

Prosecutorial Notification and Competency Restoration

Statutory Suggestions From a Victim's Perspective

Forensic Working Group

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Agenda

Introduction

Prosecutorial Notification

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Q & A

Introduction

Having both been victims in the Vermont Criminal Justice System as it has intersected with the Mental Health System in Vermont we are most interested in looking into reforms in those systems and how they interact so that others do not experience some of the problems and obstacles that we have experienced.

We should emphasize that we do not look at this from a punitive point of view and that these reforms/changes/improvements be implemented in a manner so as not to violate the constitutional rights of the accused.

Prosecutorial Notification- Legislative Charge

Legislative Charge for S.3 Working Group: **Submit a report regarding Prosecutorial Notification-** Section 6 S. 3

(c) On or before February 15, 2022, the Department of Mental Health shall submit a report to the House Committee on Corrections and Institutions, on Health Care, and on Judiciary and to the Senate Committee on Health and Welfare and on Judiciary that:

Assesses the necessity of notification to the prosecutor upon becoming aware that individuals on orders of non-hospitalization pursuant to 18 V.S.A. section 7618 are not complying with the order or that the alternative treatment is not adequate to meet the individual's treatment needs, including any recommendations:

- (A) necessary to clarify the process
- (B) addressing what facts and circumstances should trigger the Commissioner's duty to notify the prosecutor
- (C) addressing the steps that the prosecutor should take after receiving the notification

Prosecutorial Notification- Legislative History

In the version of the bill that passed the Senate the following language was included in Section 3 as a proposed amendment to section 4822 of title 13:

(C) When a person has been committed under this section and is subject to a non-hospitalization order as a result of that commitment under 18 V.S.A. section 7618,

Commissioner shall provide notice to the committing court and to the State's Attorney of the county where the prosecution originated, or to the Office of the Attorney General if that office prosecuted the case, if the Commissioner becomes aware that;

- (i) the person is not complying with the order; or
- (ii) the alternative treatment has not been adequate to meet the person's needs

Prosecutorial Notification- Legislative History

It should be noted that the language in subsection C is almost identical to the language currently contained in 18 V.S.A. section 7618 (b) which states that if at anytime during the specified period (of non-hospitalization) it comes to the attention of the court either that the patient is not complying with the order or that the alternative treatment has not adequate to meet the patient's treatment needs, the court may, after proper hearing –either modify the order or enter a new order directing that the patient be hospitalized for the remainder of the non-hospitalization order.

Prosecutorial Notification- Legislative History

During the House Committee hearings there was extensive testimony regarding this subsection C language and whether or not it should be included in the bill.

Concerns Raised:

- Practicalities of providing notice to the Commissioner
- What level of non-compliance would trigger notice
- Conflicts for the care providers who would be providing the notice
- Individual privacy vs. compelling State interest

No consensus so there was an agreement to remove subsection C from section 3 of S3 and include the language noted on the earlier slide titled Legislative Charge to Section 6 of S3 as a direction to the Forensic Working Group to consider and for the Department of Mental Health to then report to the Senate and House Committees

Prosecutorial Notification- Statutory Recommendations

From a victim's perspective we feel there is value in including notice of the type suggested in the subsection C of Section 3 of the Senate version of the Bill. The primary reason for this position relates to victim safety and public safety which needs to be considered along with the interests of the accused.

Suggestions:

Delete the requirement of notice in the event of a determination of inadequacy of treatment

While inadequacy of treatment is appropriate to a review of whether the order of non-hospitalization should be altered, we don't see how it could be practically applied to notification to the Prosecutor or tied to victim or public safety.

Notice of noncompliance should be the focus.

If such noncompliance were communicated to the Commissioner, the Commissioner could then notify the prosecutor who would best be able to make a determination as to whether the noncompliance would present a potential danger to the victims in the case or the public and would best be able to provide victim notification.

Considerations:

Whether or not there should be a hierarchy of cases where this notification requirement is triggered-look at victim's statute definition of "Listed Crime"

Specifying that notice be given to the Commissioner in cases where the type of noncompliance could present a danger to either the victim or the public.

Revision of DMH statutes to include public safety mandate

Restoration of Competency

Victim's interest in Restoration of Competency

Victim's interests under the Victim Rights statute are consistent with Defendant's Constitutional right to a speedy trial.

Chapter 165 of Title 13, Section 5312.

“(a) The prosecutor's office shall make every effort to inform a victim of a listed crime of any pending motion that may substantially delay any deposition, change of plea, trial, sentencing hearing, or resolution hearing. The prosecutor shall inform the court of how the victim was notified and the victim's position on the motion, if any. In the event the victim was not notified, the prosecutor shall inform the court why notification did not take place.

(b) If a victim of a listed crime objects to a delay, the court shall consider the victim's objection.”

Restoration of Competency

Victim's interest in Restoration of Competency

Impacts of delay on victims

During the Legislative process for S3 the Attorney General (David Scherr, Assistant Attorney General) submitted a memo to the House Committee with respect to proposed changes to section 4 of S3 that emphasized the victim's interest in speedy prosecution:

“The interest of justice weigh heavily in finality and reducing unnecessary trial delay. Victims of serious crimes, and their relatives, can suffer real additional harm when they must wait for a trial without closure, and without any certainty or even estimate about when a trial may occur. The trial itself can be a traumatizing experience, and survivors should not be unnecessarily subjected to an uncertain and emotionally fraught wait for a trial whose date is unknown. This committee heard powerful testimony from the relative of a murder victim who had to endure such a wait.”

Deterioration of Evidence.

Restoration of Competency

Legislative Charge for S. 3 Working Group

Restoration of competency once the accused is found incompetent to stand trial is critical to moving the case forward.

S. 3 Section 6 provides that the final report to be submitted to the Legislature address in part opportunities to:

- consider the importance of victim's rights in the forensic care process
- consider competency models used in other states, including both models that do not rely or involuntary medication to restore competency and cases where competency is not restored are addressed.

Restoration of Competency

Description of Restoration of Competency and the CST Process

Assessment of competency is not a medical diagnosis. Rather it is a legal adjudication that is decided by a judge after an adversarial hearing.

The Webinar viewed by the Working group concerning Connecticut's Competency to Stand Trial references the publication: **Just and Well: Rethinking How States Approach Competency to Stand Trial** which describes the CST process as follows:

“The process varies depending on state law and the availability of services and facilities. Generally, the judge or either party in a criminal case may raise a concern about a person's ability to understand and participate in the court's proceedings. Once this occurs, an evaluation of the person's competency must be conducted, and if needed, restoration services may be provided either in the community or in an inpatient restoration facility. These restoration services are designed to prepare people to participate in a courtroom process, generally focusing on symptom management or legal education. However, they are not equivalent to, nor should they be a substitute for, treatment of mental diseases and substance abuse disorders (“behavioral health” conditions). If a person's competency is restored, their case may proceed.”

Restoration of Competency

Current Vermont Statutes

Title 13 section 4817 specifies a process by which a person accused of a crime may be found to be incompetent to stand trial and provides that such person may be tried for that offense if, upon subsequent hearing, such person is found by the court having jurisdiction of his or her trial for the offense to have become competent to stand trial. It contains no provisions outlining the requirements for restoration of competence.

Title 13 sections 4820, 4821 and 4822

Specifies the process for a commitment hearing including hearing procedures and order for those individuals who are found incompetent to stand trial and are a person in need of treatment or a patient in need of further treatment as defined in 18 V.S.A. Section 1701.

When the court determines that commitment is no longer necessary, it shall issue an order discharging the patient from DMH custody.

Example of Joanne's sisters accused killer's Hospitalization Order

Restoration of Competency

Need for a Statutory Framework

Without statutes or court rules in Vermont governing competency restoration any current efforts towards restoration are being made ad hoc, without consistency or perhaps not at all.

Minnesota example:

Minnesota's Community Competency Task Force 2021 Report recognized that one of the key components necessary to create an equitable and responsive competency process was to enact a state statute to establish standards and processes for competency restoration.

The Task Force identified its Rule 20.01 as the only source governing competency restoration but that the Rule "does not reflect the needs of today's court or mental health system. The result being a "patch work system that lends itself to confusion."

The Task Force states in its report that Rule 20.01 does not require that competency services be provided to an incompetent defendant, or that the defendant participate in competency restoration programs. It also notes the inefficiencies and redundancies in using both the criminal and civil mental court systems.

Similar to Vermont- no statute – uses the Family Court and the Criminal Court systems.

Example of my sister's accused killer's case- appeals from the same Order of Hospitalization in both court systems.

Restoration of Competency

Need for a Statutory Framework

Minnesota example

The Minnesota Task Force report recommends that a bill governing competency to stand trial be drafted and passed into law and suggests:

“The statute should lay out not only the process for directing defendants to competency restoration services, but also the continuum of where and how such services should be offered and to which populations.

It would also be important for a competency statute to address defendants who are not restorable and those who do not meet the civil commitment criteria, and to include a competency curriculum which is flexible enough for a variety of users in various settings.”

Restoration of Competency

Statutory Recommendations

Diverting individuals charged with misdemeanors out of the competency restoration system. Supported by recommendations from:

Minnesota's Task Force Report

Just and Well: Rethinking How States Approach Competency to Stand Trial

National Judicial Task Force report- Leading Reform: Competence to Stand Trial Systems

Restoration of Competency

Statutory Recommendations- Diversion of individuals charged with misdemeanors

Minnesota's Task Force Report

Unlike Vermont, Minnesota has a criminal regulatory procedure governing competence (Rule 20.1)

-contains a provision that misdemeanor charges be dismissed when an individual is found

Incompetent

The Task Force report includes a recommendation that diversion of those charged with misdemeanors be included as a component of any new statute.

Stated rationale:

“Sending individuals back into the competency pipeline under a new system would likely overwhelm both state and county resources quickly and would likely consume significant criminal court resources. Moreover, those charged with misdemeanors would likely spend as much or more time in treatment or regaining competency than they would be sentenced to serve because of their criminal charges. Further, forensic examiner resources would be taxed if continuing competency evaluations (referring to Rule 20.1, sub d.7) would have to be completed for misdemeanants until they were found competent.”

Restoration of Competency

Statutory Recommendations- Diversion of individuals charged with misdemeanors

The rationale stated by the Minnesota Task Force also appears in other recent studies and national task forces around the issue of restoration of competency.

Just and Well: Rethinking How States Approach Competency to Stand Trial

The CSG (Council of State Governments) Justice Center and the APA (American Psychiatric Foundation) convened a group of experts to agree upon strategies and best practice policy makers can use to improve their CST processes- including strengthening connections to community-based treatment so that the process can be avoided altogether where appropriate.

Stated purpose of the report is to provide “examples that demonstrate how these changes can be achieved in communities across the country. It also calls on local and state leaders to adopt strategies that will improve current practices in their own communities-improving health, saving money, protecting public safety and making the legal process more just”

Honorable Brian Grearson, Chief Superior Judge, Vermont Judiciary was one of the additional national advisors on this study.

Restoration of Competency

Statutory Recommendations- Diversion of individuals charged with misdemeanors

National Judicial Task Force to Examine State Court's Response to Mental Illness titled: Leading Reform; Competency to Stand Trial Systems (A Resource for State Courts)

The Task Force began by selecting 8 trial judges from around the country who were asked to focus on what they thought was working and what was not working in the competency system. The report published in August of 2021 builds on the original recommendations of those judges and those of the National Center for State Courts set forth in the "Just and Well" report cited above

This report also recommends diversion for those charged with misdemeanors – cites the propensity for defense attorneys to raise the competency defense and notes that while: "defense counsel has an obligation to explore all possible strategies on behalf of the client it does not follow that competence be raised every time there is a colorable argument."

Restoration of Competency

Statutory Recommendation – Diversion of individuals charged with misdemeanors

Tendency to raise the defense of Competency in Vermont Cases- clogging the systems and impact on a speedy trial

Comments made by the Defender General and Legal Aid Director during the Task Force meetings about raising the competency defense including the statement by the Legal Aid Director that a competent individual would not choose to have competency restored if it means having to stand trial for the alleged offense and potentially serving prison time.

Data presented during the Task Force meetings on numbers undergoing Competency Evaluations particularly in Bennington – Kelly's individual experience with statement made by defense attorney

Restoration of Competency

Statutory Recommendation – Diversion of individuals charged with misdemeanors

Considerations when including a provision for diversion of misdemeanors as part of a restoration of competency statute:

Review of current statutes as to how certain crimes are currently categorized:

The “Just and Well” report suggests that: “Charges with high rates of referral for CST may be worth additional inquiry to determine whether specific statutory language is driving arrests that lead to CST requests. For instance, if people with mental illnesses are arrested and charged (and then referred for CST) at high rates because of the way the crime is defined or because it is described as a felony, a statutory change could prioritize connection to crises services rather than an arrest or make the same crime a misdemeanor instead of a felony.”

Restoration of Competency

Statutory Recommendation- Responsibility and Accountability- use of Liaisons and Forensic Navigators

The Just and Well report recommends that: “States should designate a specific person, multidisciplinary team or an agency to be responsible for ensuring that the CST process proceeds efficiently at each step. A designated person or agency can closely track each case to ensure that needed steps are taken and linkages across systems happen, whether it is in the form of paperwork or the physical transportation of people. This individual or agency is also best equipped to track trends and problem- solve any challenges that arise.”

Restoration of Competency

Statutory Recommendation- Responsibility and Accountability- use of Liaisons and Forensic Navigators

Task Force recommendations and other States examples

- Colorado statutory provisions and experience
- Just and Well Recommendations
- National Task Force Study Recommendations
- Minnesota Task Force Recommendations

Restoration of Competency

Statutory Recommendation- Responsibility and Accountability- use of Liaisons and Forensic Navigators

Task Force recommendations and other States examples

In 2017 Colorado created the Office of Behavioral Health as the entity responsible for the oversight and restoration education and the coordination of services necessary to competency restoration.

In creating the Office of Behavioral Health the general assembly of Colorado found:

- (a) Colorado's statutory scheme does not designate an entity responsible for competency restoration service, nor does it provide a sufficient framework for the provision of outpatient restoration services to adults and juveniles. As a result, there have been deficits and inconsistencies in the administration of the educational component of outpatient competency restoration services and the coordination and integration of that component with existing services and supports to address the underlying causes of incompetency.
- (b) The lack of a designated responsible entity for competency restoration services in Colorado has caused inconsistency in competency restoration services throughout the state and delays in proceedings that impact the due process rights of juveniles and adults involved in the juvenile and criminal justice systems as well as the interests of the victims;
- (c) Competency restoration services must be localized an accessible and take into account public safety while still allowing for state-level standards and oversight;"

Restoration of Competency

Statutory Recommendation- Responsibility and Accountability – use of Liaisons and Forensic Navigators

Task Force Recommendation and other State examples

Following the adoption of the statute that created the Office of Behavioral Health in Colorado the Colorado general assembly in its 2018 legislative session created a Statewide Behavioral Health Court Liaison program to bridge the gap between the Criminal Justice System and the Behavioral Health System across the State. Part of the stated purpose of that program is as follows:

16-11.9-203 (2). The program is designed to keep judges, district attorneys, and defense attorneys informed about available community- based behavioral health services, including services for defendants who have been ordered to undergo a competency evaluation or receive competency restoration services or receive competency evaluation services pursuant to Article 8.5 of this title 16. The Program is designed to promote positive outcomes for individuals living with mental health or co-occurring behavioral health conditions.

Restoration of Competency

Statutory Recommendation- Responsibility and Accountability- use of Liaisons and Forensic Navigators

Task Force and other State examples

As part of a bill overhauling Colorado Statutes related to Competency to Proceed the Colorado Legislature in 2019 appropriated funds to the Office of Behavioral Health who created the Forensic Support Team consisting of 16 Forensic Navigators. Navigators who check in on each client in jail who has been ordered to complete a competency restoration program.

Restoration of Competency

Statutory Recommendation – Responsibility and Accountability- use of Liaisons and Forensic Navigators

Task Force and other State examples

The Just and Well study describes models used in other states including designated liaisons or forensic navigators to follow cases through the transition of system and to ensure that cases do not get back logged at any key transition point. Key points are identified as:

- Getting an evaluation completed after CST is raised in court;
- Returning evaluation results to the court promptly after completion;
- Establishing the beginning of restoration services following an order for restoration;
- Returning a person to court and potentially, jail after restoration and making sure the jail can continue the person's medications;
- Supporting a person's return to the community (from the state hospital or jail)

The report refers to Arizona who is establishing standardized descriptions and qualifications for “clinical liaisons”- “who coordinate care, and are providing support in some communities in the form of “peer/forensic navigators-often people who have experienced the CST process firsthand and help defendants navigate their court cases and path toward recovery”

Restoration of Competency

Statutory Recommendation- Responsibility and Accountability – use of Liaisons and Forensic Navigators

Task Force and other State examples

The National Task Force study described in an earlier slide refers to the use of both forensic navigators and liaisons citing Colorado and Washington programs and their value in competency restoration:

“In a competency context, this case management role can facilitate the pairing of defendants and evaluators, identify services that would allow the evaluation and restoration process to occur in the community instead of a custodial facility, ensure appropriate attention is paid to timelines and resource coordination and generally make sure that cases do not fall through the cracks. Translating behavioral health system processes and requirements to a criminal justice context, and vice versa, has shown to benefit all of the system players by saving resources and more effectively delivering behavioral health services and access to justice.”

Restoration of Competency

Statutory Recommendation- Responsibility and Accountability- use of Liaisons and Forensic Navigators

Task Force and other State Examples

Minnesota also looked at the establishment of Forensic Navigators in its task force report on establishing a competency restoration statute in its state and noted that:

“Navigators can also directly provide the educational element of competency restoration along the full continuum. The forensic navigator would also be responsible to the supervision of the individual in all settings and could report to the court on progress, or if the defendant is ready to be re-examined sooner than the given timeline in the statute. In addition to these critical points to the competency process, forensic navigators can help individuals further along such as coordination at provisional discharge for those who have met civil commitment criteria, and continued assistance to promote long term success, especially if the individual is a good candidate for a diversion program like a mental health court.”

Restoration of Competency

Resources for the Legislature to consider when drafting a statute and creating programs for the Restoration of Competency

Just and Well Report and the **National Task Force Study**

Dartmouth Report to the House of Representatives Health Care Committee- April 2022

The report was created to aid Vermont Officials in enacting competency restoration legislation.

Includes examples of reforms being used in other state's competency restoration systems that might translate to Vermont because of similarities in population, spending and policy approaches.

Restoration of Competency

Resources for the Legislature to consider when drafting a statute and creating programs for the Restoration of Competency

Dartmouth Report- Florida and Georgia Models

Florida addresses the issue of scarce public resources by hiring recent graduates in addition to licensed practitioners and has established an innovative Forensic Alternative Center which provides psychiatric stabilization and competency restoration for individuals deemed incompetent to stand trial for third-degree and non-violent second-degree felonies. “While in the program patients learn life skills, take competency courses to improve their understanding of the legal process, and complete daily training focused on illness management and re-entry.”

Fulton County Georgia uses a jail-based competency program developed as partnership between jail administrators and the Emory University School of Medicine. (This example is also referred to in the Just and Well report).

The County launched a 16- bed pilot program for restoration services which resulted in a reduction of wait times for those who needed hospitalization while costing significantly less than hospital services with quicker rates of competency restoration. “The inmates in the competency restoration unit participate in group and individual sessions with a focus on cognitive remediation activities. Each participant has a daily structure around enhancing his problem- solving skills, attention, concentration and memory which are all key in restoring competency.”

Summary of Recommendations for Prosecutorial Notification and Restoration of Competency

Prosecutorial Notification

1. Draft language that identifies non-compliance with a Non-Hospitalization Order as a trigger.
2. Include a hierarchy of cases where the notification requirement is triggered
3. Specify that notice be given to the Commissioner in cases where the type of noncompliance could present a danger to either the victim or the public.
4. Revisions of DMH statutes to include public safety mandate

Competency Restoration

Enact a statute that requires that competency service be provided to a defendant who is adjudged to be incompetent and requires the defendant to participate in a competency program and establishes a statutory framework which should include:

1. Standards and processes with provisions for diverting those with lesser crimes.
2. Identification of an entity or agency responsible for bridging the gap between the mental health and criminal justice system and consideration of the use of liaisons/forensic navigators in accomplishing that goal

RESOURCE LINKS

Dartmouth Forensic Mental Health in Vermont

https://rockefeller.dartmouth.edu/sites/rockefeller.prod/files/2122-12_forensic_mental_health_final.pdf

Just and Well

<https://csgjusticecenter.org/wp-content/uploads/2020/10/Just-and-Well27OCT2020.pdf>

National Task Force Study

[https://www.ncsc.org/_data/assets/pdf_file/0019/66304/Leading_Reform-Competence to Stand Trial.pdf](https://www.ncsc.org/_data/assets/pdf_file/0019/66304/Leading_Reform-Competence_to_Stand_Trial.pdf)

Minnesota Task Force

https://mn.gov/sentencing-guidelines/assets/9-CCRTF-FinalReport_tcm30-470615.pdf



Questions?