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Applicability: DDSN Regional Centers, Psychologists Who Conduct Competency Evaluations, Case Management Providers, Day Service Providers, HASCI Rehabilitation Support Providers, Intake Providers and Residential Habilitation Providers

Purpose

This directive is to establish guidelines for performing Competency to Stand Trial (CST) Evaluations. CST evaluations may only be ordered by the Family Court for juveniles or the Court of General Sessions for adults. The evaluations aid the court in determining the defendant's rights in confronting the case against him/her under the United States Constitution. The final decision concerning competency to stand trial rests with the court. The evaluation is an opinion which will assist the court in its decision process. Note, the term "person," "defendant," "accused," or "individual" may be used interchangeably in this directive.

Statutory Mandates

In accordance with state law, S.C. Code Ann. § 44-23-410 (2018), whenever Defense Counsel or the Solicitor in Circuit Court or Family Court has reason to believe that a person, on trial for a criminal offense, is not fit to stand trial because the person lacks the capacity to understand the proceedings against him/her or to assist in his/her own defense as a result of a

lack of mental capacity, either Defense Counsel or the Solicitor can request the judge order an examination of the person. The examination shall be done by two examiners designated by the Department of Mental Health (DMH), if the person is suspected of having a mental illness or designated by the Department of Disabilities and Special Needs (DDSN), if the person is suspected of having an intellectual disability or a related disability. If, after initial assessment either DDSN or DMH determines the defendant evidences symptoms of both mental illness and an intellectual disability or a related disability, they may defer the case for a joint evaluation. If the person is suspected of having both mental illness and an intellectual disability or a related disability, then both Departments will conduct a joint CST evaluation with one examiner from each Department designated to further evaluate the person and render a final report on his mental capacity.

If DDSN finds no intellectual disability or a related disability but mental illness, no determination of competency shall be rendered. The court will be informed and a recommendation be made that DMH perform the CST.

By order of the SC Supreme Court, effective April 2005, DMH has sole responsibility to conduct criminal responsibility evaluations for the Court of General Sessions. The CST orders must be on the forms approved by the South Carolina Supreme Court and can be found on the Judicial Department website at: <https://www.sccourts.org/forms/>.

Procedures

Court orders for CST evaluations are referred to the DDSN Central Office, Office of Clinical Services. All statutory time frames are calculated from the date the order and required documents are received. The examination must be conducted within 30 days after receipt of the court's order unless a 15 day extension is requested and granted. The examination will be done on an outpatient basis at one of the DDSN Regional Centers. An appointment letter with date, time, and location will be sent to defense counsel and the solicitor along with Protocol for Court Ordered Forensic Mental Evaluations. The defense counsel in charge of the case shall assist in arranging transportation with the appropriate law enforcement office if the person is in a correctional facility or with a family member if the person is not incarcerated per the court order. Should the defendant refuse to cooperate with the examiners during the evaluation, the examiners shall terminate the evaluation and DDSN will contact Defense Counsel to request assistance in facilitating cooperation from the defendant. If, upon re-evaluation, the defendant continues to refuse to cooperate, DDSN's General Counsel will notify the court and all counsel of such.

S.C. law requires DDSN to designate two examiners to conduct the examination within the required timeline. In conducting the examination, one examiner who is qualified as a forensic examiner, shall be designated as the lead examiner. A secondary examiner is assigned from one of the DDSN Regional Centers. Within 10 days of the examination, the lead examiner must make a written report to the court which shall include:

1. A diagnosis of the person's mental condition;

2. Clinical findings bearing on the issues of whether or not the person is capable of understanding the proceedings against him/her and assisting in his/her own defense; and
3. If deemed to be presently incompetent to stand trial, a statement indicating whether or not there is any substantial possibility that the person will obtain that capacity in the foreseeable future.

The written report is filed with the Clerk of Court and sent to the solicitor and defense counsel. All information related to CST evaluations is maintained by the DDSN Office of Clinical Services for a period of 10 years. After 10 years the record is destroyed with the exception of the CST Court Order and CST evaluation which is archived and retained indefinitely. Examiners may be subpoenaed to testify, although the state statute indicates the evaluation can be admitted into evidence without the testimony of the examiner.

Evaluation Guidelines

In order to ensure the consistency of CST evaluations conducted by DDSN examiners, the following items should be addressed in competency reports:

1. Notification of the Purpose of the CST Examination:

The examiner should document that he/she has fully informed the person of the purpose and nature of the evaluation procedure. At a minimum, disclosure should include the legal questions to be addressed, the extent of non-confidentiality, identification of all third parties to whom the report will be sent, and the possibility that the examiners may have to testify in court. There is no requirement to give a “Miranda Rights” warning to the individual being evaluated.

2. Mental Status:

The report should contain a detailed description of the current mental status of the person. Specific reference should be made to his/her ability to communicate effectively and the results and explanation of intellectual and adaptive measures available. If suspected, the possibility of the presence of a psychiatric disorder should be noted. If mental illness is detected, the examiner should recommend that the individual be referred to DMH for evaluation to determine its bearing on the person’s competency to stand trial or recommend a joint CST evaluation.

3. Competency Opinion:

The report should include specifics in regards to whether or not the person has the capacity to understand the proceedings against him/her and to assist in his/her own defense. The United States Supreme Court in the case of Dusky v. United States, 362 U.S. 402 (1960), established the modern legal definition of competency to stand trial. The court held that “the test must be whether he (the defendant) has sufficient present ability to consult with his attorney with a reasonable degree of rational understanding and

a rational as well as a factual understanding of the proceedings against him.” South Carolina has adopted this test in the case of State v. Law, 270 S.C. 664, 244 S.E. 2d 302 (1978). The Dusky standard has several core elements:

- a. A competency assessment evaluates the defendant’s present ability to consult with his/her attorney and to understand the proceedings against him/her.
- b. The assessment focuses on the defendant’s capacity, not willingness, to relate to his/her attorney and understand the proceedings. However, if the defendant’s unwillingness is based on irrational factors as a result of a mental condition, then the defendant’s capacity to assist in his/her defense may be called into question.
- c. The assessment is flexible since it only calls for a “reasonable” degree of understanding the proceedings, not a perfect or complete understanding on the part of the defendant.
- d. The Dusky assessment also emphasizes the defendant’s cognitive functioning due to the presence or absence of “factual” or “rational” understanding of the proceedings. The presence of a mental deficiency is relevant only insofar as that deficiency affects the defendant’s “rational understanding” as he consults with his attorney and undergoes a criminal trial. However, note that S.C. statutory law emphasizes “capacity to understand” as a result of “lack of mental capacity.” Thus, S.C. statutory law has amended case law to some extent in that a defendant may be found competent if he/she has the capacity to understand the proceedings against him/her, but presently does not possess a factual and rational understanding where such lack of understanding is not based on a mental deficiency, but rather on other factors, (e.g., a lack of knowledge of the U.S. criminal justice system by a child or a foreigner).
- e. Under the Dusky standard, “competency” is that level of “present ability” and “factual and rational understanding” exhibited by the defendant which meets Constitutional standards. The South Carolina statute refers to these concepts as “capacity to understand.” On the theory that one should not be tried in his/her absence, the Constitutional standard requires only that the defendant be “present” at trial from a mental perspective. Thus, the presence of mental illness or mental deficiency would not preclude a criminal trial, except where such mental illness or mental deficiency would so cloud the defendant’s present mental faculties that he/she would not be “mentally present” for trial. This minimal standard does not require the defendant have the capacity or ability to formulate a defense, just assist legal counsel in their defense.

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