

COMPETENCE DATA SUMMARY¹

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The spreadsheets summarize data on statutes and court rules across fifty states, Washington, D.C., and the federal government, which will be helpful to researchers, practitioners, and reformers looking at the similarities and differences between the approaches in competency evaluation and restoration across jurisdictions. One spreadsheet is a high-level summary; a fuller account of each jurisdiction's provisions is also available.

The data is limited to the rules written in each jurisdiction's statutory code or court rules. Jurisdictions may have informal procedures on the ground in addition to the rules laid out here. Also, this research did not analyze court cases interpreting these rules, which may introduce important variances in how the rules work in practice. Despite those caveats, this compilation provides a useful starting point to compare the competence process requirements across jurisdictions.

The narrative below explains each category in further detail.

I. EVALUATION PROCEDURES

Allows Certain Pre-Trial Proceedings While Defendant Is Incompetent

This category tracks whether the statute explicitly allows certain types of proceedings to continue without the participation of the defendant. About half of the jurisdictions (twenty-

¹ This project is supported by GRANT NO. 2019-YA-BX-K001, awarded by the Bureau of Justice Assistance (BJA). BJA is a component of the Department of Justice's Office of Justice Programs which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crimes, and the SMART Office. Points of view or opinions expressed in this report are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

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eight) include such provisions. Most commonly, jurisdictions allow for proceedings or motions that are “susceptible to fair determination” without the participation of the defendant. Specific examples of these types of motions include decisions on the sufficiency of the indictment or other legal questions surrounding the validity of the prosecution’s case, such as whether double jeopardy has attached or whether the statute of limitations has run. Some jurisdictions have also pointed to discovery motions or other non-merits pre-trial proceedings as examples of motions that can be heard without the defendant’s participation.

Provides for Acquittal-Only Merits Proceedings While the Defendant Is Incompetent

A handful of jurisdictions go even further and provide mini-trial mechanisms that operate without a defendant’s participation and can lead only to an acquittal. Delaware, for example, allows defense counsel to move for a hearing in which the state needs to make out a prima facie case against the defendant; if it fails to do so, the charges are dismissed, and the outcome is treated as an acquittal. Four jurisdictions in addition to Delaware have similar provisions.

Imposes Specific Time Limits for Competence Evaluation

This category tracks whether jurisdictions limit the amount of time between when a court issues an evaluation order and when it decides the competence question. Forty-one jurisdictions include specific limits, but the period of time they limit varies widely. Some jurisdictions place the limit on the forensic examiner’s time: the amount of time for a competence examination, the amount of time to produce a report, or both. Other jurisdictions limit the time for proceedings in the courts, such as the time between the production of the report and the hearing on the question of competence, or the overall time between an order for evaluation and a hearing. A jurisdiction that imposes a time limit for any aspect of the evaluation proceedings is coded as “yes” in this column.

Limits Some Aspect of Evaluation Process to 30 Days or Less

This category assesses whether a jurisdiction has imposed a limit of thirty days or less on any aspect of the competence evaluation. Twenty-three jurisdictions have a limit of thirty days or less, with thirteen of those jurisdictions limited only to those who are undergoing an

examination on an inpatient basis. For jurisdictions that limit multiple aspects of the evaluation process (such as time from order to evaluation, and then also from report to hearing), the time limits are added together to reach the overall limit on the evaluation process. An “N/A” code in this column indicates that the jurisdiction does not mention a time limit on any aspect of the evaluation proceedings. Many of these statutes also allow the time period to be extended for good cause shown or in other exceptional circumstances.

Mentions Outpatient Examination Options

This category assesses whether jurisdictions explicitly allow for examinations to occur someplace other than the state hospital or other inpatient facility. Thirty-five jurisdictions mention an outpatient setting as a possible evaluation location, and several statutes include jail or a correctional facility as one of the outpatient options.

Requires More than One Examiner

Most jurisdictions (forty-two) only require one examiner to complete a report on the defendant. Of the ten jurisdictions that require more than one examiner, five limit multiple examiners to specific situations, such as cases involving felonies or defendants with a possible developmental disability.

Allows Simultaneous Insanity Evaluation

This category assesses whether the statute allows a court to order an evaluation of the defendant’s state of mind at the time of the crime in addition to an evaluation of the defendant’s competence. Twelve jurisdictions include such a provision, but one requires that the evaluator file separate reports on the two questions. Of the remaining forty jurisdictions, most make no mention of an insanity evaluation, but seven explicitly prohibit an evaluator from conducting a competence and insanity assessment at the same time.

Evaluation Report Must Include Specific Information In Addition to the Examiner's Opinion on Whether the Defendant Is Competent

This category notes whether a jurisdiction has specific requirements for what information must be included in the report of examination, above and beyond the assessment of

competence. Some examples of this required information include the defendant's diagnosis; the nature of the examination, such as what tests were used; the background and experience of the examiner; the prognosis for the defendant; treatment recommendations; and an assessment of the defendant's dangerousness.

Evaluation Includes Assessment of Likelihood of Restoration/Recommendation for Treatment Placement/Assessment of Dangerousness

These three categories track whether the jurisdiction requires one specific kind of requirement be included in its examination report.

1. Twenty-one jurisdictions mandate that evaluators assess the defendant's likelihood of restoration to competence. Many jurisdictions include provisions for dismissing the case or referring the defendant to civil commitment if he is found unrestorable.
2. Twenty jurisdictions require evaluators to provide a recommendation as to the place or type of restoration treatment that would be most likely to succeed with the particular defendant.
3. Sixteen jurisdictions explicitly require that evaluators assess the defendant's dangerousness to self or to others. Five of those jurisdictions limit this assessment to particular circumstances, such as when it is requested by the prosecutor or when the defendant is accused of a felony.

Prohibits Revoking Pretrial Release/Considering Competence as Pretrial Release Factor

Judges have been known to detain defendants pretrial simply because their competence is in question,³ but eleven jurisdictions explicitly prohibit this practice. This category tracks

³ See Jason Auslander, *Pitkin County Jail Inmate Died by Suicide Sunday Night, Sheriff Says*, ASPEN TIMES (Nov. 4, 2019), <https://www.aspentimes.com/news/pitkin-county-jail-inmate-dies-sunday-night-investigation-underway/> (noting that defendant Jillian White, who died by suicide in her jail cell, had been on pretrial release before she was found incompetent and unable to find a treatment placement to restore her competence; a warrant was then issued for her arrest).

statutory prohibitions on either considering incompetence during pretrial release decisions or revoking pretrial release once a defendant is found incompetent.

II. RESTORATION PROCEDURES

Excludes Misdemeanors or Low-Level Crimes from Restoration

This category tracks jurisdictions that place some restrictions on competence restoration for defendants accused of less serious crimes. A small number of jurisdictions (fourteen) either prohibit competence restoration for this group or encourage a court to dismiss charges against defendants before they enter into a competence restoration program. For instance, Florida limits the competence restoration procedures contained in the statute to felonies and thus implicitly excludes misdemeanors from restoration. Other jurisdictions have provisions for courts to dismiss charges against low-level offenders. California, for example, allows judges to either dismiss the charges or refer the defendant to a diversion program. Arizona allows the court to dismiss a misdemeanor charge if a defendant has previously been found incompetent.

Provides Pathways to Community Diversion Programs

Many jurisdictions have diversion programs for individuals with mental health conditions, but those programs often have restrictive criteria that exclude many defendants found incompetent to stand trial.⁴ Few jurisdictions provide explicit connections to diversion pathways once a defendant has been found incompetent. Six jurisdictions are the exception to this general rule and provide an explicit connection to a diversion program either in the statutory text or in the court rules governing competence.

This category excludes from the definition of “diversion programs” court-ordered civil commitment. Several jurisdictions do have pathways between the competence system and civil commitment system, which are not captured in this data.

⁴ See Steven K. Hoge & Richard Bonnie, *Expedited Diversion of Criminal Defendants to Court-Ordered Treatment*, 49 J. AM. ACAD. PSYCH. & L. 1 (2021).

Mentions Outpatient Options for Restoration

Most jurisdictions (forty-one) explicitly mention an outpatient option for competence restoration. Two jurisdictions limit this option only to individuals accused of certain crimes, such as misdemeanors. Jail-based restoration is included as an outpatient restoration option for purposes of this category.

Includes Explicit Time Limits on Restoration

This category identifies statutes that include a time limit on restoration that is both firm and tied to something other than the defendant's maximum sentence. Jurisdictions that use only the maximum sentence to determine the outer limits of competence restoration treatment are coded as "no."

The majority of jurisdictions (thirty-nine) either have an explicit time limit or limit restoration to the lesser of a specific time or maximum sentence. The remaining jurisdictions either rely solely on maximum sentences or do not include a time limit at all.

Time Limit Is Six Months/One Year or Less

The chart next assesses the length of time of that limit. The first category includes jurisdictions that set the limit at six months or less. Most individuals are restored to competency within six months.⁵

Of the thirty-nine jurisdictions that have set an explicit limit, only sixteen have set that limit at six months or less, and eight of those jurisdictions only apply the limit to defendants accused of less-serious crimes, such as misdemeanors or low-level felonies.

Ten additional jurisdictions have limits between six months and one year. Of the twenty-six jurisdictions that have a limit of one year or less, ten only apply the limit to those accused of certain categories of offenses, such as misdemeanors or non-violent felonies.

⁵ See Gianni Perelli & Patricia Zapf, *An Attempted Meta-Analysis of the Competency Restoration Research: Important Findings for Future Directions*, 20 J. FORENSIC PSYCH. RESEARCH & PRACTICE, 134, 152 (2020) (finding that approximately eight out of ten incompetent defendants are restored within six months).