VERMONT LAW AT THE INTERSECTION OF THE CRIMINAL JUSTICE AND MENTAL HEALTH CARE SYSTEMS NEEDS TO BE FIXED

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The laws at the intersection of the criminal justice and mental health care systems in Vermont are broken. The government needs to be able to act when people commit crimes that cause harm, make others unsafe, and disrupt the community. But Vermont law does not provide a consistently effective response when people with mental illness and cognitive disabilities commit crimes.

The criminal justice system is about responsibility and consequences. There are times, however, when criminal conduct happens but responsibility cannot be determined or imposed because of the defendant's cognitive status. When criminal defendants do not understand the justice system and cannot help with their defense, they are found incompetent, so charges cannot move forward and criminal responsibility issues cannot be addressed. People with mental illness or cognitive disabilities who did not understand their conduct was a crime or could not conform their conduct to what the law requires are found insane and also cannot be held criminally responsible.

To make sure our community is protected from criminal conduct, it is important to assess the risk posed by the conduct of people who commit crimes, including those found incompetent or insane, and to ensure appropriate oversight, supervision, monitoring, treatment, and programming are delivered. This is where Vermont law breaks down.

Based on poor drafting over 50 years ago that the Legislature never fixed, exacerbated by piecemeal legislation in the intervening years, Vermont law only authorizes an initial 90-day commitment to Department of Mental Health (DMH) custody when a person is found incompetent or is acquitted by reason of insanity based on mental illness. The law does not distinguish whether the person was making a ruckus on the street, had illegal drugs, drove drunk, was stealing, broke into a home, assaulted another, committed a sex crime, or killed someone. A one size fits all 90-day initial DMH commitment for treatment is all that is available.

For defendants with mental illness found incompetent or insane and placed in DMH custody, DMH has sole authority at the end of the 90 days to decide whether to seek continued treatment for up to a year at a time. If DMH applies for continued treatment, the decision whether to continue the commitment is made in secret mental health court proceedings that prosecutors and crimes victims cannot attend or participate in. When DMH elects not to seek continued treatment, its decision is not subject to review.

There is no structured system in Vermont to monitor if defendants found incompetent have progressed so they can understand the legal system and help their lawyers, and then be routed back to the criminal justice system. There is no structured system in Vermont for determining when criminal cases against defendants found incompetent should end. There also is no comprehensive system in Vermont for protecting victim rights in these cases.

What happens during the DMH commitment also often is wholly inadequate.

A very small group of mentally ill criminal defendants who pose risk of harm to self or others need to be and are committed to treatment in mental health hospital beds. The number of these beds in Vermont is very small, and the criteria for commitment to them are very rigorous. But the problem with Vermont's system runs deeper than the need for more beds.

When a mentally ill criminal defendant is found incompetent or insane and does not qualify for hospitalization, Vermont law only authorizes community based civil DMH commitment for treatment. This is offered by DMH through non-governmental organizations (NGOs) that deliver community based care on a voluntary treatment model. The NGOs are not designed or funded to, and do not, assess risk, supervise or monitor offenders, or provide programming to respond to criminal conduct. As DMH administers the system, it is little more than an opportunity for mentally ill criminal defendants to seek mental health treatment if they choose to.

Given how they got into the system, it is apparent that many such defendants are not willing or able on their own to engage in community mental health treatment. But when members of this population do not proactively engage with the mental health agency, DMH routinely just allows the treatment orders to end. If the offender is non-compliant with a community-based treatment order, the only remedy is hospitalization, but that only rarely happens, when clinical needs require it. People in DMH custody often continue committing crimes with little or no response from the NGO or DMH.

There are other serious holes in this safety net. The NGOs delivering mental health care on DMH's behalf do not provide services to many people with disabilities. As a result, DMH declines even to provide for treatment of many defendants found incompetent or insane. DMH's routine position is that people on the autism spectrum, and who suffer from traumatic brain injury, have dementia, co-occurring disorders, other cognitive impairments not deemed to be mental illness, or encephalopathy (so-called wet brain from prolonged alcohol abuse) do not qualify for civil commitment. Vermont law also very narrowly limits situations where the government responds to crimes committed by the developmentally disabled.

The problems with this system exist in real life and impact community safety. Findings of incompetency and insanity are made in cases where Vermont defendants are charged with crimes of violence including murder, sex offenses, and other crimes ranging from serious felonies to minor misdemeanors. The criminal conduct that brings these offenders into court causes injury and risk of harm to our neighbors and family members. It tears at the fabric of our community.

But prosecutors and victim advocates routinely must tell victims that criminal cases cannot move forward, DMH will not monitor, supervise, or ensure mental health treatment of the offender in a meaningful way, victim rights will not be protected, and information about the offender's status will not be available. Many offenders who are found incompetent have been charged multiple, sometimes dozens, of times. They cycle through a revolving door of criminal conduct, arrest, jail, hospitalization, and DMH commitment and discharge. Each passage through that cycle creates new victims and new harms.

Right now the Legislature is considering laws, known as S.192, to govern a forensic facility that would have 9 beds for defendants who do not need hospital level care, but who are not safe for release into the community. However, the draft laws being considered would continue forward the same failed model already in place in Vermont.

Functioning in the sunshine and making sure the public is aware of how the most dangerous offenders in Vermont are being supervised is of utmost importance. S.192, however, calls for gatekeeping decisions about forensic facility admission to be made in secret, without involvement of prosecutors and defense lawyers. Even though the forensic facility would be a restrictive custodial setting, S.192 would treat these commitments as community based and would give DMH administrative discretion to release defendants. Oversight of these commitments would continue to be in secret, information about the defendants and their progress would not be shared with prosecutors or the public, and victims would continue to be denied crucial information needed to protect their safety and peace of mind.

Changes to Vermont law could mend the gaps in the system. The law could change so all criminal defendants found incompetent or insane must participate in risk assessments and screening. Mandatory programming and treatment could follow, with meaningful oversight and monitoring for a period of time that relates to the injury and risk of harm caused by the criminal conduct. Information about the defendant's progress could be made available to prosecutors and defense lawyers alike. Decisions about what happens with defendants and their criminal cases could be made in public, based on information about their progress, assessment of risk of harm, and likelihood of becoming competent. Victims' rights to information could be protected.

Instead of relying on the broken infrastructure that currently exists where the Vermont criminal justice and mental health care systems meet, the Legislature should act to repair that intersection.

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