Crazy Eyes: The Discernment of Competence by a Federal Magistrate Judge

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The body makes countless demands upon us, and furthermore any sickness that may befall it hampers our pursuit of true being. Then too it fills us with desires and longings and fears and imaginations of all sorts, and such quantities of trash, that, as the common saying puts it, we really never have a moment to think about anything because of the body.

—Plato, Phaedo¹

I. APPROACHED BY A DANGEROUS STRANGER

In a large city, it is a common experience: a poorly-dressed man approaches a tourist, trying to make eye contact. Following the tourist as he makes his way down a crowded sidewalk, the man asks if he can talk to the tourist for a moment. In that split second, the tourist must determine how to react. Is the man dangerous? Is he simply needy? Perhaps it is just another tourist needing directions? When we are the tourist, we probably are not aware of how it is we decide what to do—our decision is predicated on a complex web of recollections, presumptions, and observations. Our reaction does not rely on a set of memorized rules or training we have received, but on instinctual discernment.

This type of gut-level discernment is part of the job description for federal magistrate judges. At arraignments and initial appearances, they must evaluate, based solely on what they see and

hear, the mental competency of the stranger who has approached the bench and decide whether or not to commit the stranger/defendant for a competency evaluation. The magistrate judge must do this without the usual tools of judges: directive rules, guidelines, laws, and training. Rather, the person in the robe must rely on her own perceptions—her gut—in deciding whether or not to detain the defendant to allow for a psychiatric evaluation to determine competency. This may be the purest application in the whole of federal law of the simple and personal wisdom we seek in judges.

In the end, does it matter? After all, the magistrate judge is usually doing nothing more than committing the defendant to a hospital prison for a relatively short stay. The short and emphatic answer is that yes, it does matter. As Professor Rodney Uphoff has laid out previously, such competency evaluations are usually conducted as part of a hospitalization in a maximum-security institution with minimal treatment and can subject the defendant to a far greater deprivation of his liberty than if he were convicted of the crime with which he is charged.

The initial decisions of whether to schedule a hearing on competence and whether or not to commit the defendant for evaluation are, of course, just the beginning of a much longer process. If the magistrate so orders, the initial commitment for evaluation is limited to thirty days, with possibility of a fifteen-day extension. At the conclusion of that commitment, the defendant is returned to court and a hearing is held on the issue. If the defendant is found incompetent, he can be committed again for four months to determine "whether there is a substantial

2. The issue of competence can be raised at any time in the criminal process and is often described as "competency to stand trial." 18 U.S.C. § 4241(a) (2000). However, it is typically first raised at the initial appearance or arraignment. Bruce J. Winick, Restructuring Competency to Stand Trial, 32 UCLA L. REV. 921, 924 n.6 (1985).
4. Similar points had previously been made by Professor Bruce Winick. See Winick, supra note 2, at 928-38.
probability that in the foreseeable future he will attain the capacity to permit the trial to proceed." If at the end of that four months the court finds there is a substantial probability that the defendant will become competent, he can be further committed "for an additional reasonable period of time." 

The purpose of this article is to analyze this strikingly unique situation from a very personal standpoint—the decisions one such magistrate judge has made in three distinct cases that came before him. While a survey of many magistrates would certainly reveal a truer picture of the variety of ways this problem may be approached, our goal here is to allow some depth in describing one approach, as a way to flesh out the problems inherent in this function of the magistrate and to start a discussion of a more systemic way to address the problem of evaluating competency.

Part II of the article will briefly describe the history of the competency determination and the controlling law that has resulted. Part III will examine the role of the magistrate judge in evaluating competency under contemporary standards and contrast this task with others performed by federal judges. Part IV will discuss three individual cases and the decisions that were made, and Part V will set out the challenges this process presents to fairness, as well as possible remedies to some of those problems.

II. A BRIEF (YET COMPETENT) HISTORY OF COMPETENCE

A. Common Law

Prior to the enactment of a federal competency statute in 1949, which gave statutory authority to the court to determine competency at any time, the common law provided the court with this ability. In 1899, the Sixth Circuit recognized this common law rule allowing the trial court to bar proceedings against an

6. Id. § 4241(d)(1).
7. Id. § 4241(d)(2).
8. Id. § 4244 (1946 & Supp. IV 1951).
insane person at arraignment in the case of *Youtsey v. United States*:\(^\text{10}\)

The statutes of the United States present no mode for the presentation and trial of an issue of present insanity, when presented in bar of an arraignment, trial, judgment, or execution, and we must look to the common law for guidance in practice. It is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial, receive judgment, or after judgment, undergo punishment.\(^{11}\)

Further, consistent with current practice, that same common law rule allowed that "if a person, after committing a crime, became insane, he was not arraigned during his insanity but was remitted to prison until such incapacity was removed."\(^{12}\)

The roots of this doctrine appear to run deep in the law and were based on the emerging ideal that a defendant must be able to meaningfully interact with his attorney.\(^{13}\) Reflecting this, Blackstone wrote that a madman should not be arraigned "because he is not able to plead to it with that advice and caution that he ought ... for how can he make his defense?"\(^{14}\)

Notably, while it seems clear that this common law power existed within American law, it is not known how widely it was employed. Some commentators seem to limit the doctrine to capital and treason cases, such as Sir Matthew Hale’s oft-cited treatise, which was relied on as authority by the Sixth Circuit in *Youtsey*:\(^{15}\)

If a man in his sound memory commits a capital offence, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed; the reason is because he cannot advisedly plead to the

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11. *Id.* at 940.
14. *Id.* at 204–05 (quoting William Blackstone, 4 *COMMENTARIES* 24, quoted in *Drope v. Missouri*, 420 U.S. 162, 171 (1975)).
indictment; and this holds as well in cases of treason, as felony...16

In 1949, a bill addressing competence was passed by Congress, and thereafter the federal code expressly allowed for a judge to find a defendant incompetent.17 This law was promoted by the Federal Bureau of Prisons and the Judicial Conference, largely out of the concern that considerable numbers of federal prisoners were determined to be insane for the first time when they reported for service of their sentences, raising the inference that they had never been fit for trial.18 This reasoning, of course, suggests that judges were not broadly using the authority that was at least, at times, recognized under the common law.

B. Greenwood v. United States19 and Jackson v. Indiana20

Almost immediately, the new statute was attacked because, on its face, it seemed to allow for permanent commitment of pretrial defendants. As one district court held in granting a writ of habeas corpus, if the statute was valid:

16. Id. (quoting Sir Matthew Hale, 2 THE HISTORY OF THE PLEAS OF THE CROWN (1847)).
   Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused . . . to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period . . . .
18. Foote, supra note 9, at 835.
[A]n insane person charged with a criminal offense can be imprisoned for the rest of his life without any trial as to the issue of whether or not he committed an offense, but only as to the question of whether or not he was sane or insane at the time of the hearing.21

In an attempt to finesse this problem, in 1953 the Tenth Circuit construed the new statute so that it did not allow for the pretrial commitment of the permanently insane.22 In that case, a pretrial defendant was committed to the Medical Center for Federal Prisoners in Springfield, Missouri for observation and treatment and for a report on the defendant’s condition to be prepared.23 The defendant was diagnosed as schizophrenic and was returned to the court with the report that he was incompetent and completely unable to cooperate with counsel.24 At that point, the defendant was re-committed until he was made competent or charges were dropped. The defendant then filed a petition for a writ of habeas corpus, which the trial court denied.25 On appeal, a panel of the Tenth Circuit (over a dissent) found that the statute could not be read to allow for the commitment of the permanently insane as a proper exercise of federal power and that the statute should be construed:

[T]o go no further than to make humane provision for the care and treatment of persons who were temporarily incompetent at the time of their arrest or who become so before trial on criminal charges and whose restoration to competency may be reasonably expected at some time in the future . . . .26

Three years later, in Greenwood v. United States,27 the Supreme Court held forcefully to the contrary. Writing for the Court, Justice Frankfurter held that the commitment of a defendant

22. Wells v. Attorney General of the United States, 201 F.2d 556 (10th Cir. 1953).
23. Id. at 557–58.
24. Id. at 558.
25. Id.
26. Id. at 560.
found to be psychotic was "an assertion of authority, duly guarded, auxiliary to incontestable national power," which was plainly within the Necessary and Proper Clause of the Constitution, and that the "fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner." Thus, the Supreme Court sanctioned the statute's nearly unfettered grant of authority on the judge who initially encountered the defendant to order him committed, regardless of the length of confinement for that stranger who had chanced into court.

Notably, however, the decision in Greenwood limited itself to the narrow question of federal power and did not address due process or equal protection. Subsequently, in Jackson v. Indiana, the Supreme Court examined an Indiana statute that made commitment of pretrial defendants easier than other civil commitments for insanity. The Court held that the Indiana statute violated both the Equal Protection and the Due Process Clauses of the Constitution.

Noting that the federal statute was "not dissimilar to the Indiana law," the Jackson Court also expressly imposed new limitations on federal practice. Specifically, the Court mandated that:

Without a finding of dangerousness, one committed thereunder can be held only for a "reasonable period of time" necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future. If the chances are slight, or if the defendant does not in fact improve, then he must be released or granted a ... hearing.

28. Id. at 375.
29. Id.
30. Id.
32. Id. at 727–30.
33. Id. at 730–31.
34. Id. at 731.
35. Id. at 733.
In reaction to the concerns of *Jackson*, the current statute was drafted with specific time limits for pretrial commitments for mental health issues. The initial commitment for evaluation is limited to thirty days, with the possibility of a fifteen-day extension, and the commitment if the defendant is found incompetent is limited to four months, to determine "whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed." If there is no hope for competence, the defendant is discharged, but if there is the real possibility of becoming competent, he may further be held "for an additional reasonable period of time." Clearly, the limits still have some stretch to them.

C. *Pate v. Robinson* 39

Theodore Robinson shot and killed his eighteen-month-old son, served less than four months in prison, and then killed his common law wife, Flossie May Ward. This was part of a lifetime of bizarre and violent behavior that apparently began when he was hit on the head with a falling brick when he was about eight years old.

At his trial in Illinois state court, four defense witnesses, including Robinson’s mother, testified that Robinson was insane. Nonetheless, Robinson was convicted with no finding of insanity and was sentenced to life in prison.

In petitioning for a federal writ of habeas corpus, Robinson claimed that his due process rights were violated because he "was denied due process by the state court’s failure to conduct a hearing upon his competence to stand trial," and the Supreme Court held

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37. *Id.* § 4241(d)(1).
38. *Id.* § 4241(d)(2).
40. *Id.* at 381.
41. *Id.* at 378–80.
42. *Id.* at 383 & n.5.
43. *Id.* at 384.
44. *Id.* at 377.
that the failure to hold such a hearing was, in fact, a violation of the constitutional right to due process.\textsuperscript{45}

This new requirement, that the court hold a commitment hearing, was imposed despite the fact that, though Robinson’s counsel had raised the issue of his sanity, he had never specifically asked for a hearing on the question of competence.\textsuperscript{46} Rather, even in the absence of a motion by either party, the Court held that it was the trial court’s “failure to make such inquiry” that “deprived Robinson of his constitutional right to a fair trial.”\textsuperscript{47}

Thus, the onus was put on the judge to flag those who are possibly incompetent and commit them for evaluation, even in the absence of a motion by the parties.

\textbf{D. Drope v. Missouri}\textsuperscript{48}

James Drope was convicted in Missouri state court of the rape (with several other men) of his wife.\textsuperscript{49} Prior to trial, Drope’s counsel had moved for a continuance so that Drope could be examined by a psychiatrist, which was denied by the trial court.\textsuperscript{50} Midway through the trial, Drope shot himself in the abdomen, but the trial continued through his conviction without his being present.\textsuperscript{51}

The Supreme Court reversed the conviction, holding that together with other known facts, “petitioner’s suicide attempt created a sufficient doubt of his competence to stand trial to require further inquiry on the question.”\textsuperscript{52}

For the purposes of our examination of the role of the modern magistrate, the importance of \textit{Drope} is that it reiterated the emphasis in \textit{Pate v. Robinson}\textsuperscript{53} on the judge as the principal

\begin{itemize}
\item \textsuperscript{45} \textit{Id.} at 377–78.
\item \textsuperscript{46} \textit{Id.} at 384.
\item \textsuperscript{47} \textit{Id.} at 385.
\item \textsuperscript{48} 420 U.S. 162 (1975).
\item \textsuperscript{49} \textit{Id.} at 164–66.
\item \textsuperscript{50} \textit{Id.} at 165. It appears that Drope had already received a short continuance but that it was not adequate to arrange for a psychiatric examination.
\item \textsuperscript{51} \textit{Id.} at 166–67.
\item \textsuperscript{52} \textit{Id.} at 180.
\item \textsuperscript{53} 383 U.S. 375 (1966).
\end{itemize}
evaluator of the defendant’s competence\textsuperscript{54} and firmly established the two-part definition of competence, which is discussed in Part III, \textit{infra}.

\textbf{E. Sell v. United States}\textsuperscript{55}

Charles Sell, a practicing dentist in Missouri, suffered a sad decline into mental illness, which culminated in a series of hospitalizations triggered at various times by his report that the gold he used for fillings had been contaminated by communists\textsuperscript{56} and that a leopard was outside of his office boarding a bus.\textsuperscript{57} After several years of such behavior, Sell was charged with submitting fictitious insurance claims.\textsuperscript{58}

Upon Sell’s arrival in federal court, a magistrate judge ordered a psychiatric examination but subsequently found Sell competent.\textsuperscript{59} Sell was then indicted on additional charges, re-examined at the Medical Center for Federal Prisoners in Springfield, Missouri, and found by the magistrate to now be incompetent.\textsuperscript{60}

Having found Sell incompetent, the magistrate ordered Sell hospitalized for treatment, and Sell was returned to Springfield.\textsuperscript{61} While there, the staff sought permission to administer medication over Sell’s objections, and such forcible medication was authorized in part for the purpose of making Sell competent to stand trial.\textsuperscript{62}

Sell’s challenge to the forcible administration of medication ultimately made it to the Supreme Court. There, the majority held that such forcible administration of drugs is allowable if the treatment is medically appropriate,\textsuperscript{63} is substantially unlikely to

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\item \textsuperscript{54} 420 U.S. at 172–73.
\item \textsuperscript{55} 539 U.S. 166 (2003).
\item \textsuperscript{56} \textit{Id}. at 169.
\item \textsuperscript{57} \textit{Id}.
\item \textsuperscript{58} \textit{Id}. at 170.
\item \textsuperscript{59} \textit{Id}.
\item \textsuperscript{60} \textit{Id}. at 170–71.
\item \textsuperscript{61} \textit{Id}. at 171.
\item \textsuperscript{62} \textit{Id}. at 171–72.
\item \textsuperscript{63} \textit{Id}. at 179. The question of what is “medically appropriate” is complex when, for example, the point of the therapy is to allow the patient to
\end{itemize}
have side effects that may undermine the fairness of the trial, and is necessary to further the government’s important interest in a trial.  

In short, the development of common, statutory, and case law has led us to the present day, in which magistrate judges have the ability to commit defendants for an evaluation of competence, even if that commitment is for long (but reasonable) periods and requires forcible medication, in which a hearing on competency is called for if there is a question regarding the defendant’s mental state; and—perhaps most importantly—in which it is the judge’s job to discern which defendants require further inquiry, including commitment for evaluation, even if neither party moves for such commitment.

III. THE ROLE OF THE MAGISTRATE JUDGE IN ASSESSING COMPETENCY

A. The Powers of the Magistrate Judge

While competence can be questioned before any federal judge, very often it is initially raised before a magistrate judge, simply because it is the magistrate judge who first sees the defendant in the courtroom, either at the initial appearance or the arraignment.


64. Sell, 539 U.S. at 179.
65. 18 U.S.C § 4241(d) (2000).
66. Id.
67. Sell, 539 U.S. 166.
69. Id. (“The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect . . . .”).
70. 18 U.S.C. § 4241(a) refers simply to the “court” rather than to a specifically empowered judge in discussing the initial determination of referring a case for a competency evaluation. Id.
71. Federal Rule of Criminal Procedure 5(a)(1) specifically refers to a defendant being brought “without unnecessary delay before a magistrate
Over the past several decades, the powers of the magistrate judge have grown, so that in the present day she may not only conduct initial appearances and arraignments but rule on detention and bond, try and sentence cases involving misdemeanors, make rulings or recommendations on many pre- and post-trial matters in felony cases, conduct plea hearings in felony cases, and hear any aspect of a civil case if designated by the district court and if the parties consent to that designation.

While some have seen the increased power of magistrate judges and other Article I tribunals as a source of "difficulties," it has not drawn the magistrate judge away from her core duty of performing initial appearances and arraignments. It is within this traditional role of the federal magistrate judge that the question of competency would most likely present itself, usually in the form of an unruly, unresponsive, or uncontrollable stranger in the courtroom.

B. The Process of Ordering a Competency Evaluation

Federal Rules of Criminal Procedure 5 and 10, which describe the process of initial appearance and arraignment, respectively, do not expressly address the need to assess competence. Rather, this judge," though Rule 5(c) allows for other judges to perform this function. See FED. R. CRIM. P. 5(a)(1) & (c).

72. FED. R. CRIM. P. 10(a).
74. Id. § 636(a)(3). In cases involving Class A misdemeanors, the parties must consent to trial before the magistrate judge. Id. § 636(a)(5).
75. Id. § 636 (b)(1)(A) & (B).
76. Some circuit courts have found statutory authority for this process under the somewhat vague language (referring to "additional duties") of 28 U.S.C. § 636(b)(3). Five of those circuits require that this be done in the form of a report and recommendation to the district court. Durwood Edwards, Can a U.S. District Judge Accept a Felony Plea with a Magistrate Judge's Recommendation?, 46 S. TEX. L. REV. 99–100 & n.1 (2004).
79. Of course, there is no other judge in the federal system to whom this function could be delegated downward.
requirement comes from the U.S. Constitution because (as the Supreme Court has described it) "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."\textsuperscript{80}

18 U.S.C. § 4241, in turn, directs the magistrate judge to make two discrete decisions if competence is brought into question: first, whether or not to schedule a hearing on competency,\textsuperscript{81} and second, whether or not to commit the defendant for evaluation prior to that hearing.\textsuperscript{82} It is these two initial impact decisions—which would normally be made together and based on the same facts—with which we are concerned here.\textsuperscript{83}

18 U.S.C. § 4241(a) does not provide the magistrate judge very much guidance in considering whether or not to schedule a hearing. It simply says that such a hearing should be ordered "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."\textsuperscript{84}

Similarly, 18 U.S.C. § 4241(b) simply provides that the court "may order that a psychiatric or psychological examination of the defendant be conducted . . . ."\textsuperscript{85} In connection with this evaluation, federal law expressly allows for an involuntary commitment "for a reasonable period, but not to exceed thirty days . . . ."\textsuperscript{86}

Thus, simply based on the magistrate judge’s sense of "reasonable cause," the defendant can be involuntarily committed for up to a month for a series of tests in a prison hospital. As discussed in the following sections, this decision is made without the benefit of training or directive standards regarding mental

\textsuperscript{80} Drope v. Missouri, 420 U.S. 162, 172 (1975) (citing Pate v. Robinson, 383 U.S. 375 (1966)).
\textsuperscript{81} 18 U.S.C. § 4241(a) (2000).
\textsuperscript{82} Id. § 4241(b).
\textsuperscript{83} 18 U.S.C. § 4241(d) separately allows for commitment of the defendant after the hearing, if he is found not to be competent. Id. § 4241(d).
\textsuperscript{84} Id. § 4241(a).
\textsuperscript{85} Id. § 4241(b).
\textsuperscript{86} Id. § 4247(b).
health. In short, it is little more than the same evaluation we each may make of the raggedy stranger who approaches us on the street.

C. Training and Standards

1. The Absence of Training on Mental Illness

Magistrate judges receive little in the way of mental illness training. A few law schools offer courses or seminars on mental illness in the law, but law schools are not in the habit of teaching psychology or the signs of mental illness. Likewise, magistrate judges are not provided with materials regarding mental illness or which behaviors may compel further investigation into a defendant’s mental condition. Instead, magistrate judges must rely on their own experiences and judgment of what a “normal,” competent defendant acts like, versus a defendant who exhibits potentially “abnormal” behavior and may be incompetent to stand trial.

2. Standards Used in Assessing the Need for Commitment

As set out above, the magistrate judge must make two discrete decisions in assessing the competency issues of a defendant appearing in court for the first time—first, she must decide whether to docket a hearing, and second whether to commit the defendant to a prison hospital for a competency evaluation. While there is a somewhat unhelpful two-part test for making the first decision set forth in 18 U.S.C. § 4241(a), no guidance is provided in making the second (and perhaps more significant) decision.

In 1975, the U.S. Supreme Court reaffirmed, in Drope v. Missouri, a two-part test for competence (or, seemingly, the need for a competency hearing) that was originally set out in the 1960

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87. The authors confirmed the lack of mental illness training with the Magistrate Judges Division as of the date of this article’s publication.
88. See discussion supra Part III.B.
89. See id.
91. Id. at 162.
case of *Dusky v. United States*. Under that standard, a defendant is competent if: (1) the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding"; and (2) "has a rational as well as factual understanding of the proceedings against him." This standard has now been codified at 18 U.S.C. § 4241(a), which directs that the court grant a motion for a competency 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 to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."

The standard set out in § 4241(a) has some inherent problems in the context of the decision of whether or not to schedule a competency hearing. At a most basic level, it involves determinations best left to experts, whose expertise is not available, of course, until the competency hearing itself. Further, the § 4241(a) standard relies on an analysis of the attorney-client relationship, which is generally shielded from the view of the court by the duty of the defense attorney to maintain the confidentiality of those communications. The attorney-client relationship is implicated because the standard requires the defendant to be able to assist to a reasonable extent with his own defense, and in order to be found competent, an evaluation of this ability must be made.

In a practical sense, the person best situated to determine whether the defendant is able to assist to any extent with his own defense is defense counsel. While defense counsel cannot provide sworn testimony regarding the defendant’s competence at a competency hearing, and therefore will never be subject to cross-examination by the prosecution involving her interaction with the defendant, she does have to report difficulties in communicating with her client at an earlier stage if she feels that competence may be

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95. *Id.*
an issue. In addition, if defense counsel makes a motion for an examination of the defendant’s competency to stand trial, she must set forth, in general terms, why she feels her client’s competence is at issue, with a supporting affidavit. Counsel’s affidavit may describe conversations or interactions she has had with the defendant in varying degrees of detail, which would normally be shielded by the attorney-client privilege. The problem here is that defense counsel essentially must balance a possible competence issue against a violation of the attorney-client privilege in determining whether to make such a motion based on what is most likely to help the defendant.

IV. CASE STUDIES

A. Evaluating a (Potentially) Incompetent Stranger

An initial appearance is a common occurrence in the courtroom of a magistrate judge. The judge enters her courtroom following the familiar command that “all rise” and is seated at the bench. One or more criminal defendants are called to stand before her. They may be dressed in prison-issued inmate uniforms of orange or blue, or more traditional black and white stripes, or even dressed in their own blue jeans and Nikes. Regardless of attire, they all wear a heavy chain around their waist, to which their left wrist is cuffed, leaving the right cuff dangling in front of them and their right hand free for oath-taking. U.S. marshals keep close watch over them. Counsel is rarely present at an initial appearance. The courtroom deputy gives them the oath, to which they swear collectively.

Addressing the group, the judge introduces herself and explains the purpose of the hearing and the rights of the defendants. She requires each defendant to acknowledge his understanding of the proceeding and of his rights in turn. After each defendant has done so, he is asked by the judge to give his full name, his age, and how far he went in school. The judge pays close attention to each

96. United States v. Battle, 264 F. Supp. 2d 1088, 1175 (N.D. Ga. 2003), superseded, 419 F.3d 1292 (11th Cir. 2005). This case is also the first to explicitly outline a magistrate judge’s authority to preside over a defendant’s competency hearing.
defendant's answer; if he fails to state his middle name, or gives only a middle initial, then the judge will follow up with him, as this may be a sign, albeit a small one, that he is not fully grasping the proceedings. Along with a failure to state a middle name, or giving an initial rather than a full name, the judge will look for clues in the defendant's answer as to his level of education. If a defendant does not have a high school diploma, the judge will inquire whether he obtained a G.E.D. (General Educational Development degree). Ascertaining that the defendant has achieved the equivalent of a high school diploma may dispel questions as to whether a defendant has the minimal intelligence required to understand the proceedings and to assist his counsel. If the defendant has completed little or no high school level curriculum, the judge will take special care with her evaluation.

Once the judge has heard from each defendant as to his name, age, and level of education, and has satisfied herself that the defendant possesses minimal intelligence and grasps the proceedings at hand, she inquires whether any defendant currently suffers from any mental or physical condition that impacts his ability to understand the proceedings. Once each defendant has answered, the judge follows up by asking whether any defendant is currently under the influence of any drug or alcohol that may impact his ability to understand the proceedings. During this questioning, the judge must pay close attention to each defendant, as she will weigh each one's verbal and non-verbal communications to determine whether the defendant's competence to stand trial is in question.

Once the judge is satisfied that a defendant is competent to understand the current proceedings and to stand trial, she advises each defendant of the charges against him and the possible range of punishment that would accompany each charge if he were convicted. Finally, the defendants are asked whether they have any further questions for the judge.

The ask-and-answer format of the initial appearance is meant to be an active dialogue between the defendants and the judge and it comprises the entirety of the judge's first-hand interaction with, and observation of, a defendant—provided, of course, that it is the defendant's first time before this judge and that he is not a repeat visitor. This brief interview forms the bulk of the judge's opinion
as to whether the competence of the defendant bears further investigation. As previously mentioned, magistrate judges do not receive extensive training in psychology, nor do they receive training materials to guide them in discerning competence; instead, like a tourist on a New York City street confronted with a potentially dangerous stranger, a magistrate judge must rely on her “instinctual discernment” of whether a defendant’s competence to stand trial is at issue. Included below are transcripts from the initial appearances of three defendants who were referred for psychiatric evaluation by Magistrate Judge Manske in the Western District of Texas, Waco Division. A brief discussion of each interaction follows its respective transcript.

B. Defendant A

1. Transcript

Court Clerk: Would you raise your right hand, please?
Defendant A: [No response.]
A’s counsel: Raise your right hand.
Defendant A: [No response.]

Judge Manske: Mr. [Defendant A], good afternoon. My name is Judge Manske. I am the United States Magistrate Judge for the Western District of Texas sitting in the Waco Division. This is a preliminary hearing called an initial appearance. It’s called an initial appearance because it is your first time to appear in court before a judge on these charges since you have been arrested. The purpose of an initial appearance is for me to advise you of your constitutional and statutory rights, including your right to retain counsel. Also, it is to advise you of the charges pending against you and to let you know when there might be a hearing to determine whether or not you should be released pending further proceeding. At this time, it would be appropriate for you to raise your right hand and respond to the oath as administered by the clerk of court. Let me advise you that failure to cooperate in this regard can result in the court finding you in contempt of court and

97. The names of the defendants discussed here have been changed, along with certain other key facts, to disguise the identity of those who were committed for evaluation.
ordering your incarceration throughout the proceedings, so it is in your best interest to cooperate. Do you understand?

Defendant A: The legal help I have requested has not arrived.

Judge Manske: Alright, I understand that in response to your request, we contacted [a certain defense counsel]—is that whom you retained?

Defendant A: Yes, sir.

Judge Manske: We contacted [that certain defense counsel], and he informed the Court that he had been retained by you on other matters but, however, was not retained on this particular proceeding. He said that until he was retained on this particular proceeding, he would not be coming forward to represent you.

Defendant A: That’s because I have not been able to use the telephone.

Judge Manske: I’ll permit you the opportunity to use the telephone to contact him after this hearing. And additionally, if he does sign on to be your attorney, I will be happy to grant a motion to permit him to substitute in for [the attorney who is here today]. I have appointed [this attorney] to represent you because it came to my attention that you were not cooperating with the pretrial services officers. You understand that?

Defendant A: They said I had the right to remain silent.

Judge Manske: And I’m going to advise you of that here shortly, too, but you also have an obligation to respond to the instructions and directions of the Court, and I am not going to ask you to say anything to incriminate you. And, let me tell you that you do have the right to remain silent. You are not required to speak to any law enforcement officers about the charges pending against you. If you start to speak to anyone from law enforcement about these charges, you can stop at any time. You simply don’t have to speak to them if you don’t want to. The reason I am telling you this is because if you do say anything to any law enforcement officers about these charges, anything you tell them can, and probably will, be used against you in a future proceeding. Additionally, anything you say here in court today could be used against you in a future proceeding, as well. I am not asking you to incriminate yourself in any way. I would merely like you to take the oath agreeing to tell the truth in this particular proceeding, and
I am going to ask the clerk of court to administer that oath one more time.

Court Clerk: Raise your right hand, please.

Defendant A: Sir, what is your name?

Judge Manske: Jeff Manske.

Defendant A: Okay. I was not told that I was going to have to be sworn in and, uh, have a [hearing] as I am not prepared for it and I do not have my requested help.

Judge Manske: Alright, Mr. [Defendant A], I am not going to ask you anything that will incriminate you. I am merely going to ask you to identify yourself. I am going to ask you some other very basic questions, but nothing having to do with this particular offense or the charges against you. The Court is here to protect your rights.

Defendant A: Sir, you are law enforcement.

Judge Manske: No, I am not law enforcement—I’m a judge. There is a difference.

Defendant A: Yes, you are law enforcement, and so I will not be able to, um, [he whispers to his counsel] . . . I cannot let this get snowballed out of control.

Judge Manske: Alright, Mr. [Defendant A], are you going to cooperate with the Court and agree to be sworn in here today?

Defendant A: Not today, sir. It’s, uh, not ready.

Judge Manske: Alright, I am going to give [Defendant’s counsel] an opportunity to confer with you to let you know what your particular options are. I am going to caution you that I am going to hold you in contempt of court for failing to comply with the Court’s instructions if you do fail to cooperate. I’ll give you a few moments to visit with your attorney, if you’d like.

A’s counsel: Alright

Judge Manske: [Defendant A], I would like you to pay attention, if you would, to this hearing, as well. This is going to be a very similar hearing to what I am going to have with you, and that way you can see the type questions that the Court will be inquiring of you. [The Court proceeds with, and completes, another defendant’s hearing.]

Judge Manske: [Defendant’s counsel], do you need a few more moments, or have you reached an impasse?

A’s counsel: Maybe just one more minute.
Judge Manske: Alright. [A few moments pass.] Alright, [Defendant’s counsel], where are we, sir?

A’s counsel: Your Honor, he is not able to render a legal determination as to whether he understands the allegations against him. He has... he did want me to tell the Court that he has asked for his attorney three different times. He thinks that he has retained [that particular attorney], and, uh, he does not accept me at this time as his attorney, and so, uh, that is essentially where we are at this time.

Judge Manske: Very well, if you will return your client to the lectern. [Defendant A], the Court notes your attorney’s comments, although you don’t recognize him as your attorney for the record. Once again I will state that we contacted [that particular attorney], and he indicated that he has not been retained on this particular matter. However, I will ask the marshals to give you an opportunity to make a collect call to [his] office at the conclusion of this hearing. [Then, the judge proceeded to advise Defendant A of the charge against him and the possible punishment range for that crime.] Do you understand the charge against you and the range of punishment? Are you still refusing to speak?

Defendant A: I do not understand your foreign language.

Judge Manske: Alright, the Court has before it a motion for pretrial psychiatric examination submitted by the government. Based upon what is contained in this particular motion, as well as your behavior here in court today, the Court has a question as to whether or not you are competent to proceed in these particular proceedings. As such, I am going to order a psychiatric examination to determine whether or not you are competent to understand the nature and the consequences of the proceedings against you and to assist properly in your defense. I have signed that order. Pending the outcome of that particular evaluation, I will defer my ruling on contempt; however, I will advise you that we will have a hearing after the receipt of that and will proceed further at that time. I do want to advise you that you do have the right to be represented by counsel of your own choosing in these proceedings, and if you can’t afford an attorney, I will be happy to appoint one for you as I have done with [the attorney who is here today]. Out of an abundance of caution, and as I mentioned, you do have the right to consult with your attorney before questioning
by any law enforcement and you also have the right to have your attorney present during any questioning. I am going to set this matter for a preliminary exam and detention hearing. Any questions?

Defendant A: I do.

Judge Manske: Yes?

Defendant A: [Defendant A refers to the judge as something undecipherable], are you aware that regardless of the outcome or supposed outcome of this, uh, mental incarceration that [inaudible—but something like, “whether they have information that is accurate or not”], I was not informed . . . there was no post or release instructions. I was not informed that I would have to make any changes. I was not informed that I was a mental incompetent, and I have no paperwork stating that. And, I was not informed that I would have to make any changes in my lifestyle . . .

Judge Manske: I do want to advise you as I had advised you previously . . .

Defendant A: [Still talking and trying to interrupt.]

Judge Manske: One moment. Let me advise you as I had advised you previously that anything you say here in court today can be used against you in a future proceeding, and I would caution [your attorney] to consult with you before you make any further statements and that you receive his approval before making any further statement to the Court. We’ll give you an opportunity to make any such statements that you would like to make, but I am going to ask that you first confer with your attorney in that regard. [A few moments pass.]

A’s counsel: We’ve conferred, Your Honor. He has nothing further he would like to say.

Judge Manske: Very well. The Court will stand in recess.

2. Discussion

In the case of Defendant A, Magistrate Judge Manske had the benefit of a motion from the government before the defendant came before the court for an initial appearance. That motion set out Defendant A’s behavior at the time of his arrest and requested a competency examination. While such a motion is important in flagging for the court potential defendants whose competency may
be in question, it was Defendant A’s in-court behavior that convinced Judge Manske to order a psychiatric evaluation.

Several separate behaviors, taken both individually and collectively in this case, clearly indicated a defendant who may not “ha[ve] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and who does not “ha[ve] a rational as well as factual understanding of the proceedings against him.”

In other words, Judge Manske had “reasonable cause to believe [that the defendant was] suffering from a mental disease or defect rendering him mentally incompetent to the extent that he [was] unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense,” and therefore ordered a psychiatric evaluation of Defendant A. These behaviors can be classified as: (1) failure to cooperate with courtroom personnel; (2) refusal to accept court-appointed counsel and to understand that he had not retained counsel to assist him in this case; (3) failure to respond intelligibly to the judge’s questions; (4) failure to understand the judge’s role in the proceeding or generally; and (5) failure to understand the charges against him.

Aside from the government’s motion, the first sign Judge Manske had that Defendant A’s competence was in question was his failure to cooperate with the courtroom deputy by raising his right hand to take the oath. This was not the product of questioning by the judge but rather something he observed that was far from ordinary. While a failure to cooperate with courtroom personnel may appear to be an act of simple defiance, it is quite rare and should immediately draw the judge’s attention. When Defendant A had failed to respond to the courtroom deputy, as well as his attorney’s instruction to raise his right hand, Judge Manske got involved and explained that it was in Defendant A’s best interest to cooperate, rather than to be held in contempt of court and incarcerated throughout the pretrial period. Despite extensive dialogue with the judge and with counsel during which he was repeatedly reassured that he would not have to speak about the charges against him, Defendant A never consented to being sworn.
in, instead responding to the courtroom deputy’s second attempt at swearing him by asking Judge Manske, “Sir, what is your name?” and making statements like “I cannot let this get snowball . . . It has already snowballed out of control.”

The second indication that Judge Manske had that this particular defendant may not be competent to stand trial was Defendant A’s repeated insistence that he had retained a particular attorney to represent him and his refusal to accept the attorney that was provided for him at the initial appearance. During his initial appearance, Judge Manske explained to Defendant A that he had not retained his chosen attorney for this matter but that he could do so following the initial appearance and that if Defendant A’s chosen attorney did agree to represent him, the judge would allow that attorney to substitute for the one appointed by the court. None of this appeased Defendant A. Even after Judge Manske allowed him to observe another defendant’s appearance and to discuss the situation with his court-appointed attorney, Defendant A still maintained that he had asked for his attorney three different times and been denied, and that he would not accept the court-appointed attorney as his counsel. His failure to cooperate with the court-appointed attorney, as well as his erratic responses to Judge Manske’s questioning, demonstrated that he might not be able to assist in his own defense.

Several other unresponsive statements made by Defendant A also gave some insight into his mental condition and showed that it was unlikely that he understood the purpose of that particular proceeding, as well as his rights. He responded to Judge Manske’s question whether he was still refusing to speak by saying, “I do not understand your foreign language.” In addition, Defendant A made a lengthy statement that the judge interrupted, which included the statements, “I was not informed that I was a mental incompetent, and I have no paperwork stating that. And, I was not informed that I would have to make any changes in my lifestyle.” Judge Manske interrupted Defendant A’s speech and again advised him of his right to remain silent regarding the charges against him.

100. While it is unusual for a defendant to have an attorney present during an initial appearance, Judge Manske appointed counsel in this case due to Defendant A’s refusal to cooperate with pretrial services.
As Defendant A began discussing his case and making longer, more inflammatory statements to the court, it became clearer still that the defendant did not understand his rights.

Defendant A also did not grasp the role of a judge either in this proceeding or generally. He referred to Judge Manske as “law enforcement” and improperly asserted his right to remain silent and to refuse to cooperate with the court. In addition, he asked impertinent questions to the judge such as, “Sir, what is your name?” (Judge Manske had already introduced himself by name at the beginning of the proceeding after Defendant A refused to take the oath.)

Defendant A was unable to understand the charges against him. In addition to statements that Judge Manske could evaluate first-hand, the court-appointed attorney also stated that Defendant A was “not able to render a legal determination as to whether he understands the allegations against him.” Defendant A refused to respond to Judge Manske’s question whether he understood the charges against him and their potential range of punishment.

C. Defendant B

1. Transcript

Judge Manske: Good afternoon. Could each of you please state your full name for the record?
Defendant B: [The Defendant answered with his first and last names.]
Judge Manske: How far did you go in school?
Defendant B: About sixth grade.
Judge Manske: Do you know what a G.E.D. is?
Defendant B: No, sir, not at the time.
Judge Manske: Alright, do you know what a G.E.D. is?
Defendant B: Yes.
Judge Manske: Have you taken a graduate equivalency exam?
Defendant B: No, sir.
Judge Manske: Do you suffer from any physical or mental condition that might affect your ability to understand what we are doing here?
Defendant B: Yes, sir, I do.
Judge Manske: Alright, sir, what would that be?
Defendant B: Well, I can't think clearly.

Judge Manske: Alright, other than not being able to think clearly, have you ever been diagnosed with any type of psychological condition?
Defendant B: Yes, sir, uh, I supposed to be, uh, I change into different person. Uh, uh, I got two personalities.

Judge Manske: Alright, are you taking any medication for that?
Defendant B: Yes, sir. I'm up on the M.H.M.R. [Mental Health Mental Retardation program].

Judge Manske: Alright, I'm going to order a psychiatric evaluation to see whether or not Mr. [Defendant B] can assist his attorney in the defense of this matter. Do you understand your right to remain silent?
Defendant B: Yes, sir.

Judge Manske: [At this time, the judge advised him of the charge against him and explained the possible range of punishment.] Do you understand the charge and the punishment you are facing?
Defendant B: Yes, sir.

Judge Manske: Alright, tell me what you are charged with.
Defendant B: I can't.

Judge Manske: Alright, you don't know why you are here in court?
Defendant B: No, sir. Right now I don't.

Judge Manske: [The judge then advised the Defendant of his rights, and the Court stood in recess.]

2. Discussion

Defendant B's case was fairly straightforward as there were several indicia of his inability to understand the proceedings against him. These indicia can be classified as: (1) minimal education; (2) affirmative response to the question whether he has a physical or mental condition that would impair his understanding of the proceedings with an explanation thereof; and (3) inability to understand why he was in court or what he had been charged with.
D. Defendant C

1. Transcript

Judge Manske: Good afternoon, folks. Could you please state your full name for the record and tell me your current age and how far you went in school? If you didn’t graduate from high school, let me know your last grade completed and whether or not you have a G.E.D.

Defendant C: [The Defendant stated his full name.] I graduated from, um, college, Mary-Hardin Baylor.

Judge Manske: And how old are you, sir?

Defendant C: Fifty-one years old.

Judge Manske: Do you suffer from any physical or mental condition that might affect your ability to understand what we’re doing here today?

Defendant C: I’m not sure after talking with one of the attorneys.

[Defendant’s counsel interjected that, based on his conversation with the Defendant and on conversations with the Defendant’s son and mother, he was going to be filing a motion that morning for a psychiatric evaluation prior to proceeding with a detention hearing and arraignment.]

Judge Manske: Very well, that motion will be granted when it is received. Mr. [Defendant C], if at any time you don’t understand something that I tell you during this hearing, please let me know and I will be happy to explain it to you in greater detail. I’ll also give you an opportunity to confer with your attorney. Do you understand?

Defendant C: Yes, sir.

Judge Manske: [The judge then advised Defendant C of the purpose of the hearing and advised him of his rights, and he asked him if he understood.]

Defendant C: Yes.

Judge Manske: [The judge advised him of the charge against him and the possible range of punishment.] Do you understand the charge that’s been made against you?

Defendant C: Yes.
Judge Manske: And do you understand the range of punishment?
   Defendant C: Yes.
Judge Manske: Do you have any questions about either?
   Defendant C: No.
Judge Manske: [The judge then advised Defendant C of his rights.] And, Mr. [Defendant C], you are going to be detained at this time, pending the examination referenced by your attorney. Do you understand your rights as I’ve explained them to you?
   Defendant C: Yes, Your Honor.
Judge Manske: Do you have any questions about anything that we’ve discussed?
   Defendant C: No.
Judge Manske: Very well. [The Court stood in recess.]

2. Discussion

Defendant C’s counsel made a preliminary assessment of competence prior to his initial appearance before Judge Manske. By discussing his concerns with Defendant C’s family, he was able to identify grounds upon which to base a motion for a competency hearing, which the judge agreed would be granted upon receipt. Aside from counsel’s concerns, which were communicated to Defendant C, and then by him to Judge Manske when he was asked whether there was any physical or mental condition that would impair his understanding of the proceedings, Defendant C was able to comport himself appropriately at his initial appearance, even answering that he understood his rights and the charges against him in the affirmative. Without his counsel’s intervention, Defendant C’s competence may not have been further investigated, as there was no immediate indication that it was in question. This type of initiative by defense counsel can serve defendants very well, as counsel may have a better opportunity to speak with a defendant outside the courtroom and can follow up with friends and relatives and determine whether there are issues that bear further looking into; however, it rarely occurs prior to an initial appearance.
V. CHALLENGES TO THE CURRENT SYSTEM OF DISCERNING A DEFENDANT'S COMPETENCE

A. Current Resources for Determining if Competency Is at Issue

As demonstrated by the case studies presented in Part IV, there are a few different ways that a question as to a defendant’s competence to stand trial may be raised at an early stage. The prosecutor may raise it, defense counsel may raise it, the court may raise it on its own initiative, and the defendant himself can raise it. The earliest opportunity for any preliminary evaluation of a defendant’s competence is during his arrest, which information the prosecutor will receive. The second chance for early evaluation is the interview with pretrial services, the results of which will be passed along to the court. The third—but much more rare—opportunity for such preliminary evaluation may occur if and when the defendant meets with counsel prior to his initial appearance. This usually only occurs if the defendant has retained his own counsel, rather than relying on the court to appoint counsel for him. The final and most certain of these initial evaluations is the initial appearance itself, during which the judge can evaluate firsthand whether there is any question as to a defendant’s competence that would warrant further exploration, while also considering additional factors, if any have been raised, such as the defendant’s behavior at the time of arrest, his interaction with pretrial services, and his interaction with his attorney.

1. Federal Pretrial Services Report

The pretrial services report contains information about a defendant’s background, which may include criminal history, physical and mental health, education, family history, marital status, and the like. This information may be confirmed by the pretrial services officer through telephonic interviews of the defendant’s family members and friends. The pretrial services officer relays this information to the court via an informal conference immediately prior to the defendant’s initial appearance. As demonstrated by the case study of Defendant A, a defendant’s interaction with the pretrial services officer, such as failure to
cooperate with the officer, or an inability to accurately respond to questions, can signify a potential competence issue, which the officer will likely bring to the court’s attention. Similarly, a defendant’s behavior during his arrest may prompt the government prosecutor to file a motion requesting an evaluation as well.

2. Attorney Observation and Motion

An initial evaluation of a defendant’s competence by his counsel will often be unavailable prior to the initial appearance, as counsel for an indigent defendant is usually not assigned by the court until the defendant’s financial affidavit has been received and the defendant has made his initial appearance. There are rare cases, however, in which a defendant retains his own counsel, or based on information provided by the prosecuting attorney or pretrial services officer, the court appoints counsel to represent the defendant at his initial appearance. Even in these rare circumstances in which a defendant has counsel present for his initial appearance, it is rarer still that the defendant will have met with his attorney to any meaningful extent before the initial appearance.

In the very rare circumstances where an attorney has the opportunity to observe the defendant in a meaningful way prior to the initial appearance, the attorney may be in the best position to notice whether the defendant’s competence is in question. It is unlikely that defense counsel would improperly raise the question of competence and suggest pretrial detention for a competency evaluation without good cause. This situation is best shown by the case study of Defendant C, where Defendant C had retained counsel who questioned Defendant C’s competence and who was able to follow up with Defendant C’s family members as to his mental capacity and to file a motion with the court requesting a psychiatric evaluation. In that case, the role of counsel was invaluable in flagging a potential competency issue for the court, which may have gone unnoticed if the court relied solely on Defendant C’s initial appearance, as he was able to comport himself appropriately at the appearance and rendered intelligible answers to the judge’s questions, even stating that he understood his rights and the charges against him. The attorney was in a better
position than the judge in that case to discern whether competency might be at issue, as he had met extensively with the defendant and discussed the defendant with his family members prior to the initial appearance.

3. Initial Appearance Before a Magistrate Judge

The magistrate judge’s evaluation of a defendant during his initial appearance often holds the most weight in determining whether to commit that defendant for a competency evaluation. While the magistrate judge has the benefit of the pretrial services report, as well as any motions filed by defense counsel or by the prosecutor that may bring potential competency issues to light, it is her own observations that she must rely upon in making her determination. As her career on the bench progresses, a magistrate judge will presumably grow more adept at making determinations as to which defendants’ competence need further examination as hundreds, and perhaps thousands, of defendants will make initial appearances in her courtroom. In this arena, there is no substitute for experience, as magistrate judges are not specifically trained or given formal guidance on evaluating competence during initial appearances. They must rely on their own instincts and powers of observation in determining which defendants need closer attention. This can be especially difficult to discern when defendants are able to successfully answer the judge’s questions, despite having no real understanding of the proceedings or charges against them.

B. Challenges to the Current System

The defendant’s initial appearance before a magistrate judge serves as a safety net to catch those defendants who may be incompetent as early as possible in the course of the proceedings against them. While there are other, perhaps more reliable, means of identifying competence issues early on, defendants still slip through the cracks. The pretrial services officer may not identify any issue of competence from her interaction with a defendant, as her questions are very straightforward and do not require much more than rote recitation of a defendant’s background. Additionally, while defense counsel can be integral in flagging
competence issues for the court, counsel rarely has the opportunity to observe a defendant before, or even at, their initial appearance, or she may be reluctant to share information that could violate the attorney-client privilege. Despite the large role an initial appearance may play in flagging or alleviating competency concerns, training received by magistrate judges—who are charged with making these initial evaluations by federal law—in this area is almost nonexistent. New magistrate judges are required to hold initial appearances during which they must identify those defendants who may be incompetent to stand trial, perhaps having no prior exposure to criminal defendants or parties having little in the way of higher education. Drawing a line between a defendant who is unable to understand the proceedings and assist counsel with his own defense and one who simply does not have the same level of understanding that one might expect from a high school graduate may be quite difficult to an inexperienced arbiter. Without training, each magistrate judge must rely on her own "instinctual discernment" and is given very little guidance to help her on her way.

C. Potential Solutions

There is one obvious solution that could improve the likelihood that defendants who are incompetent to stand trial will be properly identified prior to trial, while preventing those who are competent from being detained unnecessarily. This obvious and immediate solution is to introduce training for magistrate judges in the area of identifying competency issues. Additional solutions may include some form of voluntary training in the form of Continuing Legal Education that may assist both prosecutors and defense counsel in identifying which defendants may need competency evaluations; assignment of counsel prior to the initial appearance; intervention with the court by the pretrial services officer before the day of the initial appearance; and reinforcement of the ability for competency issues to be raised throughout the pretrial period, not just at the initial appearance.

As of the date of this publication, the authors are unaware of any formal materials distributed to magistrate judges to assist them in making determinations about competency concerns during
initial appearances. They propose that such materials be added to the curriculum for new magistrate judges and that a written curriculum be provided for incumbent judges. These materials should provide general guidance to magistrate judges in how to structure initial appearances, which questions are likely to elicit answers that will shed light on a defendant’s state of mind, which answers should provoke further questioning, and options that are available to those defendants whom the judge thinks would benefit from further observation or from a competency determination. Thematically, the materials should focus on the initial appearance as more than a mere formality with a rigid script (notwithstanding the need for guidance in how to structure an initial appearance generally; the focus here is on flexibility and follow-up if any defendant’s answer raises any flags with the judge) if it is to serve the purpose for which it was intended. Several case studies with their respective outcomes would be necessary to demonstrate the fine line that is being drawn with respect to competence, which may have a significant impact on a defendant who will either be detained for a competency determination, or who will remain free during the pretrial period (provided he is not being detained for other reasons). A reminder of the potential outcomes for a defendant and how these outcomes impact a defendant’s constitutional rights, as earlier described in this article, would make an excellent conclusion as it will drive home the importance of these sometimes repetitive and brief proceedings.

101. The authors have reviewed the materials provided to new magistrate judges, as well as confirmed that no such materials exist with the Magistrate Judges Division.