Incompetency and the Problem of Ganser’s Syndrome

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Because of the nature of the attorney-client relationship, it is often the defense attorney who must make a preliminary determination of whether to question a defendant’s competency to proceed. The defense attorney may initially struggle with a number of questions, such as whether (1) the defendant is just an antisocial personality; (2) the defendant is making a deliberate, conscious effort to paralyze the legal system; and (3) there is a personality conflict between attorney and client. There are no fixed or immutable signs which invariably indicate the need for further inquiry to determine a defendant’s fitness to proceed. The question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

A defendant with Ganser’s Syndrome presents a particular dilemma because there may be a sudden appearance and disappearance of an array of manifestations of mental illness. This article examines the particular competency issues related to a criminal defendant with Ganser’s Syndrome.

Background

According to Dorland’s Illustrated Medical Dictionary, Ganser’s Syndrome is defined as amnesia, disturbance in consciousness, hallucination, generally of a hysterical origin: the condition is marked by senseless answers to questions and by absurd acts.

Ganser’s Syndrome is classically described as a crime-related phenomenon and can regularly be found in forensic textbooks.

The *Harvard Guide to Modern Psychiatry* notes that hysterical pseudo-dementia (Ganser’s Syndrome) is a rare syndrome in which an individual’s responses on mental status testing may resemble those of a demented patient. Ganser’s Syndrome is usually sudden in onset, found in young people, mostly males, and occurs when an individual is facing a life situation of tremendous stress (such as combat or imminent execution). It has also been pointed out that Ganser’s Syndrome has never been observed in persons of superior intelligence. The syndrome may be an unconscious, or a conscious, attempt to gain an advantage or escape responsibility.

The syndrome is explained in greater detail in a later section.

Definition of Incompetency

The statutory definition of incompetency, set out in CRS § 16-8-102(3), reads as follows:

“Incompetent to proceed” means the defendant is suffering from a mental disease or defect which renders him incapable of understanding the nature and course of
the proceedings against him or of participating or assisting in his defense or cooperating with his defense counsel.

It is clearly not enough that the defendant is oriented to time and place and has some recollection of events. The U.S. Supreme Court has defined the competency test in both *Drope v. Missouri* and *Duskey v. United States*. The test seeks to ascertain whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational as well as a factual understanding of the proceedings against him or her.

The Colorado Supreme Court basically laid out the same test in *Jones v. District Court*. The Court held that an accused’s competency to stand trial must be assessed with specific reference to the nature of the proceeding with which he or she is confronted and an appropriate level of understanding necessary for a meaningful cooperation.

**The Syndrome**

The Ganser Syndrome is named after the first person to depict the syndrome. In his initial article, Ganser described a condition in which certain people under situations of great stress, particularly facing legal actions of some sort, began to respond in peculiar ways to the examiner’s questions, “talking at cross purposes.” Other authors described the person’s “passing by” various issues and offering “approximate” responses that seemed to be somewhere in the general area of a correct response, but not quite.’ There is some controversy regarding some of the most salient signs and symptoms of the disorder.

Most medical investigators consider that giving “approximate answers” is the essential element for making the diagnosis, with little attention being paid to the presence or absence of other factors. Some consider approximate answers, clouding of consciousness, and auditory hallucinations or pseudo-hallucinations as the main diagnostic criteria. In its *Diagnostic and Statistical Manual*, the American Psychiatric Association categorizes Ganser’s Syndrome as a dissociative disorder characterized by the giving of “approximate answers” to questions, associated with amnesia, disorientation, perceptual disturbances, fugue and conversion symptoms.

It has been noted that differentiating deliberate malingering from an actual mental condition may be problematic. Some authors point out that there are major differences between simulators and patients suffering from Ganser’s Syndrome. They note that the fatigue that develops during the course of prolonged examination causes the answers of simulators to be more and more normal. However, in persons with pseudo-dementia, their fatigue causes an increase in their bizarre answers.

Organicity has been found by many investigators in Ganser’s patients. It is easy to appreciate that the tedium and stress of incarceration could lead to such findings. For example, it is not uncommon to see people who are deprived of major sensory cues of time and space develop quickly what appears to be an “organic” confusion or even delirium. Other investigators have reported a psycho-diagnostic study of three patients with Ganser’s who had a mixture of hysterical, schizoid and sociopathic personality traits.

Other elements of the syndrome may include responses that seem in some way contrived or of such a nature that they do not fit into any of the categories of clinical signs with which mental health professionals are familiar and which they are accustomed
to fitting into the various diagnostic patterns. Because the patient / defendant’s answers do not fit neatly into categories, the competency evaluation may prove quite difficult for the examining physician.

For example, people with this condition often give accounts of events and their own historical backgrounds that are loaded with ambiguities and contradictions. When they are asked to clarify some point, they may answer with an "approximate" response, leaving the examiner with little or no clarification—or, worse yet, with even more confusion as to the true state of affairs. The following is a hypothetical example that is based on facts taken from actual cases:

During the course of examining a defendant with Ganser's Syndrome, he consistently gave these "approximate" answers:

Q: Please name the largest state in the United States.
A: Cincinatti.
Q: Cincinatti is a city, not a state. What is the largest state?
A: Russia.
Q. Russia is not a state either. Let's see. According to the records, you were born and raised in Denver. Denver is the capital of which state?
A: Pueblo.
Q: Pueblo is a city, not a state. I was trying to get some information about a state. Well, since you know something about Pueblo, is it north or south of Denver?
A: Left of Denver.
Q: What do you mean, "left of Denver?"
A: Like that plant over there (pointing to a plant on his right).
Q: I was talking about north and south. Those are positions on the compass. There are four major positions on a compass: north, south, east, and west. I was asking about directions like that.
A: I thought you were asking about up and down.

Needless to say, any significant time spent in discourse such as that would soon become distressing and confusing to nearly anyone, including the examiner.

A purely pragmatic aspect of Ganser Syndrome cases is that these people seem to change their minds a great deal or do not remember what they have quite recently said or done. Some simply do not care about what they have said or done about what they have said or done or about the consequences of their actions. This does not really appear to be a function of poor memory as with persons who have a pure organic brain syndrome, wherein there is frequently a significant decrement in short-term memory. In truth, when an examination is made which could lead to that diagnostic possibility, the Ganser's patient gives the same sort of confusing responses as before, leading to further confusion and unclarity.

Competency Issues

From the practical standpoint of the judicial system and particularly of the attorney trying to represent a client with Ganser's Syndrome, there are major questions revolving around issues of competency. Defendants cannot exercise their constitutional right to participate and assist in their defense, nor make final decisions relating to the
conduct of their defense, if they are mentally incompetent to engage in those activities. Defendants suffering from Ganser's Syndrome often cannot make a final decision, as evidenced by their ever-changing patterns of thought.

**The Trial Judge's Dilemma**

This inability to make a clear, firm, final decision creates a particular dilemma for the trial court. The Colorado Supreme Court decision in *People v. Curtis* places on the court the burden of advising defendants to their constitutional right to testify. The court must ensure that any waiver of the right to testify is voluntary, knowing and intentional by advising defendants outside the presence of the jury that (1) they have a right to testify; (2) if they want to testify, no one can prevent them from doing so; (3) if they testify, the prosecution will be allowed to cross-examine them; (4) if they have been convicted of a felony, the prosecutor will be entitled to ask them about it and thereby disclose it to the jury; and (5) if the felony conviction is disclosed to the jury, the jury can be instructed to consider it only as it bears on the defendant's credibility. Whether a defendant testifies is a decision which ultimately rests with the defendant after full consultation with counsel.

If the defendant equivocates regarding his or her decision to testify, the whole proceeding and the entire legal system may grind to a halt. The trial judge has the sole responsibility of establishing that any waiver of a defendant's constitutional right was intelligent, voluntary and knowing. As pointed out in *Curtis*, the best means of demonstrating the defendant's state of mind are his or her own declarations on the record.

If the defendant answers the inquiry by the court regarding waiver with nonsensical approximate responses, it will be difficult for the judge to decide whether the defendant is legally incompetent. For the defendant with Ganser's, the jury trial itself may precipitate the onset of Ganser's symptoms. With the added stress of being forced by the trial judge to make a decision whether to exercise the constitutional right to testify, the defendant may appear to be increasingly uncooperative. As mentioned above, an increase in the defendant's uncooperativeness in the face of fatigue from continual questioning and trial is an indication that the defendant suffers from Ganser's and is not simulating.

The question of competency must come down to whether the defendant, in light of his or her personal intellectual or emotional deficiencies, can perform functions essential to fairness and accuracy of the proceedings in which he or she is involved. An incompetent person cannot waive his or her constitutional rights. Therefore, the trial judge must carefully safeguard such rights if the judge has a reasonable doubt as to the defendant's competency. For the criminal defendant with Ganser's, the issues of exercising constitutional rights and competency become inextricably intertwined. Ganser's Syndrome may prevent the defendant from performing these essential functions.

**Defense Attorney**

For the defense attorney, the task of representing the client suffering from Ganser's begins to take on the characteristics of *Alice in Wonderland*. With this type of client, things are never as they appear to be. The client's approximate answers, continual equivocation, disorientation and perceptual disturbances all obstruct the defendant's ability to assist in the defense.
It is virtually impossible for the attorney to determine just how much the client understands. The client changes his or her mind so quickly and erratically that the attorney is left never knowing whether what the client has communicated was an accurate reflection of what the client really thinks or wants.

The Sixth Amendment not only guarantees the right to counsel, it also grants to the accused personally the right to make his or her defense. A mentally incompetent defendant can neither participate in nor make final decisions regarding his or her defense.

Plea Bargains

With regard to plea bargaining, the existence of Ganser's Syndrome may impede any meaningful negotiations. Presenting the client with the option of accepting a plea bargain or going to trial in effect forces a decision which may, due to stress, precipitate the onset of the syndrome.

Furthermore, for a court to accept a guilty plea, there must be an affirmative showing that the plea was given voluntarily and intelligently. For a plea to pass constitutional examination, the record must affirmatively show the defendant's understanding of the critical elements of the crime to which the plea is entered. Thus, the court has the same dilemma with a guilty plea as with a Curtis advisement.

Spectrum of the Syndrome

As indicated above, there is a constellation of findings related to Ganser's syndrome. Those findings may occur in varying degrees over time. It is very important to think of Ganser's Syndrome as a continuum of disordered functioning - a spectrum from one to ten, with one being the least significant sort of problem and ten being the most severe sort. At the lower end of the spectrum, a Ganser's defendant may be competent to proceed, albeit with difficulty.

At the higher end of the spectrum, where the defendant exhibits a number of symptoms in severe form, it is clear that the defendant is incompetent to proceed. Neither the trial judge nor the defense attorney will be able to communicate regarding the defendant's constitutional rights. The defendant is incompetent to proceed because of an insufficient comprehension of the nature and course of the proceedings and an inability to participated in his or her defense or to assist or cooperate with counsel.

The challenge to the psychiatric and legal communities is to determine at which point on the spectrum the particular defendant becomes incompetent. This is an extremely difficult task because the physician must differentiate the signs and symptoms of Ganser's Syndrome from other mental disorders. Those factors may be very difficult to tease apart under the circumstances confronting a criminal defendant.

As this article points out, there is no simple check-list for resolving the issues related to competency. The inquiry into the functioning of the defendant must be conducted in sufficient depth and detail to assist the judicial system. The analysis of the inquiry must be focused on a determination of the personal, intellectual and emotional realities of defendants in relation to their ability to understand and exercise their constitutional rights.
Conclusion

The protection of individual constitutional rights is a hallmark of this democratic society. For the criminal defendant with Ganser's Syndrome, the protection of these rights requires cooperation between psychiatric and legal professionals to determine whether or not the defendant is "constitutionally competent" to proceed.