

ness is an important one. In the present case, Mr. Johnson had significant problems that could affect his mental health, including several head injuries and an IQ in the 70s (Patrick F. McCann, Mr. Johnson's attorney, personal communication, August 18, 2015). Although the court of appeals dismissed Mr. Johnson's claim that the district court erred in rejecting his allegation of incompetency to waive his *Miranda* rights, the question of competency to understand the *Edwards* rule is an important one for forensic psychiatrists.

In *Lego v. Twomey*, 4404 U.S. 477 (1972), the Supreme Court ruled that the burden of proof on the state to determine admissibility of a confession was a preponderance of the evidence. As a demonstration of this holding, in *United States v. Glover*, 431 F.3d 744 (11th Cir. 2005), the defendant argued that he lacked the capacity to comprehend his *Miranda* rights. The Eleventh Circuit Court of Appeals ruled that since the defendant had interacted "normally and intelligently with the arresting agents" (*Glover*, p 748), the government had met its burden, despite the defendant's mother's vague testimony that he had an "IQ of 57 or 67" (*Glover*, p 747). Similarly, in *Colorado v. Connelly*, 479 U.S. 157 (1986), the Supreme Court reaffirmed the burden of proof set in *Lego* and made it clear that, although a defendant's mental condition "may be a significant factor in the 'voluntariness' calculus" (*Connelly*, p 164), it cannot be used as a sole argument in regard to voluntariness.

Competency is situation and issue specific. To evaluate competency in regard to *Miranda* rights in general, instruments such as the *Miranda* Rights Comprehension Instruments (Goldstein NES, Zelle H, Grisso T. Sarasota, FL: Professional Resource Press, 2011) may provide a useful roadmap for the evaluation. In cases such as *Johnson*, forensic psychiatrists may be asked to evaluate specifically the defendant's knowledge of and ability to comprehend the *Edwards* rule. Factors that should be considered are specific to the unique circumstances of the case, but may include an evaluation of intelligence, attention, recall, and abstraction skills. While commenting on language ability, it is important to be mindful that the intent behind the uttered word often varies with the level of cognitive sophistication. This reality takes on special importance when the act of talking may equate to revoking rights that have been invoked. In these situations, the forensic psychiatrist's

opinion may help provide psychiatric context to the court.

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## Court Discretion in Evaluating Competency to Stand Trial

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### Connecticut Supreme Court Rules That Trial Court Abused Its Discretion in Not Ordering a Second Competency Evaluation After Defense Counsel Raised New Concerns

In *State v. Dort*, 106 A.3d 277 (2014), the Supreme Court of Connecticut held that a trial court abused its discretion in declining to order a second competency evaluation after defense counsel, at the time of jury selection, raised new concerns to the court regarding his client's ability to understand the proceedings and assist in his defense, in accordance with Conn. Gen. Stat. § 54-56d (2009). The court further delineated the threshold of evidence for trial courts to order an evaluation of competency in criminal proceedings.

#### Facts of the Case

In 2009, Joel Dort was arrested and charged with burglary in the first degree, kidnapping in the first degree, and strangulation in the second degree after an alleged incident of breaking into a former employer's office building and attacking one of Mr. Dort's prior supervisors there. In November 2009, he was ordered to undergo an evaluation of competency to stand trial, after which both defense and prosecution stipulated as to Mr. Dort's competence to proceed.

In June 2010 (seven months later) the court granted Mr. Dort's motion for a speedy trial and began the jury selection process the next day. On the following morning, defense counsel raised new concerns with respect to Mr. Dort's competence and requested a new evaluation. He reported most notably that "[t]here's a fundamental misunderstanding

regarding what can be put forward as a defense in this case” and that “[h]e’s indicated to me that there are things that he has withheld because he was waiting for trial” (*Dort*, p. 283). In response, the court replied that this report did not appear to represent substantial evidence of incompetence and denied the request for an evaluation. The court further declined to hear from Mr. Dort directly after he expressed a wish to speak himself. The trial proceeded and Mr. Dort was found guilty of burglary and kidnapping and was sentenced to 10 years of imprisonment and 7 years of special parole.

He appealed to the state appellate court, asserting that the trial court had erred in denying the request for a second competency evaluation. The appellate court agreed and, in reversing the conviction, noted that Mr. Dort’s due process rights had been violated by not having his competency properly evaluated (*State v. Dort*, 51 A.3d 1186 (2012)). It ordered that, if the state wished to re-prosecute the case, the trial court should conduct a hearing investigating the need to re-evaluate Mr. Dort’s competency at that time before proceeding with the trial process.

The state’s subsequent petition for certification to the Connecticut Supreme Court was accepted with limitation to three specific questions:

Was the appellate court’s determination of the inadequacy of the trial court’s competency evaluation appropriate, given that the parties had not directly raised or briefed that issue on appeal?

Did the appellate court properly determine the trial court’s inadequacy of investigation with regard to the defendant’s competency?

If yes to both, was it proper for the appellate court to reverse the conviction and order the trial court to conduct a hearing to determine the need for a new competency evaluation?

#### *Ruling and Reasoning*

In its ruling, the state supreme court upheld the appellate court’s prior decision on all three questions, with particular attention paid to the latter two. Specifically, it first affirmed the reversal of conviction and remand to the trial court. It further ordered that, should the state wish to re-prosecute the case, the trial court would need to conduct a hearing on whether to repeat the competency evaluation process prospectively before proceeding again.

This decision proceeded from the concept that prosecuting an incompetent defendant violates both constitutional due process protections as laid out in *Dusky v. United States*, 362 U.S. 402 (1960), as well as Connecticut statutory protections in Conn. Gen. Stat. § 54-56d (a) (2009): “A defendant shall not be tried . . . while the defendant is not competent.” The test for when the court is required to order a competency evaluation was explained based on prior case law. “As a matter of due process, the trial court is required to conduct an independent inquiry into the defendant’s competence whenever he makes specific factual allegations that, if true, would constitute substantial evidence of mental impairment” (*Dort*, p. 290, quoting *State v. Lloyd*, 507 A.2d 992 (1986), as referring to *Pate v. Robinson*, 383 U.S. 375 (1966)).

The Connecticut Supreme Court determined that the defense counsel’s stated concerns at the time of jury selection represented such specific factual allegations and that, by declining to further explore them via professional evaluation and a competency hearing, the trial court abused its discretion. The existence of an evaluation and ruling finding Mr. Dort competent seven months earlier did not weigh into the decision. The court further determined that, consistent with Supreme Court decisions in *Dusky*, *Pate*, and *Drope v. Missouri*, 420 U.S. 162 (1975), the state could not attempt to perform a retrospective competency evaluation, but rather must begin a new trial with a hearing to determine Mr. Dort’s competency to stand trial again at that time, given that the prior conviction had been reversed.

#### *Discussion*

This decision shines light on two important elements of a criminal defendant’s due process right to stand trial only if competent. It first emphasizes the temporal nature of such an evaluation and ruling as cross-sectional and immediate rather than wide-ranging and fixed, and clarifies the court’s obligation to order such an evaluation when concerns of incompetence are raised.

Unlike many other evaluations done in forensic settings, competency to stand trial evaluations focus not on the past (such as in examining criminal responsibility at the time of the action) or on the future (such as in risk assessments for commitment proceedings), but on the here-and-now capacities of the evaluatee—specifically, on the two classic *Dusky* prongs of understanding the criminal process in his

case and being able to work with counsel in his defense.

What this means for the courts is that a defendant's ability to meet the bar of competence can change over time, either as his own mental state changes, due to the natural course of an underlying illness or the stress of criminal proceedings, or as the situation changes, perhaps in a case where new and more complex features come into the defense strategy. A prior, even recent, finding of competency is no guarantee of current competency. The corollary is that competency cannot be fairly examined in hindsight, particularly many months to years after the fact, and attempts to do so have been struck down by the courts on numerous occasions as insufficient to protect the due process right to a fair trial.

Although the elements of competence are well-described in case law and statute, the trigger for when a court may or must request an evaluation by a professional is less clear. The state supreme court asserted that the trial court has a requirement to pursue such evaluation under a defined condition, when specific factual allegations have been raised, and that failure to do so represents abuse of discretion. The ruling did, of course, leave the lower courts some latitude in making this determination judiciously, confirming prior rulings that mere legal conclusions (as opposed to facts) are insufficient to trigger this requirement, and that "prisoners are not entitled . . . to make bald charges of incompetency" (*Dort*, p. 290). Regardless, they emphasize that concerns raised by the defendant or defense counsel must be taken seriously, with appropriate action by the court.

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## Re-evaluating the Volitional Test for Criminal Responsibility

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## Consideration of Diagnostic Categories versus Symptom Severity in Evaluating the Volitional Component of Behavior

In *Maine v. Giroux*, 113 A.3d 229 (2015), the Maine Supreme Court considered Mr. Giroux's appeal of the denial of his motion to withdraw his guilty pleas on the ground that his kleptomania diagnosis was new evidence that raised reasonable doubt related to his intent and should therefore have been admitted.

### *Facts of the Case*

In December 2012, Collin Giroux was on probation from charges originating in 2008. He incurred seven new charges, including two counts of burglary, three counts of theft by unauthorized taking, criminal mischief, and violation of the conditions of release. Mr. Giroux subsequently requested an evaluation to determine his competence to stand trial and his criminal responsibility. He was found competent, able to appreciate the wrongfulness of his behavior, and able to plan his behavior at the time of the offenses.

Thereafter, Mr. Giroux waived indictment and pleaded guilty to all charges and accepted a plea bargain, including a 30-month cap on time to serve. Mr. Giroux's counsel requested that the case be continued for sentencing pending a third evaluation of the impact of Mr. Giroux's kleptomania diagnosis. The request was granted, and a presentence examination report was filed on January 1, 2013.

On August 13, 2013, Mr. Giroux moved to withdraw his guilty pleas, asserting that diagnostic information from the third report was new evidence of a mental abnormality that raised reasonable doubt as to intent pursuant to Maine statute 17-A M.R.S. § 38 (2014). The court denied his motion, finding that kleptomania is not a valid defense to theft under Maine common or statutory law.

Mr. Giroux was sentenced to five years' imprisonment with three years suspended and two years' probation. His earlier probation was partially revoked, and two years of the underlying sentence were to be served concurrent with the new sentence. Mr. Giroux appealed his conviction and was granted a certificate of probable cause to proceed.

### *Ruling and Reasoning*

The Maine Supreme Court upheld the ruling. In considering Mr. Giroux's claim, the supreme court reviewed Maine statutory and common law and