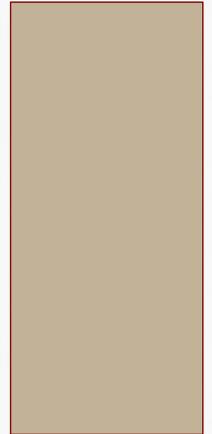


ENFORCING DUE PROCESS AND  
INDIVIDUALIZED TREATMENT:  
COMPETENCY AND MENTAL HEALTH

ANGELA CHANG, HAMILTON COUNTY PUBLIC DEFENDER  
ALISON P. HATHEWAY, HAMILTON COUNTY PUBLIC DEFENDER



# OVERVIEW

- Why does competence to stand trial matter?



# OVERVIEW

**What the prosecutor thinks  
your client is thinking:**



**What your client is actually  
thinking:**



# OVERVIEW

- Legal Standard
- Competency Evaluations
- Competency Attainment
- Ethical Obligations and Considerations
- Legal Responsibility Defense
- Preparing for dismissal or disposition

# LEGAL STANDARD

DUE PROCESS REQUIRES COMPETENCY

# LEGAL STANDARD

- Dusky v. United States, 362 U.S. 401 (1960):
  - sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding
  - rational and factual understanding of the proceedings against him
  - Adopted, State v. Rahman (1986), 23 Ohio St. 3d 146, 156; State v. Marshall (1984), 15 Ohio App. 3d 105

# LEGAL STANDARD

- R.C. 2152.51(A)(1):
  - “Competent” and “competency” refer to a child's **ability to understand the nature and objectives of a proceeding against the child** and to **assist in the child's defense**.
  - A child is incompetent if, due to mental illness, due to developmental disability, or otherwise due to a lack of mental capacity, the child is presently incapable of understanding the nature and objective of proceedings against the child or of assisting in the child's defense.

# PROCEDURE

- Juv. R. 32
  - (A) The court may order and utilize a social history or physical or mental examination at any time after the filing of a complaint... (4) Where a party's legal responsibility for the party's acts or the party's competence to participate in the proceedings is an issue;
  - (B) Limitations on preparation and use... any social history, physical examination or mental examination ordered pursuant to subdivision (A) Shall be utilized only for the limited purposes therein specified..

# PROCEDURE

- Juv. R. 32
  - (C) Availability of social history or investigation report. **A reasonable time before the dispositional hearing, or any other hearing** at which a social history or physical or mental examination is to be utilized, **counsel shall be permitted to inspect any social history or report of a mental or physical examination. The court may, for good cause shown, deny such inspection or limit its scope to specified portions of the history or report.** The court may order that the contents of the history or report, in whole or in part, not be disclosed to specified persons. If inspection or disclosure is denied or limited, the **court shall state its reasons for such denial or limitation to counsel.**

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# COMPETENCY EVALUATIONS

# BASIC FRAMEWORK OF COMPETENCE

- Four factor summary model
  - **Factual Understanding**
    - Basic, concrete knowledge of the legal process
  - **Rational Appreciation**
    - Accurate “beliefs” about what is understood about court
  - **Assisting Counsel**
    - Ability to participate with and meaningfully aid counsel in developing and presenting the defense
  - **Legal Decision Making**
    - Ability to consider, process, & weigh legal alternatives, and reach & communicate legal choices

# FACTUAL UNDERSTANDING

- Basic, concrete knowledge of the legal process
  - Understands they are accused of a crime
  - Understands what the alleged crime is
  - Understands the court will decide guilt and innocence
  - Understands the trial could result in punishment
  - Understands what punishments are possible
  - Understands the various ways one may plead
  - Understands the roles of various participants at a trial
  - Understands the basic process of a trial



# RATIONAL APPRECIATION

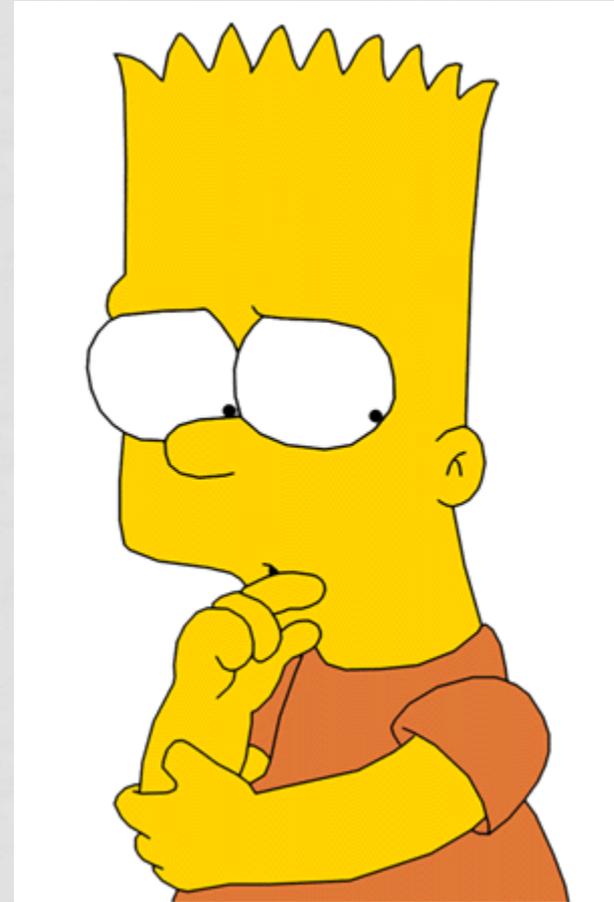
- Accurate “beliefs” about what is factually understood about court
  - Able to manipulate information that is factually understood
  - Able to contemplate the implications and significance of what is understood
  - Able to rationally apply that knowledge in one’s actual case-related situations

# ASSISTING COUNSEL

- Ability to participate with and meaningfully aid counsel in developing and presenting the defense
  - Understand and respond to counsel's questions during
  - Provide relevant information for defense
  - Provide a coherent account of the facts of the alleged crime
  - Identify potential sources of relevant evidence and witnesses
  - Identify reasons for confronting opposing witnesses
  - Manage the stresses and demands of trial process
  - Follow and comprehend the testimony of other witnesses so to be able to alert counsel to any distortions of the facts
  - Provide testimony with relevance, coherence, and independence of judgment.

# LEGAL DECISION MAKING

- Ability to consider, process, & weigh legal alternatives, and ability to reach & communicate legal choices: need to make rational decisions about:
  - how to plead
  - going to trial
  - accepting a plea offer
  - testifying
  - calling certain witnesses
  - pursuing certain defenses



# DEVELOPMENTAL FACTORS

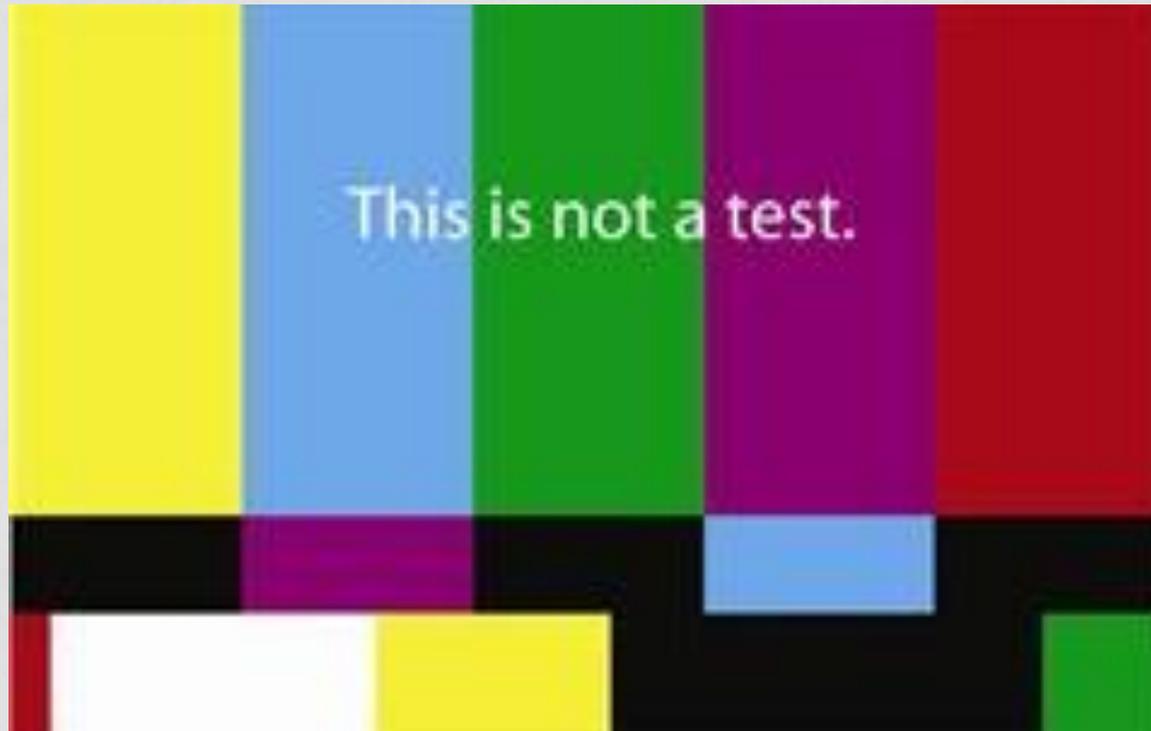
- Understanding
  - Less exposure than adults
  - Challenged by abstract concepts (e.g., rights)
- Appreciation
  - Immature Beliefs
  - Superficial understanding yields erroneous applications
  - Demands beyond their own experience (e.g., role of defense)
- Assisting Counsel
  - Information processing and organization weaknesses
  - Social skill weaknesses                      Attentional weaknesses
- Legal Decision Making
  - Psychosocial deficits yield poor decisions

# JUVENILE ADJUDICATIVE COMPETENCE INTERVIEW (JACI)

- Experience & Legal Context
- Juvenile Court Trial and Its Consequences
  - Nature and Seriousness of Offense
  - Nature and Purpose of Trial
  - Possible Pleas
  - Guilt and Punishment/Penalties
- Roles of Participants
  - Prosecutor
  - Defense Attorney
  - Probation Officer
  - Judge
  - Jury (optional)
- Assisting Counsel
  - Assisting Defense Attorney
  - Plea Bargains/Agreements
- Decision Making
  - Deciding about having a defense attorney
  - Deciding how to assist your lawyer
  - Deciding how to plead
  - Deciding about a plea bargain
- Participating at Juvenile Court Hearing
  - Ability to Attend
  - Ability to Have Self-Control
  - Ability to Testify

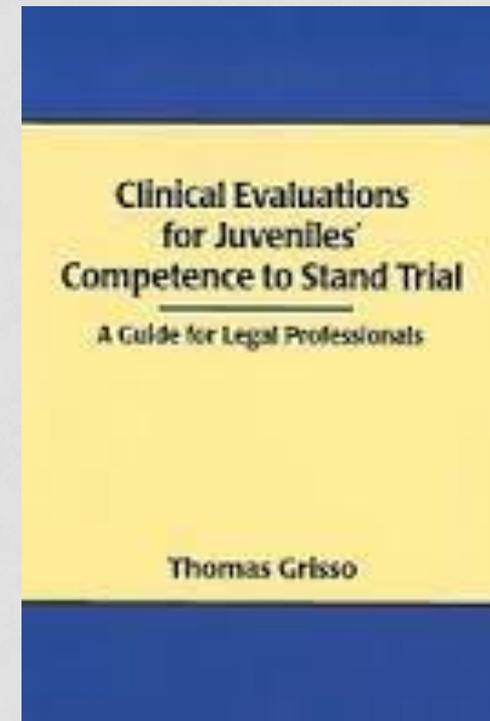
Grisso (2005)

# JUVENILE ADJUDICATIVE COMPETENCE INTERVIEW (JACI)



# RESOURCES

- Grisso, T. (2005). Clinical Evaluations for Juveniles' Competence to Stand Trial: A Guide for Legal Professionals.
- Kruh, I.P. & Grisso (2013). Evaluation of Competence to Stand Trial in Juveniles. In R. Roesch & P. Zapf (Eds.) Forensic Assessments in Criminal and Civil Law: A Handbook for Lawyers. New York: Oxford University Press.



# RESOURCES



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# COMPETENCY EVALUATIONS

CHALLENGING AND OBTAINING EVALUATIONS

# DEFENDING YOUR CLIENT

- Quality of the evaluation
- Obtaining a second opinion
  - Consulting with expert and reviewing report draft
- Collecting all the records
- Preparing for hearing
  - Expert preparation
  - Challenging the prosecution's expert
  - Challenging allegation of malingering
  - Challenging remediation/attainment process
- Set up services!

# DO I HAVE A GOOD REPORT?

- Determining the quality of the competency evaluation
  - What are the evaluator qualifications
  - Does the evaluator provide sufficient information in support of his/her determination?
  - Did the evaluator adequately consider all the relevant information?
  - What sources of information did the evaluator use?

# EVALUATOR QUALIFICATIONS

- R.C. 2152.54 Evaluators; qualifications.
  - (A) An evaluation of a child who does not appear to the court to have at least a moderate level of intellectual disability shall be made by an evaluator who is one of the following:
    - (1) A professional employed by a psychiatric facility or center certified by the department of mental health and addiction services to provide forensic services and appointed by the director of the facility or center to conduct the evaluation;
    - (2) A psychiatrist or a licensed clinical psychologist who satisfies the criteria of division (I) of section 5122.01 of the Revised Code and has specialized education, training, or experience in forensic evaluations of children or adolescents.
  - (B) An evaluation of a child who appears to the court to have at least a moderate level of intellectual disability shall be made by a psychiatrist or licensed clinical psychologist who satisfies the criteria of division (I) of section 5122.01 of the Revised Code and has specialized education, training, or experience in forensic evaluations of children or adolescents with intellectual disabilities.

# COMPETENCY ASSESSMENT REPORT

- R.C. 2152.56
  - (A) Upon completing an evaluation ordered pursuant to section 2152.53 of the Revised Code, an evaluator shall submit to the court a written competency assessment report. **The report shall include the evaluator's opinion as to whether the child, due to mental illness, due to developmental disability, or otherwise due to a lack of mental capacity, is currently incapable of understanding the nature and objective of the proceedings against the child or of assisting in the child's defense.** The report shall not include any opinion as to the child's sanity at the time of the alleged offense, details of the alleged offense as reported by the child, or an opinion as to whether the child actually committed the offense or could have been culpable for committing the offense.

# COMPETENCY ASSESSMENT REPORT

- R.C. 2152.56
  - (B) A competency assessment report shall address the child's capacity to do all of the following:
    - (1) Comprehend and appreciate the charges or allegations against the child;
    - (2) Understand the adversarial nature of the proceedings, including the role of the judge, defense counsel, prosecuting attorney, guardian ad litem or court-appointed special assistant, and witnesses;
    - (3) Assist in the child's defense and communicate with counsel;
    - (4) Comprehend and appreciate the consequences that may be imposed or result from the proceedings.

# AREAS TO FOCUS ON WITH AN EXPERT

- Four factor summary model
  - **Factual Understanding**
    - Basic, concrete knowledge of the legal process
  - **Rational Appreciation**
    - Accurate “beliefs” about what is understood about court
  - **Assisting Counsel**
    - Ability to participate with and meaningfully aid counsel in developing and presenting the defense
  - **Legal Decision Making**
    - Ability to consider, process, & weigh legal alternatives, and reach & communicate legal choices

# DO I NEED A SECOND OPINION?

- Types of experts to consider in addition to a competency evaluator
  - Special education expert
  - Forensic speech/language pathologist
  - Trauma expert
  - Neuropsychologist
- R.C. 2152.57
  - (E)(1) Before a hearing is held under section 2152.58 of the Revised Code, any party may object to the contents of a competency assessment report and by motion request an additional evaluation. If the court determines that an additional evaluation is appropriate and grants the motion, the evaluator shall complete an additional evaluation as soon as possible but not more than forty-five calendar days after the order allowing the additional evaluation is issued. An additional evaluation shall meet all the criteria that apply to a court-ordered evaluation.
  - (2) An additional evaluation allowed under division (E)(1) of this section shall be made at the moving party's expense unless the child is indigent. If the child is indigent, the county shall pay the costs of the additional evaluation. However, the county shall not be required to pay costs exceeding that which the county would normally pay for a competency evaluation conducted by a provider with which the court or county has contracted to conduct competency evaluations

# OTHER CONSIDERATIONS

- Malingering
- Medication issues
- Effects of detention on competency

# COMPETENCY ATTAINMENT

YES, IT IS A THING.

# COMPETENCY ATTAINMENT/REMEDATION

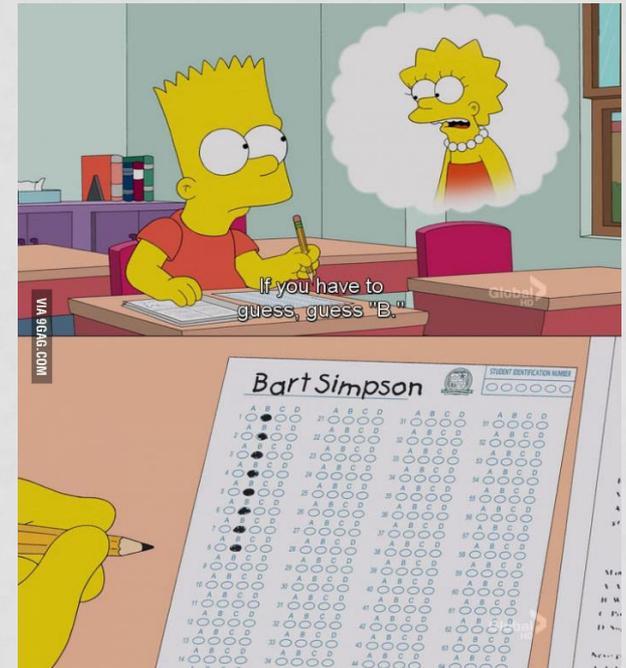


# COMPETENCY ATTAINMENT

- R.C. 2152.59
  - (C) If after a hearing held pursuant to section 2152.58 of the Revised Code the court determines that a child is not competent but could likely attain competency by participating in services specifically designed to help the child develop competency, the court may order the child to participate in services specifically designed to help the child develop competency at county expense. The court shall name a reliable provider to deliver the competency attainment services and shall order the child's parent, guardian, or custodian to contact that provider by a specified date to arrange for services.

# COMPETENCY ATTAINMENT/REMEDATION

- Know the program
  - “Homework” sheets
  - Quizzes
  - Progress notes
  - Who is teaching your client?
  - IEP accommodations?
  - Ancillary Treatment and Services?
- Teaching or teaching to the test?
- Does the program address the barrier to competency?
- Beware of the one size fits all!



# COMPETENCY ATTAINMENT/REMEDICATION

- Issues with attainment/remediation
  - Can you really improve developmental immaturity in a matter of weeks/months?
  - For a cognitively or neurologically impaired youth, how to you teach appreciation?
  - For a child with a severe language impairment, can you really teach words beyond their comprehension level?
  - Who is administering the program?



# COMPETENCY ATTAINMENT PROGRAMS

- Utah State University:  
<http://hs.utah.gov/pdf/juvenile-competency-curriculum.pdf>
- Florida: <http://www.myflfamilies.com/service-programs/mental-health/juvenile-incompetent-proceed-program>
- California:  
[http://www.acbhcs.org/providers/documentation/SOC/AC\\_Juvenile\\_Competency\\_Protocol.pdf](http://www.acbhcs.org/providers/documentation/SOC/AC_Juvenile_Competency_Protocol.pdf)
- Virginia: <http://juvenilecompetency.virginia.edu/>

# LEGAL RESPONSIBILITY DEFENSE

ETHICAL OBLIGATIONS AND OTHER CONSIDERATIONS

# CLIENT-LAWYER RELATIONSHIP

- **RULE 1.1: COMPETENCE (Ohio Rules of Professional Conduct)**
  - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation
- **Other Considerations**
  - While in many instances, the required proficiency is that of a general practitioner. However, expertise in a particular field of law may be required in some circumstances.

# NATIONAL JUVENILE DEFENSE STANDARDS

- **1.1 Ethical Obligations of Juvenile Defense Counsel— Counsel must provide competent, diligent, and zealous advocacy to protect the client’s procedural and substantive rights.**
  - Counsel must be skilled in juvenile defense. Counsel must be knowledgeable about adolescent development and the special status of youth in the legal system. Counsel must be familiar with relevant statutes, case law, and court rules...

# ROLE REGARDING COMPETENCY OF YOUTH

- **1.7 Counsel must be able to recognize when the client may not be competent to stand trial and take appropriate action.**
  - Counsel must learn to recognize when a client's ability to participate in his or her own defense may be compromised due to developmental immaturity, mental health disorders, or developmental/intellectual disabilities;
  - Counsel must assess whether the client's level of functioning limits his/her ability to communicate effectively with counsel, as well as his/her ability to have a factual and rational understanding of the proceedings. When counsel has reason to doubt the client's competence ... counsel must gather additional information and consider filing a pre-trial motion requesting a hearing for competence determination;

# RULE 1.7 CONT'

- Counsel must be versed in the rules, statutes, and case law governing juvenile competence to stand trial in the jurisdiction.
- Counsel must become familiar with experts qualified to assess competence to stand trial and learn the mechanisms for requesting an evaluation.
- Counsel must learn the procedures for a competence hearing in his or her jurisdiction and fully comprehend the ramifications if the client is found incompetent to stand trial.
- Counsel must carefully weigh the consequences of moving forward with the case against the likely consequences of a finding of incompetence, and whether there are other ways to resolve the case, such as dismissal upon obtaining services for the client...

## RULE 1.7 CONT'

- If counsel decides to proceed with a competence hearing, counsel must secure a qualified, independent expert to evaluate the client's competence.
- Counsel must then advise the youth about the evaluation and proceedings, analyze the results of the evaluation, prepare the expert for testimony, and prepare his or her case substantively and procedurally for the hearing.
- Counsel must advise the client about the content of the hearing and assist the client in navigating the complexities of the proceedings.

# NO JUVENILE NGRI, BUT...

- Juv. R. 32
  - (A) The court may order and utilize a social history or physical or mental examination at any time after the filing of a complaint... (4) **Where a party's legal responsibility for the party's acts** or the party's competence to participate in the proceedings **is an issue**;
- Juv. R. 29(F)(2)(d)

# WAYS TO CHALLENGE LEGAL RESPONSIBILITY

- Mental health
  - Trauma/PTSD
  - ADHD
  - Bipolar or schizoaffective disorder
- Developmental Immaturity
  - Peer pressure
  - Ability to appreciate consequences of an action

# PREPARING FOR DISMISSAL OR DISPOSITION

ADDRESS THE COURT'S CONCERNS

# PREPARING FOR DISMISSAL

- R.C. 2152.59
  - (B) If after a hearing held pursuant to section 2152.58 of the Revised Code the court determines that the child is not competent and cannot attain competency within the period of time applicable under division (D)(2) of this section, **the court shall dismiss the charges without prejudice, except that the court may delay dismissal for up to ninety calendar days and do either of the following:**
    - (1) Refer the matter to a public children services agency and request that agency determine whether to file an action in accordance with section 2151.27 of the Revised Code alleging that the child is a dependent, neglected, or abused child;
    - (2) Assign court staff to refer the child or the child's family to the local family and children first council or an agency funded by the department of mental health and addiction services or department of developmental disabilities or otherwise secure services to reduce the potential that the child would engage in behavior that could result in delinquent child or other criminal charges.

# PAVE THE ROAD TO DISMISSAL

- Make it easier for the judge to dismiss by addressing the underlying issues:
  - Mental Health services in place
  - Children's Services involvement
  - Mentoring
  - Educational Supports
- Start ASAP!



# CASE STUDY

- Charge: Burglary
- Facts: T.R. is a 16 year old male who has a severe expressive and receptive language disorder. He can barely read or write. His verbal IQ score is 56 and his overall IQ score is 67. He has been through attainment classes (24, to be exact), and the court appointed evaluator has determined he is now competent.

# CASE STUDY

- Charges: Obstruction of Official Business and Resisting Arrest
- Facts: C.S. has been diagnosed with schizoaffective and bipolar disorder and was just robbed at gun point two days before this incident. C.S. was wearing four pairs of pants, four shirts, four pairs of socks, and four pairs of underwear. His mother heard him talking about the number four the entire day. She was concerned about him and called the police to take him to the hospital.

# CASE STUDY: LEGAL RESPONSIBILITY

- Police were warned by dispatch that C.S. had mental illnesses, had made suicidal threats, was wearing four layers of clothing, and had not been taking his medication. They approached him and asked him to take his hands out of his pockets, and eventually the situation escalating to the point that he was tased for refusing to put his hands behind his back to be handcuffed.