisdell v. Commonwealth*, 372 Mass. 753, 766 (1977)) unless the court determines that the report contains

> no matter, information, or evidence which is based upon statements of the defendant as to his or her mental condition at the relevant time of, or criminal responsibility for, the alleged crime, or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) during trial the defendant raises the defense of lack of criminal responsibility and the judge is satisfied that (1) the defendant intends to testify or (2) the defendant intends to offer expert testimony based in whole or in part upon statements of the defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime. If a psychiatric report contains both privileged and nonprivileged matter, the court may, if feasible, at such time as it deems appropriate, make available to the parties the nonprivileged portions.

Mass. R. Crim. P. 14(b)(2)(B)(iii).

§ 5.7.1 Practice Advisory

While G.L. c. 123, § 15(b) does not require that examinations be performed at a DMH facility or Bridgewater, most courts routinely order inpatient examinations. Generally, counsel should insist on a hearing as to the necessity of an inpatient examination. The most important evidence at such a hearing will likely be that of the forensic psychiatrist or psychologist who conducted the preliminary examination under G.L. c. 123, § 15(a). Therefore, counsel should always ask this forensic clinician to assess the defendant's ability and willingness to undergo a Section 15(b) examination on an outpatient basis and, if helpful, ask that a recommendation to that effect be incorporated into the clinician's report.

The chief justice of the District Court Department issued guidelines as to when examinations at Bridgewater are appropriate. Dist. Ct. Dep't Bulletin No. 6-80 (Dec. 8, 1980), cited in Engle, *Representing the Mentally Impaired Defendant*, Mental Health Legal Advisors Committee (1985). The guideline states as follows:

> A male should only be sent to Bridgewater if he cannot be properly assessed in a less secure facility and if the following guidelines are met:
>
> The male is charged with a major felony (murder, rape, arson, assault with intent to murder) and a qualified psychiatrist believes an inpatient evaluation is required.

> If the male is not charged with a major felony there should be evidence of an acute risk of assaultive or homicidal behavior that would justify sending the person to a hospital with strict security.

Unless the defendant prefers to be examined at Bridgewater, counsel should oppose any such order absent a finding, after a hearing, that strict security is necessary. DMH and Bridgewater will often request, and be granted, twenty-day extensions of the initial twenty-day observation period. Thus, examinations often are not commenced until well into the first twenty-day period. Such extensions are typically sought only for the convenience of the clinical staff, not because an examination is particularly difficult to complete. Early and persistent inquiries by counsel as to the status of an examination may prompt the facility to conduct a timely examination. Counsel should always question the necessity of an extension and, where appropriate, object and insist on a hearing. As with the Section 15(a) examination, counsel should advise the defendant of

- the purpose of the examination;
- the right to refuse to speak with the forensic clinician (*cf. Sheridan, petitioner*, 412 Mass. 599 (1992));
- the use to which information will be put;
- the lack of privilege applying to the communications; and
- counsel's recommendation regarding whether the defendant should speak with the forensic clinician.

Counsel, with the defendant's consent, should seek to be present during court-ordered competence and criminal responsibility examinations. The court has discretion as to whether to allow counsel's attendance. *Commonwealth v. Trapp*, 423 Mass. 356 (1996). Where counsel's attendance is denied, counsel should consider seeking permission to record audio or video of the examinations. The court has discretion over whether to allow any such recording. *Commonwealth v. Baldwin*, 426 Mass. 105 (1997); *Commonwealth v. Lo*, 428 Mass. 45 (1998). All of the conditions and cautions that apply to the initial competency evaluation apply to subsequent evaluations. Counsel should always consider whether an independent evaluation might be helpful, particularly if defense counsel or the defendant disagree with the initial Section 15(a) findings.

The district attorney is entitled to notice of and afforded the opportunity to be heard at all commitment and recommitment hearings. G.L. c. 123, § 16(d). Similar notification of defense counsel is not mandated. Therefore, counsel should always ask the court to include in its Section 15(b) order language ordering the facility to provide counsel with notification of any mental health proceedings and copies of any reports or pleadings filed.

§ 5.8 COMPETENCE TO STAND TRIAL DETERMINATION

"Due process under both the Fourteenth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights prohibits the prosecution from proceeding to trial against a criminal defendant or juvenile who has been found incompetent to stand trial." *See Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); *Commonwealth v. Robidoux*, 450 Mass. at 152. Due process, however, does not require the cessation of all pretrial proceedings. *Abbott A. v. Commonwealth*, 458 Mass. 24, 27 (2010).

A defendant is competent to stand trial if that person possesses the "sufficient present ability to consult with his or her counsel with a reasonable degree of rational understanding and a rational, as well as factual understanding of the proceedings." *Commonwealth v. Vailes*, 360 Mass. 522, 524 (1971) (quoting *Dusky v. United States*, 362 U.S. 402 (1959)).

A competence examination may be ordered and a competence hearing may be conducted at any stage of the criminal proceedings. The Supreme Judicial Court has reversed a trial court ruling denying a criminal defendant the right to a competency hearing four and one-half years after entering a guilty plea. *Commonwealth v. Conaghan*, 433 Mass. 105 (2000). Treating the request for a competency hearing, based on the defendant's claim that she suffered from battered woman's syndrome, as a motion for new trial, the court held that "[n]othing in [Section 15(a)] limits the time" within which a court may order a hearing on the issue of competency. *Commonwealth v. Conaghan*, 433 Mass. at 110; *see also Robidoux v. O'Brien*, 643 F.3d 334, 338–39 (1st Cir. Mass. 2011).

§ 5.9 PROCEDURAL CONSIDERATIONS

The prosecution bears the burden of establishing competence to stand trial by a preponderance of the evidence. *Commonwealth v. Crowley*, 393 Mass. 393 (1984).

Unlike lack of criminal responsibility, which requires that a defendant be found to suffer from a mental disease or defect, incompetence to stand trial does not depend on finding that the defendant suffers from a particular psychiatric or clinical diagnosis. A defendant can be found not competent if they lack the requisite capabilities, regardless of the cause. *Commonwealth v. Robbins*, 431 Mass. 442, 448 (2000).

After the evaluation as to competence to stand trial is completed, the forensic psychiatrist or psychologist files a signed, written report with the court. It should include clinical findings on the issue of competence and an opinion, supported by clinical findings, as to whether the defendant is in need of treatment and care offered by DMH. G.L. c. 123, § 15(c). Copies of the report should be made available to both defense counsel and the Commonwealth. If the report is sufficient evidence to convince the court that the defendant is competent to stand trial, the criminal proceeding will go forward. If not, a competency hearing must be held. G.L. c. 123, § 15(d). Similarly, a

hearing must be held if the court, defense counsel, or government has substantial doubt as to the defendant's competence at any stage of the proceeding. *Commonwealth v. Hill*, 375 Mass. 50, 54 (1978); *Commonwealth v. Kostka*, 370 Mass. 516, 522 (1976); *see also Commonwealth v. Robbins*, 431 Mass. 442 (2000).

If the defendant is found incompetent, the criminal proceedings must be stayed until the defendant is restored to competency or until the charges are dismissed. An incompetent defendant may not be tried, convicted, or sentenced (*Commonwealth v. Vailes*, 360 Mass. 522 (1971)), or plead guilty (*Commonwealth v. DelVerde*, 398 Mass. 288 (1986) (incompetent defendant may not enter plea by means of substituted judgment determination)).

During the observation period under Section 15(b), the superintendent of the facility may file a petition for commitment under G.L. c. 123, § 16(b) with respect to a defendant who is believed to be incompetent to stand trial. The petition must be dismissed if the defendant is found competent to stand trial. If the defendant is found incompetent to stand trial and a petition to commit under Section 16(b) has been filed, the defendant may, but need not, be held at a facility or Bridgewater pending a commitment hearing. G.L. c. 123, § 6. The district attorney can file a petition for commitment of an incompetent defendant under Section 16(b). The district attorney may do so regardless of whether the defendant is being held in a facility, but must do so within sixty days of the finding of incompetence to stand trial. Any petition filed more than sixty days after the finding of incompetency should be dismissed, as the court does not have jurisdiction to hear late-file petitions. *See generally Hashimi v. Kalil*, 388 Mass. 607 (1983).

Another possibility, following an incompetency finding, is that an incompetent defendant may be ordered to undergo an observation period at a DMH facility or Bridgewater pursuant to G.L. c. 123, § 16(a). This observation period may last no longer than forty days, and the total combined period of observation and evaluation under Sections 15(b) and 16(a) may not exceed fifty days. G.L. c. 123, § 16(a).

Despite a finding of incompetence to stand trial, the court may release the defendant with or without bail and may impose conditions of release, possibly including outpatient treatment. G.L. c. 123, § 17(c). A defendant who is found competent to stand trial and held on bail may request a voluntary admission to a DMH facility or Bridgewater pending trial. Such an admission must be approved by the superintendent of both the place of detention and the facility. G.L. c. 123, § 18(b).

§ 5.9.1 Practice Advisory

A defendant who is found incompetent to stand trial and is unlikely to be restored to competence in the foreseeable future should have the charges dismissed. G.L. c. 123, § 16(f). An incompetent defendant or juvenile may not be held in criminal custody awaiting trial "more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future." *Jackson v. Indiana*, 406 U.S. 715, 733, 738 (1972). To satisfy this due process requirement, referred to in *Jackson* as the "rule of reasonableness," *Jackson v. Indiana*,

406 U.S. at 733, a judge must make a searching inquiry into the likelihood that a defendant or juvenile will become legally competent in the foreseeable future. *Jackson v. Indiana*, 406 U.S. at 738; *see Foucha v. Louisiana*, 504 U.S. 71, 79 (1992) (state entitled to detain incompetent defendant "only long enough to determine if he could . . . become competent"); *Abbott A. v. Commonwealth*, 458 Mass. at 37; *see also Commonwealth v. Giunta*, 28 Mass. L. Rptr. 501 (Mass. Super. 2011). The defendant is not required to be in custody in order for the charges to be dismissed under Section 16(f). *Cf. Foss v. Commonwealth*, 437 Mass. 584 (2003). While *Foss* involved the mandatory dismissal of charges pursuant to Section 16(f) upon reaching the parole eligibility date, the rationale applies equally to dismissal in the interest of justice where a defendant is not likely to be restored to competency in the foreseeable future. Dismissal of charges against an incompetent defendant has usually been thought to be justified on grounds of the Sixth Amendment right to a speedy trial, or the denial of due process under the Fourteenth Amendment inherent in holding pending criminal charges indefinitely over the head of one who will never have the chance to prove their innocence. *Jackson v. Indiana*, 406 U.S. 715, 733, 738 (1972).

§ 5.10 DEFENSE ON THE MERITS—INCOMPETENT DEFENDANT

At any time, an incompetent defendant or their counsel may request the opportunity to offer a defense (other than lack of criminal responsibility) to the pending charges. G.L. c. 123, § 17(b). The defendant must make a preliminary showing, typically by means of an affidavit or other evidence, that the request to offer such a defense should be allowed. If a hearing is granted, the court will hear the prosecution and defense evidence. The defendant may call witnesses and cross-examine the Commonwealth's witnesses. If the court finds that the weight of the credible evidence could not lead a rational jury to find the defendant guilty beyond a reasonable doubt, it must dismiss the charges or find the charges defective or insufficient and order the defendant's release from criminal custody. *See Commonwealth v. Hatch*, 438 Mass. 618 (2003). The court cannot find the defendant guilty at this hearing. However, dismissal is not a final determination and, therefore, the defendant may be reindicted upon proffer of additional evidence. *Commonwealth v. Hatch*, 438 Mass. 618 (2003). Counsel should always consider this procedure, particularly where such defenses as an airtight alibi (e.g., the defendant was in custody or hospitalized at the time of the crime) or impossibility (e.g., the defendant was physically incapable of the alleged activity) are available. However, counsel also should balance the risk of tipping off the prosecution to possible defense strategies. *See, e.g.*, *Commonwealth v. Woods*, 382 Mass. 1 (1980); *Commonwealth v. Vaughn*, 23 Mass. App. Ct. 40 (1986).

§ 5.11 DIMINISHED CAPACITY AND OTHER CONSIDERATIONS

A defendant's mental condition also will be relevant to any waiver of certain substantive or procedural rights. *See, e.g.*, *Commonwealth v. Sheriff*, 425 Mass. 186, 192–96 (1997) (statements not product of rational intellect or free will are not voluntary);

Commonwealth v. Libran, 405 Mass. 634, 639 (1989) (statement inadmissible only if it would not have been obtained but for effects of defendant's mental impairment); *Commonwealth v. Edwards*, 420 Mass. 666, 670 (1995) (waiver of Miranda rights must be knowing, intelligent, and voluntary); *Commonwealth v. Barnes*, 399 Mass. 385, 391 (1987) (waiver of counsel requires competence to stand trial and awareness of magnitude of task and disadvantages of representing self); *Indiana v. Edwards*, 554 U.S. 164 (2008) (state permitted to insist upon representation by counsel where mentally ill defendant competent to stand trial, but not competent to conduct trial proceedings by themselves); *Commonwealth v. Diaz*, 431 Mass. 822 (2000) (capacity to entertain mens rea); *Commonwealth v. Grey*, 399 Mass. 469 (1987) (capacity to form specific intent); *Commonwealth v. Ostrander*, 441 Mass. 344 (2004) (capacity to voluntarily waive Miranda rights); *Commonwealth v. Russin*, 420 Mass. 309 (1995) (standard for competence to plead guilty equivalent to standard for competence to stand trial); *Commonwealth v. Vazquez*, 387 Mass. 96, 102–03 (1982) (statements inadmissible where mental illness rendered defendant "incapable of understanding meaning and effect of a confession or caused [defendant] to be indifferent to self-protection"); *Commonwealth v. Boateng*, 438 Mass. 498 (2003) (where lack of responsibility raised at trial, court must conduct voluntariness hearing before admitting defendant's statements to police); *Commonwealth v. Torres*, 441 Mass. 499 (2004) (conducting bail hearing for incompetent defendant not per se due process violation); *cf. Commonwealth v. Contos*, 435 Mass. 19 (2001) (Commonwealth's scheduling of psychiatric exam, without notice, did not violate defendant's right to counsel).

The notice provisions and other procedural requisites pertaining to the lack of responsibility defense, codified at Mass. R. Crim. P. 14(b)(2), have been made applicable where other defenses relating to a defendant's mental condition are raised. *E.g.*, *Commonwealth v. Diaz*, 431 Mass. 822 (2000) (capacity to entertain mens rea); *Commonwealth v. Ostrander*, 441 Mass. 344 (2004) (capacity to voluntarily waive Miranda rights).

§ 5.12 PERIODIC REVIEW OF COMPETENCY

Pursuant to G.L. c. 123, § 17(a), a defendant who has been found incompetent to stand trial and committed to a DMH facility or Bridgewater must be evaluated periodically as to competency. See G.L. c. 123, § 4 for timelines. If, as a result of such an evaluation, the defendant is thought to be competent to stand trial, the court having criminal jurisdiction must be notified and must conduct a competency hearing without delay. Further, a defendant may petition the court for a competency hearing at any time.

Should the defendant be found competent to stand trial, any commitment will terminate and the criminal proceedings will go forward. The court may permit the defendant to remain at the facility during the pendency of the criminal proceedings on the defendant's request and with the approval of the facility. G.L. c. 123, § 17(a).

§ 5.13 DISMISSAL OF CHARGES—INCOMPETENT DEFENDANT

> [A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.

Jackson v. Indiana, 406 U.S. at 739. General Laws c. 123, § 16(f) was the Commonwealth's response to *Jackson*.

Upon finding that a defendant is not competent to stand trial, the court must notify the Department of Correction so that it may compute the date that the defendant would have been eligible for parole, if convicted of the most serious crime charged. Any charges pending against such defendant must be dismissed on that date of eligibility of parole, and may be dismissed at any time prior thereto "in the interest of justice." G.L. c. 123, § 16(f). Section 16(f) allows for dismissal for incompetent defendants charged with crimes for which parole is not available. "Substantive due process requires dismissal of the charges where a defendant will never regain competency and maintaining the charges does not serve the compelling State interest of protecting the public." *Sharris v. Commonwealth*, 480 Mass. 586, 593 (2018). Parole eligibility is calculated based on the maximum sentence for the most serious crime charged and not on consecutive sentences on all crimes charged. *Foss v. Commonwealth*, 437 Mass. 584 (2003). For this purpose, parole eligibility is one-half of the maximum potential sentence for the most serious crime with which the defendant has been charged. The defendant is entitled to the deductions established under G.L. c. 127, §§ 129B–129D. *See* G.L. c. 123, § 18.

Where a defendant is found not competent in the District Court, but is subject to indictment in the Superior Court, the potential Superior Court sentence should be used in calculating the parole eligibility date. *Commonwealth v. Calvaire*, 476 Mass. 242 (2017). The dismissal of charges upon an incompetent defendant's reaching the parole eligibility date is not dependent upon commitment of the defendant. *Foss v. Commonwealth*, 437 Mass. 584 (2003).

Defendants committed pursuant to G.L. c. 123, § 16(b), or recommitted pursuant to G.L. c. 123, § 16(c), whose charges are dismissed under Section 16(f), will be retained at the facility until the commitment order expires. If recommitted under Section 8, it may appear that the dismissal of charges is of little consequence to the defendant. After all, the person will remain behind the same brick walls; all that will have changed will have been the section number noted on the admission form.

While a person committed pursuant to G.L. c. 123, § 8 may be released whenever the mental health facility deems discharge appropriate, an incompetent defendant committed pursuant to G.L. c. 123, § 16(b) or § 16(c) may face further court proceedings. The facility must notify the appropriate district attorney of its intention to discharge the defendant, and the district attorney may, within thirty days of receipt of the notice, petition for the defendant's continued commitment. G.L. c. 123, § 16(e). Similarly, a person committed under G.L. c. 123, § 8 may be afforded whatever privileges the mental health facility deems clinically appropriate, without court oversight. When an incompetent defendant is committed under Section 16(b) or 16(c), the court may restrict them to the buildings and grounds of the facility. G.L. c. 123, § 16(e). The facility may remove this restriction only if, after giving the court and district attorney written notice, neither the court nor the district attorney has objected in writing within fourteen days. G.L. c. 123, § 16(e). Where such restrictions are ordered, however, the facility must be permitted to exercise its discretion in determining how such restrictions are implemented, absent a finding that there is but one way to do so or a finding that the facility is unable or unwilling to provide adequate security. *Commonwealth v. Carrara*, 58 Mass. App. Ct. 86 (2003) (court cannot order that client be escorted at all times).

§ 5.14 DEFENSE: NOT CRIMINALLY RESPONSIBLE

A defendant is not criminally responsible (or not guilty by reason of mental disease or defect—formerly known as "not guilty by reason of insanity" (NGRI)) "if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." *Commonwealth v. McHoul*, 352 Mass. 544, 546–47 (1967).

> The standard set forth in *Commonwealth v. McHoul*, [], requires that there be a causal connection between the defendant's mental disease or defect and the substantial incapacity to appreciate the wrongfulness of her conduct or conform her conduct to the requirements of the law. Under a separate line of cases, voluntary intoxication, standing alone, does not provide a basis for a claim of lack of criminal responsibility. (Citations omitted.) Where these two lines of cases overlap, this court has said if the jury find that the "defendant had a latent mental disease or defect which caused the defendant to lose the capacity . . . to conform his conduct to the requirements of the law, lack of criminal responsibility is established even if voluntary consumption of alcohol activated the illness," as long as the defendant did not know or have reason to know that the activation would occur (citations omitted). "[L]atent" is defined as "[c]oncealed; dormant" or "existing in hidden, dormant, or repressed form but [usually] capable of being evoked, expressed, or brought to light." *Black's Law Dictionary* 961 (9th ed. 2009). *Webster's Third New Int'l Dictionary* 1275 (1993).

Commonwealth v. Berry, 457 Mass. 602, 612–13 (2010).

§ 5.14.1 Mental Disease, Disorder, or Defect

While a psychiatrist or psychologist may classify a particular condition as a mental disease, disorder, or defect, this is not dispositive for purposes of criminal responsibility. The condition must be of a nature that society deems sufficient to relieve a defendant from responsibility as a result of its effect on their capacity to appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of law. *Commonwealth v. Sheehan*, 376 Mass. 765, 769 (1978). Among the conditions that have met this criterion are mental illness, mental retardation, and organic brain syndrome.

Alcohol or substance use disorders are not mental diseases or defects for purposes of criminal responsibility. *Osborne v. Commonwealth*, 378 Mass. 104, 111 (1979) (alcohol use disorder); *Commonwealth v. Sheehan*, 376 Mass. at 767 (substance use disorder). However, the consumption of alcohol or illicit drugs may bring about mental disease or defect sufficient to establish lack of responsibility (e.g., Korsakoff's psychosis or syndrome, an organic brain syndrome associated with long-term alcohol use). *Commonwealth v. Sheehan*, 376 Mass. at 769. In addition,

> where proof of a crime requires proof of a specific criminal intent and there is evidence tending to show that the defendant was under the influence of alcohol or some other drug at the time of the crime, the judge should instruct the jury, if requested, that they may consider evidence of the defendant's intoxication at the time of the crime in deciding whether the Commonwealth has proved that specific intent beyond a reasonable doubt.

Commonwealth v. Henson, 394 Mass. 584, 593 (1985).

Further, if the consumption of drugs or alcohol activates a latent mental disease or defect and, as a result, the defendant loses the substantial capacity to understand the wrongfulness of the conduct or to conform the conduct to the requirements of the law, lack of criminal responsibility would be established, unless the defendant "knew or had reason to know that the [drug] would activate the illness." *Commonwealth v. Herd*, 413 Mass. 834, 839 (1992) (quoting *Commonwealth v. Brennan*, 399 Mass. 358, 363 (1987)).

The jury must be instructed that it may consider the effects of a defendant's consumption of alcohol or drugs on any manifestation of a latent mental disease or defect when lack of responsibility is sufficiently raised at trial. *Commonwealth v. Angelone*, 413 Mass. 82, 87 (1992). In *Commonwealth v. Berry*, 457 Mass. 602 (2010), the Supreme Judicial Court set out the following instruction to be used in cases where there is evidence that a defendant had a mental disease or defect and consumed drugs or alcohol:

> A defendant's lack of criminal responsibility cannot be solely the product of intoxication caused by her voluntary consumption of alcohol or another drug. (Citation omitted.)
>
> However, a defendant is not criminally responsible if you have a reasonable doubt as to whether, when the crime was committed, the defendant had a latent mental disease or defect that became activated by the voluntary consumption of drugs or alcohol, or an active mental disease or defect that became intensified by the voluntary consumption of drugs or alcohol, which activated or intensified mental disease or defect then caused her to lose the substantial capacity to appreciate the wrongfulness of her conduct or the substantial capacity to conform her conduct to the requirements of the law. If you have a reasonable doubt as to whether the defendant was criminally responsible, you shall find the defendant not guilty by reason of lack of criminal responsibility. (Citations omitted.)
>
> Where a defendant has an active mental disease or defect that caused her to lose the substantial capacity to appreciate the wrongfulness of her conduct or the substantial capacity to conform her conduct to the requirements of the law, the defendant's consumption of alcohol or another drug cannot preclude the defense of lack of criminal responsibility.

Commonwealth v. Berry, 457 Mass. at 617–18. However,

> where a defendant suffers from a mental illness that, by itself, causes her to lack the substantial capacity to appreciate the wrongfulness of her acts or to conform her conduct to the law, any voluntary consumption of alcohol or drugs by the defendant does not defeat a defense of lack of criminal responsibility, regardless of whether the defendant knows that such consumption may exacerbate the mental illness. This court further explained that where a defendant who suffers from a mental illness is criminally responsible but through the voluntary consumption of drugs or alcohol loses that responsibility, again a defense of lack of criminal responsibility will not be defeated unless the defendant knows that the consumption will have that effect.

Commonwealth v. Berry, 466 Mass. 763, 768 (2014) (citations omitted).

§ 5.14.2 Procedural Considerations

The prosecution bears the burden of proving a defendant criminally responsible beyond a reasonable doubt. *Commonwealth v. Kostka*, 370 Mass. at 526. Where lack of responsibility may be an issue at trial, the court, on request of counsel, must conduct

an individual voir dire regarding each prospective juror's willingness to return an insanity acquittal. *Commonwealth v. Seguin*, 421 Mass. 243, 249 (1995). *But see Commonwealth v. Ashman*, 430 Mass. 736, 739–40 (2000) (*Seguin* rule applies only to cases where defendant seeks verdict of not guilty by reason of insanity, and does not apply to cases where defendant argues mental defect or impairment).

The lack of responsibility defense may be raised by means of any evidence that might create reasonable doubt as to the defendant's criminal responsibility. *Commonwealth v. Laliberty*, 373 Mass. 238, 246–47 (1977). However, the prosecution may rely on a presumption of sanity to meet its burden in the first instance. *Commonwealth v. Kostka*, 370 Mass. at 526–27. Generally, the defendant attempts to establish lack of responsibility by offering expert psychiatric testimony. However, such testimony is not required. *Commonwealth v. Monico*, 396 Mass. 793, 798 (1986). Rather, lack of responsibility may be established by means of the facts of the case, through the Commonwealth's witnesses, through lay testimony, through the defendant's own testimony, or any combination thereof. *Commonwealth v. Mattson*, 377 Mass. 638, 644 (1979). Similarly, the prosecution is not required to present expert testimony to refute a claim of lack of criminal responsibility. *Commonwealth v. Cook*, 438 Mass. 766, 777 (2003).

A defendant who is competent to stand trial and understands the consequences of refusing to pursue a lack of responsibility defense after being fully advised may not be required to assert such a defense. *Commonwealth v. Federici*, 427 Mass. 740, 743–46 (1998); *cf. Commonwealth v. Cook*, 438 Mass. 766, 775 (2003) (no colloquy required where there is no conflict regarding insanity defense between defendant and defense counsel).

Where evidence of lack of responsibility is produced at trial and the defendant requests an instruction on the issue, the court must instruct the jury as to the insanity defense (*Commonwealth v. Monico*, 396 Mass. 793, 797 (1986)) and the consequences to the defendant of an insanity acquittal (*Commonwealth v. Mutina*, 366 Mass. 810, 823 (1975)). *See Commonwealth v. Goudreau*, 422 Mass. 731, 737–39 (1996) (for appropriate criminal responsibility instruction). An expert witness may not offer an opinion as to whether a defendant was, at the time of the alleged crime, criminally responsible. The expert may offer an opinion as to whether a defendant was, at that time, able to appreciate the criminality or the wrongfulness of their actions or to conform their conduct to the requirements of the law. *Commonwealth v. Westmoreland*, 388 Mass. 269, 280 (1983).

Although not required, an insanity acquittee will likely be ordered to undergo an examination at a DMH facility or Bridgewater pursuant to G.L. c. 123, § 16(a).

During the observation period under G.L. c. 123, § 15(b), DMH or DOC may file a petition for commitment under G.L. c. 123, § 16(b). Additionally, if the defendant has been acquitted as NGRI, the prosecutor, DMH, or DOC may file a petition for commitment within sixty days of the insanity acquittal under G.L. c. 123, § 16(b). If said petition is filed, the insanity acquittee may, but need not, be held at a facility or Bridgewater pending a commitment hearing. G.L. c. 123, § 6.

§ 5.14.3 Notice

If the defense intends to raise the lack of responsibility as an affirmative defense with expert psychiatric testimony, the district attorney and court must be notified of the name and address of each expert witness and whether any expert witness will "rely in whole or in part on statements of the defendant as to his or her mental condition at the time of the alleged crime or criminal responsibility for the alleged crime." Mass. R. Crim. P. 14(b)(2)(A). See Mass. R. Crim. P. 13 for timelines. Failure to provide notice in accordance with Mass. R. Crim. P. 14(b)(2)(A) may result in sanctions, including exclusion of expert testimony. Mass. R. Crim. P. 14(b)(2)(B)(iv); Mass. R. Crim. P. 14(c). However, the lack of responsibility defense can be proven and disproven with lay testimony, including that of the defendant. Such testimony must be admitted at trial. Mass. R. Crim. P. 14(c)(2); *Commonwealth v. Guadalupe*, 401 Mass. 372, 375–76 (1987).

Where an untreated mental illness is the basis of a lack of responsibility defense, and a defendant wants to appear at trial unmedicated (*see Commonwealth v. Louraine*, 390 Mass. 28 (1983)), the defendant must request leave of the court to do so. *Commonwealth v. Colleran*, 452 Mass. 417 (2008) (defendant medicated during trial: no error where question of defendant's demeanor at trial in unmedicated state never presented to court). If by deciding to appear in an unmedicated state a defendant becomes incompetent to stand trial, that will be considered a waiver of the right to be tried while competent. *Commonwealth v. Louraine*, 390 Mass. at 38 n.13. Should the defendant agree to be medicated during trial despite the relevance of demeanor when unmedicated as an issue at trial, the defendant must be permitted to inform the fact finder of the use of medication and its effects on the defendant's demeanor in court. *Commonwealth v. Gurney*, 413 Mass. 97, 103–04 (1992).

§ 5.15 COURT-ORDERED EXAMINATIONS

The court may order a criminal responsibility examination pursuant to G.L. c. 123, § 15(a) or § 15(b) only if it finds that the defendant intends to offer psychiatric or other expert evidence at trial or there is a reasonable likelihood that the defendant will offer such evidence. Mass. R. Crim. P. 14(b)(2)(B); *Blaisdell v. Commonwealth*, 372 Mass. 753, 766 (1977). The defendant's refusal to undergo a court-ordered examination may result in sanctions in the discretion of the court, including exclusion of testimony by the defendant's expert. Mass. R. Crim. P. 14(b)(2)(B)(iv); Mass. R. Crim. P. 14(c). In no event, however, may the lack of responsibility defense itself, raised by means of nonexpert testimony, be excluded. Mass. R. Crim. P. 14(c)(2); *Commonwealth v. Guadalupe*, 401 Mass. at 375–76.

The forensic clinician's criminal responsibility report is to be filed with the court and must be sealed. At that point,

> [u]nless the parties mutually agree to an earlier time of disclosure, the examiner's report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the

> report contains no matter, information, or evidence which is based upon statements of the defendant as to his or her mental condition at the relevant time or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) after the defendant expresses the clear intent to raise as an issue his or her mental condition, the judge is satisfied that (1) the defendant intends to testify, or (2) the defendant intends to offer expert testimony based in whole or in part on statements made by the defendant as to his or her mental condition at the relevant time.

Mass. R. Crim. P. 14(b)(2)(B)(iii).

§ 5.16 EXAMINATION BY PROSECUTION EXPERT

The prosecution may retain an expert to examine a defendant as to criminal responsibility after the defendant has given notice that lack of responsibility may be asserted at trial and that expert testimony relying on the defendant's statements will be introduced. Mass. R. Crim. P. 14(b)(2)(B); *Commonwealth v. Baldwin*, 426 Mass. at 109. The defendant must provide the Commonwealth's expert with the same records provided to or considered by the defense expert. *See Commonwealth v. Hanright*, 465 Mass. 639 (2013). The decision in *Hanright* directed the Court's Standing Advisory Committee on the Rules of Criminal Procedure to further define the scope of the required disclosure. The defendant's refusal to undergo such an examination may result in sanctions, including exclusion of testimony by the defendant's expert. Mass. R. Crim. P. 14(b)(2)(B)(iv); Mass. R. Crim. P. 14(c). However, lay evidence regarding criminal responsibility is always admissible. *Commonwealth v. Guadalupe*, 401 Mass. at 375–76.

§ 5.16.1 Practice Advisory

As with other psychiatric or psychological evaluations, counsel, with defendant's consent, should seek to be present during a court-ordered responsibility examination. The court has discretion as to whether to allow counsel's attendance. *Commonwealth v. Trapp*, 423 Mass. 356 (1996). Where counsel's attendance is denied, counsel should consider seeking permission to record audio or video of the examinations. *Commonwealth v. Baldwin*, 426 Mass. 105, 110 (1997) (audiotaping); *Commonwealth v. Lo*, 428 Mass. 45 (1998) (videotaping).

As noted above, a defendant who is competent to stand trial and has been advised of the consequences of refusing to pursue a lack of responsibility defense and is found to understand said consequences may not be required to assert such a defense. *Commonwealth v. Federici*, 427 Mass. 740, 743–46 (1998) (not ineffective assistance for counsel to heed competent defendant's informed refusal to pursue insanity defense); *cf. Commonwealth v. Cook*, 438 Mass. 766, 775 (2003) (no colloquy required between defendant and judge where no conflict as to insanity defense exists between defendant

and defense counsel). Counsel, however, must investigate the possibility of an insanity defense where "facts known to, or accessible to, [them] raise a reasonable doubt as to defendant's condition." *Commonwealth v. Doucette*, 391 Mass. 443, 458–59 (1984) (failure to do so constituted ineffective assistance of counsel); *Commonwealth v. A.B.*, 72 Mass. App. Ct. 10 n.6 (2008) (counsel and court required to explore insanity defense where competence to stand trial in question and lack of responsibility only viable defense); *see also Commonwealth v. Boateng*, 438 Mass. 498 (2003) (where lack of responsibility raised at trial, court must conduct voluntariness hearing before admitting defendant's statements to police).

§ 5.17 OTHER PSYCHIATRIC EVALUATIONS

In addition to examinations for competency to stand trial and for criminal responsibility, psychiatric evaluations also may be ordered, as discussed below.

§ 5.17.1 Evaluations at the Place of Detention

The director of a jail or prison may have a prisoner examined by a forensic clinician if there is reason to believe that the individual is in need of hospitalization by reason of mental illness. The forensic clinician's report will be filed with the District Court having jurisdiction over the place of detention unless the prisoner is a defendant awaiting trial, in which case the report will be filed with the court having criminal jurisdiction. The court may order an inpatient examination at a DMH facility or at Bridgewater for up to thirty days. During this thirty-day period, the facility, Bridgewater, or the director of the place of detention may petition the court for the prisoner's commitment. G.L. c. 123, § 18(a). A court may not order commitment pursuant to a Section 18(a) petition if the required evaluation has not taken place at the place of detention. *See In re P.I.*, 2014 Mass. App. Div. 116. A defendant held at a place of detention pending trial may request admission and, with the approval of the director of the place of detention, may be admitted to a DMH facility or Bridgewater to await trial. G.L. c. 123, § 18(b).

§ 5.17.2 Evaluations in Aid of Sentencing

After a guilty finding and before sentencing, the court may order the defendant to be examined at a DMH facility or at Bridgewater for up to forty days to aid the court in sentencing. During this hospitalization, a petition for commitment may be filed by the facility or Bridgewater. If a petition is filed, the defendant must be sentenced prior to the commitment hearing, and if the defendant is committed, the time served is to be credited against the sentence imposed. G.L. c. 123, § 15(e).

§ 5.18 RIGHT TO INDEPENDENT CLINICAL EXAMINATIONS

Where a lack of responsibility defense is being considered, an indigent defendant must be afforded access to an independent clinician at the Commonwealth's expense. *See Ake v. Oklahoma*, 470 U.S. 68 (1985) (funding for psychiatric assistance required

where defendant's mental state at time of alleged offense likely to be significant factor at trial). The right of an indigent defendant, whose competency to stand trial is or may be at issue, to expert clinical assistance at public expense has not been established. However, a motion for funds under G.L. c. 261, § 27B is likely to be allowed unless entirely frivolous. *See* G.L. c. 261, § 27C; *Commonwealth v. Lockley*, 381 Mass. 156 (1980) (funds must be authorized where requested services are reasonably necessary to assure as effective a defense as would be available to person of means in same circumstances). Appeals from the denial of a motion for funds are taken as follows:

> If the matter arises in the superior [court] . . . the appeal shall be to a single justice of the appeals court at the next sitting thereof. If the matter arises in the juvenile court department, the appeal shall be to the superior court sitting in the nearest county or in Suffolk County. If the matter arises in the district court or Boston municipal court departments, the appeal shall be to the appellate division. Upon being notified of the denial, the applicant shall also be advised of his right of appeal, and he shall have seven days thereafter to file a notice of appeal with the clerk or register.

G.L. c. 261, § 27D.

While an indigent defendant ordinarily should be permitted to select the clinician, such a choice is not a matter of right. *Commonwealth v. DeWolfe*, 389 Mass. 120, 126 (1983). Where the opinion of an independent clinician is not helpful, there is no right to the assistance of another clinician. *Commonwealth v. DeWolfe*, 389 Mass. at 126. The information gathered and the opinions formed by an independent clinician are privileged and work product, which is not discoverable by the Commonwealth unless counsel decides to use the information and opinions at trial. Disclosure to the prosecution of the defense expert's reports and statements must wait until the defendant decides whether the expert will testify at trial based in whole or in part on the defendant's statements to the expert, because, until that decision is made, the defendant's statements to a defense expert retained by their attorney are protected by the attorney-client privilege. Reports and statements arising from such communications are also protected by the work product doctrine. *Commonwealth v. Sliech-Brodeur*, 457 Mass. 300, 341 (2010).

§ 5.19 EFFECT OF PSYCHIATRIC TREATMENT ON THE LACK OF CRIMINAL RESPONSIBILITY DEFENSE

Whether a defendant may be compelled to undergo treatment with antipsychotic or other mind-altering medications to restore or maintain competency to stand trial is unsettled in Massachusetts. *Commonwealth v. Louraine*, 390 Mass. at 38 n.13; *see also Commonwealth v. Colleran*, 452 Mass. 417 (2008). However, the U.S. Supreme Court has held that

> the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

Sell v. United States, 539 U.S. 166, 179 (2003). This standard permits involuntary administration of drugs solely for trial competence purposes in limited and rare instances because the standard fairly implies the following:

> [The] court must find that important governmental interests are at stake. The Government's interest in bringing to trial an individual accused of a serious crime is important. That is so whether the offense is a serious crime against the person or a serious crime against property.
>
> [T]he court must conclude that involuntary medication will significantly further those concomitant state interests. It must find that administration of the drugs is substantially likely to render the defendant competent to stand trial. At the same time, it must find that administration of the drugs is substantially unlikely to have side effects that will interfere significantly with the defendant's ability to assist counsel in conducting a trial defense, thereby rendering the trial unfair.
>
> [T]he court must conclude that involuntary medication is necessary to further those interests. The court must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results.
>
> [T]he court must conclude that administration of the drugs is medically appropriate, i.e., in the patient's best medical interest in light of his medical condition. The specific kinds of drugs at issue may matter here as elsewhere.

Sell v. United States, 539 U.S. at 180–81.

The Court went on to say that the trial court need not consider whether to allow forced medication to restore competency to stand trial, if forced medication is warranted for a different purpose (e.g., where the defendant's behavior poses a danger to themselves or to others, or where the defendant's refusal to take drugs puts their health gravely at risk). *Sell v. United States*, 539 U.S. at 181–82.

§ 5.19.1 Criminal Responsibility Defense—Right to Appear at Trial in Unmedicated State

If the defendant raises the defense of lack of criminal responsibility due to untreated mental illness or lack of medication or proper medication at the time of the alleged incident, then that defendant's demeanor when unmedicated is an issue at trial. In such cases, the defendant has a right to appear at trial in an unmedicated state so that the fact finder may observe such a condition.

> In a case where an insanity defense is raised, the jury are likely to assess the weight of the various pieces of evidence before them with reference to the defendant's demeanor. Further, if the defendant appears calm and controlled at trial, the jury may well discount any testimony that the defendant lacked, at the time of the crime, substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

Commonwealth v. Louraine, 390 Mass. 28, 34–35 (1983).

Defendants have a right to have the jury fully consider their mental state before, during, and after the crime. *Commonwealth v. Sheriff*, 425 Mass. 186, 191 (1997) (judge unduly infringed on this right when he incorrectly instructed jury to disregard defendant's commitment to Bridgewater State Hospital).

However, the right to appear in an unmedicated state is not unrestricted. *Commonwealth v. Gurney*, 413 Mass. 97, 103 (1992). Not everyone who is treated for mental illness is entitled to be observed at trial in an unmedicated state. *Commonwealth v. Gurney*, 413 Mass. at 103. The defendant's demeanor in an unmedicated condition or evidence of a defendant's medicated condition at trial may not be relevant. The admissibility of such evidence must be decided on the facts of each case. *Commonwealth v. Louraine*, 390 Mass. at 37; *see Commonwealth v. Colleran*, 452 Mass. 417 (2008) (defendant medicated during trial: no error where question of defendant's demeanor at trial in unmedicated state never presented to court; no error in denying motion for new trial where unmedicated depressed but nonpsychotic demeanor not relevant to defense, and defendant medicated for depression, not psychotic symptoms); *Commonwealth v. Hunter*, 427 Mass. 651, 655 (1998) (where sanity is at issue, prosecution may alert jurors to defendant's conduct at trial inconsistent with asserted mental illness); *Commonwealth v. Biancardi*, 421 Mass. 251, 255 (1995) (defendant may place before jury any evidence probative of mental condition).

If a defendant is rendered incompetent to stand trial, by electing to appear in an unmedicated state, the right to be tried while competent is waived. *Commonwealth v. Louraine*, 390 Mass. at 38 n.13. The defendant is not limited to appearing in an unmedicated state. "[I]it is axiomatic that a defendant is entitled to present to the jury 'any evidence which is at all probative of his mental condition,' both before and after the alleged commission of a crime.' (Citation omitted.)" Expert testimony on the issue

is to be "unrestricted in stating all that is relevant to the defendant's mental illness." *Commonwealth v. Gurney*, 413 Mass. 97, 102–03 (1992).

§ 5.19.2 Practice Advisory

Where the clinical staff of a facility at which a defendant has been committed or ordered to undergo a forensic examination believes that the defendant is unable to make informed decisions as to mental health treatment, it is likely that judicial authorization to administer such treatment (often referred to as a "*Rogers* order") will be sought. An attorney from the Committee for Public Counsel Services Mental Health Litigation Division will be appointed to represent the defendant in the treatment proceeding. As described above, since the impact of any such treatment on the pending criminal proceedings will be substantial, criminal defense counsel and mental health counsel should consult and cooperate in the representation of their mutual client.

§ 5.20 PRIVILEGED COMMUNICATIONS—COMPETENCE TO STAND TRIAL AND CRIMINAL RESPONSIBILITY

Competence to stand trial and criminal responsibility examinations are to be conducted by either a qualified physician or a qualified psychologist. G.L. c. 123, §§ 15(a), 15(b); *see* 104 C.M.R. § 33.03, "Designation of Forensic Psychiatrists and Psychologists." When made under circumstances in which there is a reasonable expectation of privacy, communications made by a defendant to a forensic clinician are generally privileged and, therefore, excludable at a subsequent hearing. G.L. c. 233, § 20B (psychotherapist-patient privilege); G.L. c. 112, § 129A (privilege, as specified in G.L. c. 233, § 20B, incorporated in respect to licensed psychologists). Further, privileged communications may not serve, in whole or in part, as the basis of a forensic clinician's opinions. *See DYS v. A Juvenile*, 398 Mass. 516 (1986) (expert opinion may be based only on admitted or otherwise admissible evidence); *see also Commonwealth v. Markvart*, 437 Mass. 331 (2002); *Commonwealth v. Morales*, 60 Mass. App. Ct. 728 (2004).

For purposes of the privilege, communications are broadly defined as "[c]onversations, correspondence, actions and occurrences relating to diagnosis or treatment before, during or after institutionalization, regardless of the patient's awareness of such conversations, correspondence, actions and occurrences, and any records, memoranda or notes of the foregoing." G.L. c. 233, § 20B. While G.L. c. 233, § 20B contains several exceptions under which the privilege will not apply, two are pertinent to criminal proceedings.

§ 5.20.1 Court-Ordered Evaluations

The privilege will not apply and a clinician may testify to or base an opinion on a defendant's communications where

> a judge finds that the [defendant], after having been informed that the communications would not be privileged, has made

> communications to a [clinician] in the course of a psychiatric examination ordered by the court, provided that such communications shall be admissible only on issues involving the [defendant's] mental or emotional condition but not as a confession or admission of guilt.

G.L. c. 233, § 20B(b). The notification required under this paragraph is commonly referred to as a *Lamb* warning. *See Commonwealth v. Lamb*, 365 Mass. 265 (1974).

The requirement that a clinician give a *Lamb* warning before conducting an examination has been extended to include examinations of persons where the examination is conducted at the request of a facility or entity acting under the auspices of the Commonwealth, and the person's communications, or expert opinions based on such communications, are sought to be used at a hearing in which the person's mental capacity will be at issue. *DYS v. A Juvenile*, 398 Mass. at 526 (1986) (recommitment of child to DYS under G.L. c. 120).

§ 5.20.2 Mental or Emotional Condition Introduced by Defendant

Similarly, the privilege will not apply where "the [defendant] introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between [defendant] and psychotherapist be protected." G.L. c. 233, § 20B, ¶ (c). A defendant's statements to a treating psychiatrist were admitted over the defendant's objection, where the defendant introduced his mental condition by raising an insanity defense and the court determined that the "interests of justice in disclosure outweighed the need to protect the defendant's otherwise confidential communications." *Commonwealth v. Seabrooks*, 433 Mass. 439, 448–49 (2001); *see also Commonwealth v. Harris*, 468 Mass. 429, 448–49 (2014) (where defendant give notice of their intent to offer expert testimony regarding their mental impairment, based in part on their statements, and then offers expert testimony as evidence thereof at trial, defendant is deemed to have waived constitutional privilege against self-incrimination and opened door for rebuttal evidence on issue of mental impairment).

§ 5.20.3 Procedural Considerations

The privilege belongs to the defendant and must be raised by counsel at every hearing. If a timely objection to the introduction of privileged communications is not made, the privilege is waived. *See, e.g.*, *Adoption of Abigail*, 23 Mass. App. Ct. 191, 198 (1986). If not asserted at trial, the privilege may not be asserted on appeal. *Commonwealth v. Benoit*, 410 Mass. 506, 518 (1991); *P.W. v. M.S.*, 67 Mass. App. Ct. 779 (2006).

Privileged communications are not made admissible under G.L. c. 233, § 79, the hospital records exception to the hearsay rule, by their inclusion in a facility's record. *See, e.g.*, *Usen v. Usen*, 359 Mass. 453 (1971). However, "while the scope of this privilege

is broad, it does not cover all hospital records concerning nonpsychiatric admissions simply because some psychiatric information appears in the hospital record." Records are privileged only if they contain communications or notes of communications between a patient and a psychotherapist. The exercise of the privilege does not preclude the admission of parts of a psychiatric record that are conclusions based on objective observations rather than on communications from the patient. *P.W. v. M.S.*, 67 Mass. App. Ct. 779, 786–87.

§ 5.20.4 Waiver of Privilege

The privilege will be waived if the defendant, after being informed that the communications will not be privileged, voluntarily speaks with a forensic clinician in the course of a court-ordered examination. G.L. c. 233, § 20B(b). Any such communications will be admissible only as they pertain to the defendant's competence to stand trial or criminal responsibility. If such communications constitute a confession of guilt of the crime charged, they may not be admitted under any circumstances or for any purpose. G.L. c. 233, §§ 20B(b), 23B; *Commonwealth v. Callahan*, 386 Mass. 784, 788–89 (1982). Inculpatory statements constituting admissions short of a full acknowledgment of guilt, as well as evidence discovered as fruits of such statements, are also inadmissible. *Seng v. Commonwealth*, 445 Mass. 536 (2005); *see also Commonwealth v. Brown*, 75 Mass. App. Ct. 361 (2009).

§ 5.20.5 Practice Advisory

Where a *Lamb* warning is required, a defendant's decision to communicate with a forensic clinician (i.e., to "waive" the privilege) must be knowing, intelligent, and voluntary. *In the Matter of Laura L.*, 54 Mass. App. Ct. 853 (2002). Thus, where a forensic clinician is asked by the prosecution to testify to a defendant's communications, or seeks to offer an opinion based in whole or in part thereon, counsel should inquire as to

- whether the *Lamb* warning was given and, if so,
- whether it was given in a manner and form so as to be understandable to the defendant;
- whether the defendant was able to fully comprehend
  - the purpose of the examination,
  - the uses to which the defendant's statements and the clinician's report will be put,
  - that the defendant need not have communicated with the clinician, and
  - the consequence of the defendant's decision to forgo the privilege and communicate with the forensic clinician; and
- the manner by which the clinician evaluated the client's ability to comprehend such information.

Voir dire examination of the expert can be particularly effective for this purpose. Note that the criteria to establish a defendant's ability to knowingly and intelligently waive the privilege are different from those to establish competence to stand trial. That is, a defendant may be able to waive the privilege despite being incompetent to stand trial.

Where an expert witness's opinion is based, in whole or in part, on a defendant's communications made to a nontestifying clinician or on the opinions of such other clinician, counsel should examine the witness as to whether the nontestifying clinician gave the defendant an appropriate and adequate warning, and, if not, or if the witness does not know, counsel should seek to exclude the testimony. Further, a nontestifying clinician's opinion may be admitted into evidence through the testimony of another witness (expert or lay) only if it is properly admissible under G.L. c. 233, § 79. *Petition of Davis*, 8 Mass. App. Ct. 732 (1979).

Note also that certain mental health practitioners are required, either by statute or the ethical standards of their profession, to inform their patients of any limitations upon the confidentiality accorded patient communications, such as testimony at a judicial proceeding. *See, e.g.*, G.L. c. 112, §§ 129A (psychologists), 135A (social workers); American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct* §§ 3.10, 4.02, 10.01 (psychologists); American Psychiatric Association, *Principles of Medical Ethics Applicable to Psychiatry* § 4 (psychiatrists).

As noted above, for purposes of the privilege, communications are defined as "conversations, correspondence, actions and occurrences relating to diagnosis or treatment." G.L. c. 233, § 20B. In general, behaviors that provide a psychotherapist with "a basis on which to render an evaluation of [a defendant's] mental health" will not be actions protected by the privilege. *Sheridan, petitioner*, 412 Mass. at 605; *Adoption of Abigail*, 23 Mass. App. Ct. at 198–99 (conclusions based on objective indicia admissible). A defendant's behavior will fall within the privilege only if made in response to a psychotherapist's inquiry during an examination. For example, a defendant's grimace in response to a psychiatrist's question about the defendant's feelings toward their father should be privileged as an "action [or] occurrence relating to diagnosis or treatment." "Communications" includes conversations, correspondence, actions, and occurrences relating to diagnosis or treatment before, during, or after institutionalization, regardless of the patient's awareness of such conversations, correspondence, actions, and occurrences, and any records, memoranda, or notes of the foregoing. G.L. c. 233, § 20B.

§ 5.21 PSYCHIATRIC COMMITMENTS

After a finding of incompetence to stand trial or a finding or verdict of not guilty by reason of mental disease or defect, the court may order an examination at a mental health facility or, if the defendant or the insanity acquittee is male and in need of strict security, at Bridgewater State Hospital. This inpatient observation may be for up to forty days, but the total period of inpatient observation under Sections 15(b) and 16(a) may not exceed fifty days. G.L. c. 123, § 16(a).

While examinations pursuant to G.L. c. 123, § 16(a) may be conducted at appropriately licensed private mental health facilities, virtually all such examinations are conducted at DMH facilities or at Bridgewater.

§ 5.21.1 Petition and Hearing

Petitions for commitment can be filed at various times and by various entities, depending on the nature of the proceeding and location of the defendant. During an observational hospitalization under Section 15(b) or 16(a), DMH, Bridgewater, or the district attorney may petition for the defendant's or the insanity acquittee's commitment. Within sixty days of a finding of incompetence to stand trial or a finding or verdict of not guilty by reason of mental disease or defect, the district attorney, DMH, or Bridgewater may petition for the defendant's or the insanity acquittee's commitment. The petition is filed with the court having jurisdiction of the criminal case. G.L. c. 123, § 16(b). During the thirty-day period during which a prisoner is held for observation and examination, DMH, Bridgewater, or the director of the place of detention may petition for the prisoner's commitment. If the prisoner is a defendant awaiting trial, the petition is filed with the court having jurisdiction of the criminal case; otherwise, the petition is filed with the District Court having jurisdiction over the place of detention. G.L. c. 123, § 18(a). During a forty-day aid-in-sentencing evaluation, a petition for commitment may be filed by the facility or Bridgewater. If a petition is filed, the defendant must be sentenced prior to the commencement of the commitment hearing. G.L. c. 123, § 15(e).

A hearing on the commitment petition must be commenced within fourteen days of filing, unless a continuance is requested by the defendant or their counsel. G.L. c. 123, § 7(c). Pending the hearing, the defendant may be held in the facility or Bridgewater. G.L. c. 123, § 6.

If the commitment proceedings involve a defendant against whom criminal charges remain pending, competence to stand trial will continue to be at issue. A "petition for the commitment of an untried defendant shall be heard only if the defendant is found incompetent to stand trial, or if the criminal charges are dismissed after commitment." G.L. c. 123, § 16(b).

The district attorney must be notified of and afforded the opportunity to be heard at all commitment hearings conducted pursuant to G.L. c. 123, § 16, and may inspect all reports and papers concerning pending commitment proceedings that are filed with the court. G.L. c. 123, § 36A. While Section 16(d) accords the district attorney the right to be heard, the district attorney is not a party to the commitment proceeding, nor may the district attorney submit information "unconstrained by the usual evidentiary rules (i.e., relevance, personal knowledge, oath or affirmation, and cross-examination)." *Cf. Adoption of Sherry*, 435 Mass. 331, 338 (2001).

§ 5.21.2 Right to Independent Experts

In most commitment proceedings, the services of an independent expert to assist in the preparation and presentation of the defense will be crucial. Funds therefor may be

sought by means of a motion under G.L. c. 261, § 27B. The information gathered and opinions formed by the independent clinician belong to the defense. They should not be shared with (and are not discoverable by) counsel for the petitioner, the district attorney, or the court unless and until a decision is made to call the clinician to testify at the hearing (or to otherwise seek to introduce the clinician's information and opinions into evidence). *See Thompson v. Commonwealth*, 386 Mass. 811 (1982). However, once the decision is made to introduce expert opinion, the defendant waives the constitutional privilege against self-incrimination. The court can then order the defendant to submit to a Rule 14(b)(2)(B) examination, including all that a comprehensive examination entails. *Commonwealth v. Hanright*, 465 Mass. 639, 646 (2013). Over the vigorous dissent of Justice Lenk (joined by Justices Botsford and Dufly), the majority in *Hanright* expanded the scope of discovery under Rule 14(b)(2)(B) and applied what it termed "the same records approach." *Commonwealth v. Hanright*, 465 Mass. at 649.

> [A] defendant is to provide the rule 14 (b) (2) (B) examiner with the same records provided to or considered by the defense expert. A rule 14 (b) (2) (B) examiner may also ask a defendant directly for the names, addresses, dates of treatment, and areas of specialized practice of all treatment providers, and a defendant should answer to the best of his or her ability. Should the rule 14 (b) (2) examiner discover, either from speaking with the defendant or reviewing the treatment records provided, that records necessary to conduct a psychiatric evaluation have not been disclosed, the examiner may request the clerk of court to subpoena such records.

Commonwealth v. Hanright, 465 Mass. at 648–49.

§ 5.21.3 Criteria for Commitment

The following are the criteria for commitment of a defendant or insanity acquittee to a psychiatric facility.

(a) *DMH and Private Psychiatric Facilities*

In order for a defendant or insanity acquittee to be committed to a DMH or private psychiatric facility, the petitioner must prove each of the following beyond a reasonable doubt:

- the defendant or the insanity acquittee is mentally ill;
- the failure to retain the defendant or the insanity acquittee at a facility would create a likelihood of serious harm by reason of mental illness; and
- no less restrictive alternative to hospitalization is appropriate and available in which to treat the defendant or the insanity acquittee.

G.L. c. 123, §§ 8(a), 16(b); *Worcester State Hosp. v. Hagberg*, 374 Mass. 271 (1978). These are the same requirements as civil commitment for individuals without criminal court involvement.

(b) *Bridgewater State Hospital*

To commit a male defendant or insanity acquittee to Bridgewater, the petitioner must prove all of the above beyond a reasonable doubt, and that

- the defendant or the insanity acquittee is not a proper subject for commitment under Sections 7 and 8 to a DMH facility; and
- the failure to retain the defendant or the insanity acquittee in strict custody would create a likelihood of serious harm, as defined at G.L. c. 123, § 1, by reason of mental illness.

G.L. c. 123, §§ 8(b), 16(b); *Worcester State Hosp. v. Hagberg*, 374 Mass. 271 (1978).

Prior to seeking commitment, the person in charge of the place of detention shall have the person evaluated at the place of detention by a qualified psychologist or psychiatrist. The qualified examiner's report is submitted to the District or Municipal Court that has jurisdiction over the place of the criminal case. The court can order further evaluation at Bridgewater State Hospital. If the evaluator believes the person is commitable, then the person in charge of the place of detention may file a petition for commitment.

Where commitment has been sought by the director of a place of detention, a male prisoner may be confined at Bridgewater if the court finds him to be committable. The section allows the commissioner of correction to override an order of commitment to DMH if the commissioner certifies that such confinement is necessary to "insure his continued retention in custody." G.L. c. 123, § 18(a). Under Section 18, there is no need for a court finding that the need for strict security be established beyond a reasonable doubt. The override provision of Section 18 is likely unconstitutional as a violation of the separation of powers. It seems to allow the executive branch to ignore an order of the judiciary. "The judgment of a court must stand as final. It can be reversed, modified, or superseded only by judicial process. It is wholly under the control of the judicial department of government. The Legislature cannot 'supersede' a judgment of a court by its direct declaration to that effect." *In re Opinion of the Justices*, 234 Mass. 612, 621–22 (1920).

§ 5.21.4 Recommitment

Prior to the expiration of an initial six-month commitment under Section 16(b), the facility or Bridgewater may petition for twelve-month recommitments pursuant to G.L. c. 123, § 16(c). Prior to the expiration of an initial six-month commitment under Section 15(e), the facility or Bridgewater may petition for twelve-month recommitments pursuant to Section 18. Prior to the expiration of an initial six-month commitment under Section 18(a), the facility or Bridgewater may petition for twelve-month recommitments pursuant to Section 18(a). Petitions and hearings for recommitments

are filed with and held at the District Court having jurisdiction over the facility at which the defendant or the insanity acquittee is confined. Brockton District Court will hear recommitments to Bridgewater.

The district attorney must be notified of and afforded the opportunity to be heard at all recommitment hearings, G.L. c. 123, § 16(d), and may inspect all reports and papers concerning pending commitment proceedings that are filed with the court. G.L. c. 123, § 36A. While Section 16(d) accords the district attorney the right to be heard, the Commonwealth is not a party and may only submit information constrained by the usual evidentiary rules. *Cf. Adoption of Sherry*, 435 Mass. 331, 338 (2001).

If, after the hearing, the court finds that the criteria for commitment have been established beyond a reasonable doubt, the defendant or the insanity acquittee may be recommitted for a one-year period. As with the initial commitment, the defendant's competency to stand trial will be at issue in a recommitment proceeding under G.L. c. 123, § 16(c). At any time during a commitment or recommitment, an incompetent defendant may bring a motion for a competency hearing. G.L. c. 123, § 17.

§ 5.21.5 Restrictions in and Discharge from Facilities or Bridgewater

A defendant or insanity acquittee who has been committed under Section 16(b) or recommitted under Section 16(c) may be restricted to the buildings and grounds of the facility (including Bridgewater). Where such restrictions are ordered, the facility must be permitted to exercise its discretion in determining how such restrictions are to be implemented, absent a finding that there is but one way to do so or a finding that the facility is unable or unwilling to provide adequate security. *Commonwealth v. Carrara*, 58 Mass. App. Ct. 86 (2003) (court cannot order that client be escorted at all times). Should the facility or Bridgewater desire to remove or modify such restrictions, the court must be notified. Only if neither the court nor the district attorney have objected in writing within fourteen days may the facility remove or modify the restrictions. G.L. c. 123, § 16(e).

A facility or Bridgewater may not discharge a committed defendant or insanity acquittee on its own. Rather, should it desire to discharge during a commitment period or should it intend not to petition for recommitment on the expiration of a commitment, the facility must notify the court and the district attorney. If the district attorney does not petition for further commitment within thirty days of receipt of such notice, the defendant or the insanity acquittee may be discharged. If a petition is filed, the defendant or the insanity acquittee will be retained at the facility or Bridgewater until a hearing is held. At this hearing, the district attorney will bear the burden of proving that the criteria for commitment are met beyond a reasonable doubt. G.L. c. 123, § 16(e).

§ 5.21.6 Prisoners

When a prisoner is committed to a DMH facility or Bridgewater pursuant to G.L. c. 123, § 18(a), the Department of Correction must determine the expiration date of

the prisoner's sentence, taking into account applicable earned reductions and credit for time held in custody. Upon the expiration date, the Section 18 commitment will terminate and the client must be discharged unless the facility or Bridgewater petitions for commitment under G.L. c. 123, § 7. The petition must be filed with the District Court having jurisdiction over the facility and prior to the dismissal of the criminal charges. G.L. c. 123, § 18(c); *In re C.B.*, 2013 Mass. App. Div. 42. As with other requirements in Chapter 123, procedures under Section 18(a) must be strictly adhered to lest the court be deprived of jurisdiction to hear the petition. *See In re P.I.*, 2014 Mass. App. Div. 116. Moreover, any commitment petition must be filed while the defendant or prisoner is still a lawful "patient" of the facility. *See In re C.B.*, 2013 Mass. App. Div. 42 (where defendant being evaluated at Bridgewater is found competent and ordered returned to court with criminal jurisdiction but held at Bridgewater for transport, his status as a patient had terminated and the subsequently filed commitment petition should be dismissed). *But see Matter of E.C.*, 479 Mass. 113, 119–20 (2018) (trial court abused its discretion in declining to allow Bridgewater to amend its petition for recommitment to a petition from G.L. c. 123, § 16(c) to G.L. c. 123, §§ 7 and 8, a motion that Bridgewater filed immediately upon learning that an individual's criminal charge had been dismissed, and continuing authority of Bridgewater to hold individual briefly pending a hearing on its motion to amend did not constitute a violation of due process).

> To the extent the Appellate Division's case law defines "patient" otherwise, we are not bound by it. *See Matter of C.B.*, 2013 Mass.App.Div. 42, 2013 WL 1111396. In any event, the narrow definition of "patient" accepted in C.B. contemplated the commitment of an individual who, unlike E.C., was found competent to stand trial prior to BSH's petition under G.L. c. 123, § 16(c).

In re E.C., 89 Mass. App. Ct. 813, 820 (2016), *aff'd and remanded sub nom. Matter of E.C.*, 479 Mass. 113 (2018).

A prisoner who is retained in any place of detention may, with the approval of the person in charge, apply for admission to a DMH facility or Bridgewater. G.L. c. 123, § 18(b).

§ 5.21.7 Practice Advisory

Immediately upon receipt of a commitment petition, the court should notify the Mental Health Litigation Division of the Committee for Public Counsel Services so that counsel may be appointed. In all cases in which commitment of a defendant is sought and, in particular, those in which authorization to treat the defendant with antipsychotic medication is sought, the impact on the pending criminal proceedings is likely to be substantial. Criminal defense counsel and mental health counsel should consult and cooperate in the representation of their mutual client.

Unless the defendant or counsel requests or assents to a continuance, failure to commence the commitment hearing within the fourteen days established under G.L. c. 123,

§ 7 deprives the court of its jurisdiction to hear the petition. A timely motion to dismiss must be allowed. *Hashimi v. Kalil*, 388 Mass. at 609 (1983). Arguably, the court may also permit delays due to certain unavoidable circumstances (e.g., snowstorms) despite the defendant's refusal to assent thereto. Unless the defendant knowingly agrees after consultation with counsel, counsel should not assent to such a continuance and should instead move to dismiss the petition once the fourteen days have passed.

Neither the restrictions applicable to discharge nor those applicable to a defendant's or an insanity acquittee's movements within a facility or Bridgewater may be imposed on a person who is civilly committed under G.L. c. 123, § 8. Counsel should always advocate for dismissal of the charges in the case of a defendant who is found incompetent to stand trial and committed, or for civil commitment under Section 8 in the case of an insanity acquittee. Only then will the defendant's or the insanity acquittee's care and treatment be governed by their clinical needs as determined by the facility or Bridgewater. However,

> pursuant to G.L. c. 123, § 16(d), the district attorney must continue to be notified of any hearings conducted pursuant to any section of G.L. c. 123 for a person who was initially committed under G.L. c. 123, § 16(b). The requirement of notification includes any future hearings on petitions for civil commitment or an extension of civil commitment pursuant to G.L. c. 123, §§ 7, 8. (Citation omitted). Moreover, any dismissal of charges pursuant to G.L. c. 123, 16(f), is without prejudice, so in the unlikely event that a defendant whose charges had been dismissed were to regain competency, the Commonwealth would be able to reinstate the charges.

Sharris v. Commonwealth, 480 Mass. 586 (2018).