Mental Competency:
A Rights-Based Approach

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Mental Competency, Where the Rules of Ethics Lose their Meaning

1. "[T]he conviction of an accused person while he is legally incompetent violates due process." *Pate v. Robinson*, 383 U.S. 375, 378 (1966).
2. "[A] lawyer *shall* abide by a client's decisions: (1) concerning the objectives and general methods of representation; (2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law; (3) In a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify." TX ST RPC Rule 1.02(a) (emphasis added).
    A. Defense counsel cannot strictly comply with the above ethical rule and provide effective representation for an incompetent client at the same time.
    B. The attorney-client relationship with an incompetent client often consists of conflict.
    C. The conflict that arises in representing an incompetent clients is necessary for defense counsel to discharge their duties.
3. "A lawyer may limit the scope, objectives and general methods of the representation if the client consents after consultation." TX ST RPC Rule 1.02(b).
    A. An incompetent client cannot consent after consultation.
    B. The inability of an incompetent client to consent to anything is foundation of all competency proceedings.
4. No plea of guilty or nolo contendere should be accepted from a defendant who is incompetent to proceed. *See* Standard 7-4.2 Competence to Plead, ABA Standards for Criminal Justice 7-4.2(a).
5. Failure to request a competency evaluation can constitute ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984).
6. Where a condition may not be visible to a layman, counsel cannot depend on his or her own evaluation of someone's sanity once he has reason to believe an investigation is warranted because, where such a condition exists, the defendant's attorney is the sole hope that it will be brought to the attention of the court. *See Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990).

Counsel Becomes the Representative of the Incompetent Client's Rights

7. "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.'" *United States v. Cronic*, 466 U.S. 648, 656 (1984) (quoting *Anders v. California*, 386 U.S. 738, 743 (1967)).
    A. When defense counsel is appointed to represent an incompetent client, they become an advocate for the constitutional rights of the accused. Only when the client is restored to competency can the lawyer become an advocate for the client in the ordinary sense.
    B. With an incompetent client, discussing the facts or application of law would be rhetorical and not useful.
    C. The rules of professional conduct illustrate the dichotomy between advocating for an incompetent client's constitutional rights and representing the client:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

    See TX ST RPC Rule 1.03(a)-(b). An incompetent client cannot make "informed decisions regarding the representation." *Id*. Therefore, counsel's only guidance from the rules of professional conduct is to keep the client "reasonably informed." *Id*.
8. Defense counsel should inform the client of the intent to seek a competency evaluation and provide their reasoning. An incompetent client may become confrontational, but the advice must be given.
9. From the moment that counsel has a reasonable basis to believe their client is incompetent, they cannot allow the client to assert or waive any rights. A waiver would prejudice the defendant because the right would be lost. At the same time, the assertion of a right would also prejudice the defendant because the right to be competent during the assertion of said right would also be lost.
    A. The preliminary hearing cannot be waived.
    B. Nor can counsel proceed with the preliminary hearing.
    C. The detention hearing, likewise, cannot be waived.
    D. Counsel is prohibited from proceeding with the detention hearing.
10. Counsel must resist the temptation to proceed with the preliminary and detention hearing, even where a finding of no probable cause or release on bond is assured, because the accused would be deprived of his right to participate while competent. First, defense counsel's belief in the probability of success is almost always overconfident. Second, an attorney could vigorously cross-examine the witnesses against his client and present appellate court opinions in support of a finding of no probable cause, but fail to expect the unexpected:

> [Attorney visits his client in holding cell after court hearing.]
>
> Attorney: Well, as you saw, I argued there was no probable cause and asked to have you released, but the court ruled against us.

> Client: Yes, I remember. I saw the witnesses testify and listened to the arguments you made on behalf of your client. But there is one problem. Everybody was talking about David. My name is Chris. I'm not the person you all were talking about. David is my brother.

In the above example, the defendant was provided with a hearing on bond under the Bail Reform Act of 1984, 18 U.S.C. § 3142. The fact that his counsel proceeded under a misapprehension of the identity of the person named as the defendant would be his error and certainly constitute ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

11. Counsel must assume that the defendant insists on exercising all of his rights, including the right to be present for every court appearance. This mindset assures that the client, who may be restored to competency at another time, is the one making decisions on how to exercise his rights.

A Texas Tale of Competency

12. Defense counsel should raise the issue of competency and insanity even where success is dubious. A cautionary tale from west Texas illustrates that, even with good intentions, competency cases can go bad.
13. In *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990), the 5th Circuit warned attorneys of the necessity to investigate mental health issues: "We are not insensitive to the hardships imposed on appointed counsel who work with little or no compensation under difficult conditions. It is very often a thankless undertaking. Nevertheless, there is a duty to investigate which cannot be abridged because counsel is only appointed, not retained." It is the law of nature than whenever the court says defense counsel has a thankless job, it is a prelude to a finding of ineffective assistance of counsel.
14. The defendant in *Bouchillon* was a Vietnam veteran with a history of mental problems and substance abuse who was charged in state court in Lubbock, Texas, with aggravated kidnapping and aggravated robbery. *Bouchillon*, 907 F.2d 589, 590. On advice of counsel, he pled guilty to robbery and was sentenced to 20 years imprisonment. *Id*. He filed a habeas petition alleging that he was insane at the time of the offense and incompetent at the time of his plea. *Id*. The opinion is terrifying because the attorney was advising what he thought was best given his experience:

> At the federal evidentiary hearing, Bouchillon's trial counsel did not deny that Bouchillon told him he had mental problems, had been institutionalized, and was on medication. He claimed however that the discussion of Bouchillon's mental problems arose because Bouchillon wanted to assert an insanity defense and that he advised Bouchillon that "it was difficult to prove an insanity defense in Lubbock, Texas." To drive this point home he told Bouchillon about one of his recent cases in which ten members of the jury had voted for a guilty verdict despite the testimony of numerous experts, including the well-known Dr. Grigson, that his client was insane. He admitted that this story may have "persuaded Mr. Bouchillon a little bit" to abandon the insanity defense and accept the plea. He made no phone calls, did not request Bouchillon's medical records, did not talk to witnesses regarding Bouchillon's mental problems—in short, he did no investigation of any kind because he said that Bouchillon appeared rational.

See Bouchillon v. Collins, 907 F.2d 589, 596 (5th Cir. 1990) (internal citations omitted). The 5th Circuit held that counsel was ineffective and affirmed the district court's order granting the writ of habeas corpus. *Bouchillon*, 907 F.2d at 590.

Competency is the Right Not to be Tried or Convicted While Incompetent

15. "The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope v. Missouri*, 420 U.S. 162, 172 (1975) (citing *Pate v. Robinson*, 383 U.S. 375 (1966)).
16. The Supreme Court has "repeatedly and consistently recognized that 'the criminal trial of an incompetent defendant violates due process.'" *See Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Medina v. California*, 505 U.S. 437, 453 (1992)).
17. Competency is not the same as criminal responsibility, and implicates only the rights guaranteed to the accused for due process. "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a **fair trial**, including the right to **effective assistance of counsel**, the rights to **summon**, to **confront**, and to **cross-examine witnesses**, and the **right to testify** on one's own behalf or to **remain silent** without penalty for doing so." *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (emphasis added). "Some have viewed the common-law prohibition as a by-product of the ban against trials in absentia." *Drope*, 420 U.S. at 171 (internal quotation marks omitted).
18. The right to competency does not extend to federal habeas proceedings. *See Ryan v. Gonzales*, 568 U.S. 57, 60–61 (2013).
19. The test for competency seeks to assure that the defendant can exercise all the rights guaranteed to the accused. The assistance of counsel is thought to assure that the defendant can protect his other rights, so the competency test centers on the right to counsel under the 6th Amendment: "A defendant may not be put to trial unless he has sufficient present ability to **consult with his lawyer** with a reasonable degree of rational understanding ... [and] a rational as well as factual understanding of the proceedings against him." *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)) (emphasis added) (internal quotations omitted). The Supreme Court has recognized that "an incompetent defendant would be unable to assist counsel in identifying witnesses and deciding on a **trial strategy**." *Ryan v. Gonzales*, 568 U.S. 57, 65 (2013) (emphasis added).
    A. The competency test is codified in 18 U.S.C. § 4241, but the statute is not useful.
    B. Counsel should think of competency in terms of rights, not the statute.

Ignore the Statute: A Rights-Based Approach to Competency

20. The question for counsel is how can I protect my client's ability to exercise all the rights afforded to the accused in criminal prosecution?
    A. If the defendant cannot rationally exercise those rights, he is not competent. The client must be able to weigh arguments for and against any course of action.
    B. For example, the client must be able to make a rational decision concerning the privilege against self-incrimination. He must understand that he could remain silent

without penalty but would be cross-examined by the government if he chooses to testify.

21. The defendant's right not to be tried and convicted while incompetent assumes the defendant has entered a plea of not guilty. When the defendant seeks to enter a plea of guilty, the considerations are the same:

> A defendant who stands trial is likely to be presented with choices that entail relinquishment of the same rights that are relinquished by a defendant who pleads guilty: He will ordinarily have to decide whether to waive his privilege against compulsory self-incrimination, by taking the witness stand; if the option is available, he may have to decide whether to waive his right to trial by jury; and, in consultation with counsel, he may have to decide whether to waive his right to confront his accusers, by declining to cross-examine witnesses for the prosecution. A defendant who pleads not guilty, moreover, faces still other strategic choices: In consultation with his attorney, he may be called upon to decide, among other things, whether (and how) to put on a defense and whether to raise one or more affirmative defenses. In sum, all criminal defendants—not merely those who plead guilty—may be required to make important decisions once criminal proceedings have been initiated. And while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial. (The decision to plead guilty is also made over a shorter period of time, without the distraction and burden of a trial.) This being so, we can conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty. If the *Dusky* standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty.

See Godinez v. Moran, 509 U.S. 389, 398–99 (1993) (internal citations and quotation marks omitted).

22. While the competency standard is the same for a plea of not guilty or plea of guilty, the defendant's waiver of the right to trial or counsel, however, is subject to heightened scrutiny. "A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is **knowing and voluntary**." *Godinez v. Moran*, 509 U.S. 389, 400 (1993) (citing *Parke v. Raley*, 506 U.S. 20, 28–29 (1992)) (emphasis added).
23. A defendant who is incompetent could never enter a plea that was knowing and voluntary. At the same time, a defendant who is competent would not necessarily be able to enter a plea that was knowing and voluntary. Competency is necessary but not sufficient to enter a knowing and voluntary waiver of the right to trial or counsel.
24. The Supreme Court has provided the following analysis of a guilty plea, which is useful for competency because, again, if the defendant does not understand the following, he is not competent:

> Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so—hence the minimum requirement that his plea be the voluntary expression of his own choice. But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction

> may be entered without a trial—a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.

See Brady v. United States, 397 U.S. 742, 748 (1970) (internal citations omitted).

25. "Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." *Godinez v. Moran*, 509 U.S. 389, 402 (1993). This holding is particularly useful in competency analysis because it cautions against requiring that defendants exercise their rights wisely. There is no requirement that the defendant make good strategic decisions, only that he have some degree of rationality.

The Statute: 18 U.S.C. § 4241

26. The competency statute codifies the test in *Dusky v. United States*, 362 U.S. 402, 402 (1960). There are two possible bases for a finding of incompetency: the defendant is unable to 1) understand the nature and consequences of the proceedings against him; or 2) assist properly in his defense. *See* 18 U.S.C. § 4241(a). The test implies rationality and the ability to discuss trial strategy.
27. Some interesting competency cases:
    A. Throwing a chair at the prosecutor during trial does not render the defendant incompetent. *See Mirra v. United States*, 255 F. Supp. 570, 572 (S.D.N.Y. 1966), aff'd, 379 F.2d 782 (2d Cir. 1967) ("After two months of trial, on June 4, 1962, at 10:30 A.M., while under cross-examination about a prior conviction for conspiracy to violate the federal narcotics laws, petitioner picked up the witness chair and threw it at the prosecutor. The chair shattered against the jury rail. Following a two-hour recess, petitioner's trial attorney reported that: 'he thought' petitioner was 'not in control of himself;' 'he has been incoherent when I tried to talk to him;' 'he complained of being sick' and that counsel tried to consult with him and that he just 'couldn't get through to him now. There is a block there.'").
    B. The defendant's amnesia, that he was devoid of any memory of the offense, does not render him incompetent or insane. *See United States v. Borum*, 464 F.2d 896, 900 (10th Cir. 1972) (rejecting the defendant's argument that "he was deprived of full opportunity to defend himself because of his inability to remember the events which transpired at the time of the offense… [and because] he at trial had a mental block on these events, so he argues, he was unable to communicate the facts from his standpoint to his counsel and on this account was deprived of due process.").
    C. A claim of innocence despite overwhelming evidence of guilt does not render a defendant in competent. *See United States v. deBerardinis*, No. 18-CR-00030-01, 2020 WL 2153526, at *14 (W.D. La. Apr. 3, 2020), report and recommendation adopted, No. CR 18-00030-01, 2020 WL 2130996 (W.D. La. May 5, 2020) ("It is not uncommon for perfectly competent defendants to insist to the court and counsel that they are completely innocent despite overwhelming evidence to the contrary.") "[T]he mere fact that a criminal defendant espouses a far-fetched, or even bizarre, legal-defense theory is insufficient to clear the high hurdle for incompetency that

has been set by the prior decisions of the Supreme Court." *See United States v. Davis*, 515 F. App'x 486, 493 (6th Cir. 2013).

D. Refusal to cooperate with counsel does not render a defendant incompetent. "The decision not to speak to one's lawyer is a defendant's prerogative, not a sign of mental incompetence." *United States v. Coleman*, 871 F.3d 470, 478 (6th Cir. 2017) (internal citations omitted). A defendant who has it "within his voluntary control to ... cooperat[e]," is not incompetent merely because he refuses to cooperate. *See United States v. Simpson*, 645 F.3d 300, 306 (5th Cir. 2011) (quoting *United States v. Joseph*, 333 F.3d 587, 589 (5th Cir. 2003)).
E. Competency can arise from "mental disease or defect," meaning mental illness or cognitive deficit like retardation. *See* 18 U.S.C. § 4241(a).
F. Brain injury can render a defendant incompetent. *See United States v. Rudisill*, 2 F. Supp. 2d 46, 47 (D.D.C. 1998) ("[The defendant] was brutally attacked by eight prisoners while he was attempting to make a phone call. His head was bashed in, resulting in severe brain injury.") "Rudisill has been living under the constant care and supervision of his mother, who has achieved remarkable results with his recovery. Although he still needs a cane for stability, his physical abilities have improved significantly, but mentally, he remains severely impaired. Although he can dress himself, he cannot select what clothes to wear. Rudisill also cannot cut his food. His short term memory deficit results in his having difficulty remembering what his mother asks him to do. He cannot drive a car. He spends his day watching television and reading children's books. Mrs. Rudisill testified that she has never left him alone and that she supervises him all the time. She said that Rudisill wakes up during the night somewhat bewildered and that she frequently has to comfort him during these times. In essence, his brain damage has left him with the mental capacity of a child of tender years." *United States v. Rudisill*, 2 F. Supp. 2d 46, 47.
G. Learning disabilities can render a defendant incompetent. *See United States v. Morales-Gonzales*, 376 F. Supp. 2d 1066, 1071 (D.N.M. 2004) (holding that the defendant's severe learning disabilities were sufficient to render him incompetent to stand trial on charges of drug conspiracy).
H. Schizophrenia and religiosity do not necessarily render a defendant incompetent. *See United States v. Turner*, 644 F.3d 713, 719 (8th Cir. 2011). In this case, the defendant, accused of being a felon in possession of a firearm, represented himself and made the following opening statement at trial:

> Ladies and gentlemen of the jury, I stand before you evident, accused and convicted but through—but before my Father in Heaven, through my Lord and Savior Jesus Christ's blood, I am innocent, without guilt and shame. All right. Thank you.

Turner, 644 F.3d at 719. The Defendant finished his defense with the following closing argument:

> Ladies and gentlemen of the jury, which of you are without sin. He that have no sinful transgression let him judge first. I stand before this Court evident accused and convicted but before my Father which is in Heaven, through my Lord and Savior, Jesus Christ blood I am found innocent, without guilt and shame. Which of you is without mercy? He shall have judgment without mercy and mercy rejoices against judgment. Thank you Your Honor.

See id. The court held that the defendant was not incompetent. *See United States v. Turner*, 644 F.3d at 726 ("He invoked the rule on witnesses leaving the courtroom, used cross-examination to his benefit, and tried on several occasions to appeal to the jurors' consciences in an attempt for them to 'forgive' him by finding him not guilty.").

28. Some commentary from the courts on what constitutes competency:
    A. "It is not enough for the district judge to find that the defendant is oriented to time and place and has some recollection of events. *See United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)) (internal quotations omitted).
    B. "One need not be catatonic, raving or frothing, to be unable to understand the nature of the charges against him and to be unable to relate realistically to the problems of his defense." *Lokos v. Capps*, 625 F.2d 1258, 1267 (5th Cir. 1980).
29. The better practice is to analyze the issue in terms of whether the defendant can exercise the rights guaranteed to the accused.

Raising Competency Under 18 U.S.C. § 4241

30. The motion requesting a competency evaluation must be sealed, and disclosure of information protected by attorney-client privilege is prohibited. *See* TX ST RPC Rule 1.05(c)(4) ("A lawyer may reveal confidential information: …[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law.")
    A. The subject matter of any conversations remains privileged. Always err on the side of protecting confidentiality.
    B. The attorney's observations of the client's disposition, thought process, and ability to communicate can be shared with the court.
31. Competency can be raised at any time, including during probation or supervised release – even where no petition to revoke is pending. *See* 18 U.S.C. § 4241(a) ("At *any time* after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, or at any time after the commencement of probation or supervised release and prior to the completion of the sentence…) (emphasis added). Counsel for an incompetent defendant may request a psychological evaluation where the defendant cannot comply with probation or supervised release.
32. Competency can be raised by anyone. *See* 18 U.S.C. § 4241(a) ("[T]he defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant." The court may also order a competency evaluation. *See United States v. Flores-Martinez*, 677 F.3d 699, 706 (5th Cir. 2012). ("If neither the defendant nor the government moves for such a hearing, § 4241(a) requires the district court to *sua sponte* conduct a hearing if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent.") (internal quotations omitted) (emphasis in original).
33. The order should limit the evaluation to competency, and preclude any discussion of insanity. Generally, the psychologists who conduct competency evaluations so limit their work.

A. An ideal court order would expressly prohibit discussion of the facts, other conduct, and criminal history.
B. Insanity evaluations are also referred to as "criminal responsibility" evaluations. They will specifically ask the defendant to explain the offense. No such question should be posed during a competency evaluation.

34. "There is no question that in federal prosecutions, the government bears the burden of proving the defendant's competence to stand trial by a preponderance of the evidence." *Lowenfield v. Phelps*, 817 F.2d 285, 294 (5th Cir. 1987), aff'd, 484 U.S. 231 (1988).
35. Frequently, the parties will stipulate to the findings of the competency report, and the court will follow the recommendations of the evaluator. Hearings often involve no more than a proffer by the Government and assent by the defendant's attorney.
36. In cases where the psychologist finds the defendant to be competent but counsel disagrees, the defense is entitled to an evidentiary hearing. The only limit on the admissibility of evidence is whether it is relevant.
37. The attorney is unlikely to persuade the court that the evaluator's application of the tools of psychology was erroneous. Counsel will have a deficit in training and experience in psychology. Therefore, it is more effective to concentrate on the client's ability to exercise his rights, a subject matter counsel should know well.
38. Cross-examination should be directed towards the fact that "an incompetent defendant would be unable to assist counsel in identifying witnesses and deciding on a **trial strategy**." *Ryan v. Gonzales*, 568 U.S. 57, 65 (2013) (emphasis added).
39. Likewise, the right "to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so," *see Drope v. Missouri*, 420 U.S. 162, 171 (1975), all depend on the defendant's competency. The evaluator should be examined concerning these issues.
40. Last, the psychologist can be cross-examined on whether the client would understand that in a guilty plea, he "stands as a witness against himself" even though he cannot be compelled to do so. *See Brady v. United States*, 397 U.S. 742, 748 (1970).

Potential Error Brought About by Good Intentions

41. It is a truism that defense attorneys want to get their clients released from incarceration.
    A. There are few things more satisfying to the lawyer or client than achieving the client's release from custody.
    B. The desire to secure the client's liberty is the one motive most likely to cause the attorney to provide ineffective assistance of counsel.
42. There is no easy way to "just get the defendant out of jail" when he is incompetent.
    A. While a plea of guilty and sentence of time-served may seem like the best way to protect the interests of a client with mental illness, it is potentially disastrous.
    B. A conviction can have collateral consequences that are unforeseeable at the time of plea or sentencing.
43. There are only two outcomes that protect the rights of an incompetent defendant: 1) dismissal of all charges: or 2) restoration to competency. Anything beyond that requires supposition by counsel that risks ineffective assistance of counsel or potentially professional misconduct.

The Maximum Sentence Is Not What You Think It Is

44. The maximum penalty prescribed by law for a crime is not the maximum term of imprisonment authorized by the statute of offense.
45. A defendant convicted of a crime faces two punishments: a term of imprisonment and a term of supervised release. It is the second punishment, a term of supervised release, which is problematic for incompetent defendants.
    A. "The federal criminal statutory scheme envisions that there can be at least two components of a sentence: 1) a term of imprisonment up to the maximum prison term permitted in a statute delineating the penalty for a particular offense ..., and 2) a term of supervised release as delineated in [18 U.S.C. § 3583] with the potential for additional prison time if the terms of supervised release are violated." *See United States v. Hampton*, 633 F.3d 334, 341 (5th Cir. 2011) (internal quotation marks omitted).
    B. Although supervised release is not mandatory, courts generally order it as a matter of course. "The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment." 18 U.S.C. § 3583(a). The court is required to impose supervised release "if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime." *Id*.
    C. Subject to a few exceptions, the court can impose a term of supervised release of no more than five years, three years, or one year, depending on the offense. "[T]he authorized terms of supervised release are--(1) for a Class A or Class B felony, not more than five years; (2) for a Class C or Class D felony, not more than three years; and (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year." 18 U.S.C. §§ 3583(b)(1)-(3).
        (i) Class A and B felonies are punishable by 25 years to life. *See* 18 U.S.C. § 3559(a)(1)-(2).
        (ii) Class C and D felonies are punishable by five years up to 25 years. *See* 18 U.S.C. § 3559(a)(3)-(4).
        (iii) Class E felonies are punishable by one year up to five years imprisonment. *See* 18 U.S.C. § 3559(a)(5).
46. On a petition to revoke the defendant's supervised release, the court is authorized to "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision." 18 U.S.C. § 3583(e)(3).
    A. For a revocation sentence, the possible term of imprisonment is five years, three years, or one year, which is the term of supervised release authorized for the offense. *See* 18 U.S.C. §§ 3583(b)(1)-(3); § 3583(e)(3).
47. The court is authorized to impose a term of imprisonment of five years, three years, or one year for **each** revocation of supervised release. *See United States v. Hampton*, 633 F.3d 334, 342 (5th Cir. 2011) (emphasis added). "We hold that upon each revocation of supervised release, a defendant may be sentenced to the felony class imprisonment limits at the end of § 3583(e)(3) [five years, three years, or one year], without regard to prison

time previously served for revocation of supervised release in the same case." *United States v. Spencer*, 720 F.3d 363, 370 (D.C. Cir. 2013) (citing *Hampton*, 633 F. 3d 334).

A. That the total imprisonment imposed for the offense at initial sentencing and later revocation exceeds the statutory maximum prescribed for the offense of conviction is not a limitation on the court's authority in sentencing the defendant on a revocation. *See United States v. Purvis*, 940 F.2d 1276, 1278 (9th Cir. 1991).
B. That the total imprisonment on multiple revocations cannot exceed five years, three years, or one year, depending on the offense, *see United States v. Jackson*, 329 F.3d 406 (5th Cir. 2003), is no longer good law.
C. If the court chooses to place the defendant back on supervised release after revocation, "[t]he length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release." 18 U.S.C. § 3583(h).
D. The foregoing § 3583(h) is a "cap on the aggregate amount of post-revocation supervised release a defendant may receive. This, in turn, imposes an indirect limit on the aggregate amount of revocation imprisonment." *United States v. Hampton*, 633 F.3d 334, 339 (5th Cir. 2011).

48. A defendant who was incompetent at the time of plea or sentencing could face multiple supervised release and revocation sentences for their inability to comply with the terms and conditions of the court's orders.
49. Furthermore, a defendant who was incompetent at the time of plea or sentencing could become competent later, and question why their counsel allowed them to plead guilty and be sentenced. The attorney involved in such a case, despite having acted with the best of intentions, would be subject to accusations of ineffective assistance of counsel or professional misconduct.

Summary

50. Defense counsel should ask for a competency evaluation every time they have a reasonable basis to question the defendant's competency. There is no easy way to "just get the defendant out of jail."
    A. A defendant who is sentenced to anything other than time-served faces the potential of multiple sentences.
    B. An incompetent client can later be restored to competency and question why they were allowed to enter a guilty plea.
    C. Defense counsel is the advocate for his incompetent client's rights, responsible for protecting those rights so that the defendant himself may exercise them later when he is restored to competency.