

STATE JUSTICE INSTITUTE Improving the Justice System Response to Mental Illness

NCSC Competency Focus Group

Discussion Summary

As both a constitutional principle and one of fundamental fairness, the government cannot prosecute a defendant who does not understand the nature of the charges against him and cannot participate in his defense. While *Dusky* articulates this standard in broad terms, states have operationalized it in a multitude of ways. There is no clear consensus among the states about how, when, or where competency should be measured.

The process of legally restoring a presumptively incompetent defendant is likewise inconsistent. Where it is done, by whom, for how long, and even what elements such a process consists of are different from state to state.

On October 4, 2019. eight trial judges from around the country were convened by the National Center for State Courts to discuss their experiences, observations, and needs relative to the forensic competency process. They were asked to identify promising practices, gaps in resources or knowledge, and changes they thought would improve that system. The following are the actions they identified as needing the most immediate attention from policymakers, though as one judge put it, all of these issues are important, and we can't afford to address them one at a time, they all require urgent and immediate attention.

The most urgent issues relate to the fundamentals of the process – liberty interests and effective treatment:

Expedite and make uniform timing at all points of the process. Screening, assessment, and evaluation delays have particular implications for the liberty interests of defendants. Oregon rapid evaluation process once competency is raised seems promising, usually within five days, and California often does competency evaluations for both in and out of custody defendants within one day. Research shows that the sooner one is engaged with treatment, the better the outcomes, and there are obvious deleterious effects of staying in jail while these processes play out.

Later in the process there are also significant concerns about timely placement upon a finding of a defendant's incompetency and additionally for prompt return to court with a sufficiently resourced plan to maintain a restored defendant's competency.

Legal standards and processes vary from state to state, but model time standards should be developed for each stage of the process, based on relevant efficacy research and a respect for the liberty interests of the defendants.

Improve treatment options throughout the process (meaning treatment in the broad sense, i.e. including housing and other supports). Treatment needs to begin before the legal











consideration of competency, and an appropriate continuum of effective treatment resources must be available throughout the evaluation, competency determination, and restoration processes.

Without meaningful treatment options, case management, wrap around services, housing and the like, a trial court in the process of adjudicating competency issues often is unable to set meaningful and realistic conditions for a defendant's release. A trial court should not be placed in the position of effectively ordering illusory conditions of release or conversely of detaining persons for want of clinicians to provide evidently necessary treatment in a least restrictive setting.

Effective treatment must also include an emphasis on diversion and deflection. The best way to avoid the inefficiency of the competency process, and the above list of problems that come with it may be to avoid the competency process altogether. For appropriate cases, treatment and diversion from the criminal system entirely seems the most effective, cost-efficient, and humane course. For example, several judges described ways in which the systems in their states presumptively removed misdemeanants from the competency process altogether, even post-charging. This approach reserves competency and restoration resources for those who are more likely to need that level of intervention.

- The judiciary should play a role in Intercept 0 opportunities, including judicial outreach (compassion, stigma reduction, also focus on diversity/inclusion)
- Intercept 1 diversion opportunities should be emphasized, and resources to which defendants can be diverted expanded
- Consider opportunities for court involved or court directed treatment, aside from competence consideration, perhaps akin to assisted outpatient treatment (AOT), but preplea and pre-competency determination
- The need for housing resources cannot be overstated. Treatment is much less likely to be effective if this need is not addressed early in the process.

Develop the behavioral health treatment workforce. Related to the overall issue of supporting an effective treatment continuum, this is a pervasive issue, and is most acute in rural areas. More and perhaps different resources are needed in rural jurisdictions. Tele-health services seem promising for some functions. Urban jurisdictions are also affected by this deficiency though. In both settings the issue of what qualifications a competency evaluator should have is important to address.

This lack of a sufficiently robust behavioral health workforce not only effects the treatment required for restoration and maintenance of competency but also significantly impedes efforts to stem the larger behavioral health crisis.

The next broad issue relates to the restoration process:

Assess the appropriate use of jail-based restoration. There is some sense that it should be prohibited, unless clearly required. While everyone believes that community-based restoration appears to be preferable, the issue becomes what the alternative is. Other alternatives may not have the ability to provide medication monitoring and other short-term compliance monitoring. Which setting is appropriate should be based on the offenders clinically determined needs. Community safety considerations and victim perspectives are also relevant. More research may be needed to help inform this decision, but clearly there should be a continuum of settings that can be matched to the defendant's therapeutic and safety needs.

The added complication of private for-profit jails, some of which provide restoration services, makes the practice even more concerning. Several state's statutes (e.g. Maryland) simply prohibit restoration in any jail. Where custodial settings *are* appropriate, they should be as therapeutic as possible

Better define restoration services. There are different definitions of what the restoration process is – it can be legal education, treatment, or both. The legal education alone approach seems insufficient, if not inappropriate.

Promote effective post-restoration services. Best practices need development and dissemination. After we put all the time, effort and resources into community restoration (or even in a more structured setting), we should make sure the person is transitioned onto a path of sustainable treatment and housing.

Improve the transition to civil commitment. Options for transitioning to a civil process should occur early in the process, whether as an alternative to the criminal process entirely, or as an adjunct to the criminal process, akin to an AOT format.

At the post-restoration stage, we need best practices regarding who files or has the responsibility to initiate a civil commitment, and what the specific timing and trigger is. The Oregon statute directs the judge to look at transition options, including civil commitment. California judges can order an investigation into danger to self or others by the conservatorship investigator, who would then direct the civil process. But the protocol for this stage in the proceedings varies widely from state to state, and the principles for how this should work need to be clearly articulated.

The remaining issues relate to important system efficiencies and best practices:

Maximize technology to:

- Have better, more complete, timely information about participants.
- Provide less threatening (for some) court interfaces to defendants via video or virtual technologies.
- Allow for better access to resources and resource inventories.
- Promote more accurate descriptions of resources and eligibility requirements.
- Enhance timeliness of evaluations.
- Increase rural treatment services.
- Enhance uniformity of pleadings and practices.

Improve treatment efficacy. We need research on what treatment modalities work, when, and where. How does a judge know if the treatment to which a defendant is ordered is "good" treatment? We also need support for effective and appropriate peer support programs, as they seem promising.

Assess the role of the judge. Especially when there is no appropriate continuum of treatment options and when executive branch players are unable or unwilling to meet court-ordered or statutory timelines or other responsibilities, judges are put in the position of having to comple compliance with those orders or statutes. The adversarial system doesn't seem to work as well in the competency context, which puts judges in the uncomfortable position of having to be more of

an advocate when they see systemic failures that impact individual defendants. Judges are a sometimes uncomfortable when they try to lead out in that individual capacity.

Assess the federal role. The federal role would, optimally, include allocating funds, allowing flexibility in use of those funds, support for research, and perhaps an IMD exclusion repeal, but obviously without going back to gross institutionalization. Clear federal policies and funding structures favoring continuity of care for this severely ill revolving door population of competency defendants and similarly situated individuals would also be of enormous benefit.

Resolve data-sharing and privacy. Best practices on universal releases and unique identifiers would be helpful. It appears that HIPPA and 42 CFR are read more broadly than intended sometimes, but because of their complexity and opacity, judges sometimes lack the nuanced understanding of the regulations, and a lack of appropriate information sharing can occur.

Improve process efficacy data. Leverage the cost-savings aspects of early treatment and evidence-based practices. We need to collect the data though, so outcome evaluation and measurement of particular practices and programs is important. The judiciary can play a role in articulating these savings and advocating for effective practices.

Enhance coordination. A boundary-spanner type role is especially important with this population – resolving, consolidating, and coordinating multiple cases in multiple jurisdictions. Some person, whether in the judicial branch or the executive branch, should have the responsibility to facilitate this communication as well as legal and treatment coordination. The resource savings should quickly outweigh the cost. We should explore and the potential placement in the courts of liaisons, navigators, facilitators, and the like. The ability to link the treatment and legal systems, and to translate the needs of each to one another seems to benefit all stakeholders.

Improve court case management. Consolidated calendars breeds consistency and competence. Perhaps also include Mental Health Court, civil commitments, temporary holds or interventions, guardianship/conservatorship proceedings, GAMI, NGRI, etc. in those calendars. Broad education about mental health issues of all judges is also important, as well as education about procedural fairness/procedural justice concepts – those are particularly important considerations when working with people with behavioral health needs. Consistent assignment of counsel is also a promising practice, for the rapport of the "team," for awareness or resources, and for implementation of best practices.

Support judicial well-being efforts. Several states are following-up on the ABA's recent lawyer well-being effort with judicial well-being programs, and judges (and staff) involved in the spectrum of issues surrounding competency may be particularly vulnerable to vicarious trauma.

One post-script, just so that it isn't lost:

A thread that resurfaced several times during the day was the extent to which the legal concept of "competency" is a useful framework for addressing these problems. Thinking of this as a competency issue is perhaps too narrow, and that may constrain the conversation and limit the scope of the solutions. However, it was also noted that legal competency can give the court a lever that can be used to compel treatment. It also constitutes an entitlement to treatment, and a way that some well-meaning system actors seek to access services that otherwise would not be available. Again, this speaks to a lack of appropriate treatment options across the continuum.

As Judge Lipman stated: "Many court -involved seriously mentally ill defendants in Maryland never touch the competency process. Competency is perceived as a high standard. The majority of seriously ill individuals who are in contact with the criminal justice system are diverted, placed on therapeutic pretrial conditions of release, given clinically meaningful conditions of probation, apart from competency evaluation, adjudication or restoration."

Appendix

To better understand the perspective of our participant judges, they were asked to generally describe the issues, challenges, and innovations in their states relative to the competency process.

Judge Nan Waller (Multnomah County Circuit Court, Portland, Oregon)

- State Hospital resources dictated a need for change, and one solution was to perhaps divert misdemeanants.
- "Rapid evaluation process" gets a competency evaluation done quickly, within days. This process gets incompetent folks out of jail and into treatment quicker.
- A 2019 law now requires a dangerousness determination in order to be eligible for the State Hospital setting. There is also a 7-day reevaluation clause in the bill may have constitutional issues (because they would continue to hold people in custody after an incompetency determination), and that may be revisited in the next legislative session.
- The good news is that this is forcing the creation of temporary therapeutic settings, as alternatives to jail.
- There is also an issue on the back end after restoration time periods time out, we release them to nothing.

Judge James Bianco (Superior Court of Los Angeles County, California)

- There has been a large increase in competency proceedings lately, mostly because defense counsel, on misdemeanants, has recently decided it is a better practice to raise competency, whereas before they didn't. But misdemeanor treatment, the responsibility of counties in California, was only in jails. Now there are community resources (200+ in LA County in the new resource), but there is a similar number of people getting treatment/restoration services in jails.
- On the felony side, the state is responsible, and the State Hospital backlog is 2-5 months. Judges have begun to impose day fines on the State for these delays past statutory timelines.
- Office of Diversion and Reentry allows felony restoration in the community. Note the downside risk, one person released to this program killed his mother while in the program.
- One can, in some circumstances, keep restored folks in the therapeutic setting rather than jail before and during trials.
- USC and UCLA have forensic psychiatry fellowships, and they work in the courthouses, and then sometimes become the permanent providers afterwards.

Judge Jonathan Shamis (Lake County Court, Fifth Judicial District, Leadville, Colorado)

• Colorado's recent progress is largely because of a recent lawsuit and consent decree and the fallout therefrom. And while the consent decree and plan going forward is a good one, there are insufficient safeguards and oversight measures to ensure compliance. So even a lawsuit and consent decree don't necessarily create sustainable and effective change.

- If we place people with significant needs in a community resource that is insufficient to meet their needs, and they fail, we've done them no favors we've made them worse.
- Incarceration makes defendants ineligible for Medicaid, so their ability to get timely and appropriate community services and to transition successfully diminishes.
- Colorado is engaged in an extremely promising endeavor to place court liaisons in each jurisdiction. These court employees serve as behavioral health "translators" and case managers, bridging the gap between the treatment and criminal justice systems.

Judge George Lipman (First District Court, Baltimore, Maryland)

- Their recent experience is unusual in that their competency volume has not increased dramatically. It is relatively flat.
- Maryland has dedicated competency judges.
- The biggest structural issue is services silos, and there are no wraparound services or supportive services.
- A class action lawsuit filed, but no real change came about.
- New legislation: no restoration services in jail, they must be by the Health Department, in the community or in a treatment facility.
- Two Sessions ago the Maryland General Assembly amended the competency statute to not only prohibit restoration of competency in detention centers but also to require the State Health Department to place a defendant found incompetent and dangerous in a state hospital or state designate health facility within 10 working days of the trail court's commitment order. The statue also permits the trial court to impose reasonable sanctions upon the Health Department, including the defendant's jail costs, if the Department fails to place within the time frame. The statute also requires the trial court to hold a hearing within 10 working days of the Health Departments notice or their opinion that a defendant has been restored to competency.

Judge Mark Stoner (Marion Superior Court, Criminal Division, Indianapolis, Indiana)

- Resources are an issue; his involvement came from frustration with a lack of compliance with constitutional and statutory restoration responsibilities and timelines.
- Mental health issues aren't particularly sexy, and there is little public attention on the issue. Unlike the opioid crisis, for example.
- Recently there were 80 incompetency commitments in Indiana, languishing in county jails, awaiting treatment. This led to contempt proceedings against the Department of Mental Health.

Judge Brian Grearson (Chief Superior Judge for the Trial Courts, Vermont)

- There are only 25 secure mental health beds in Vermont.
- Orders for hospitalization kick in when incompetence is determined, then it becomes a civil process.
- Misdemeanors are dismissed, as a practical matter, 95% of the time when incompetence is determined. But it is a civil context, so they still get treatment.
- For felonies and misdemeanors once it is civil the proceedings become confidential, so the prosecutors are out of the picture, and they are starting to object to that blindspot.
- Mental health screens are done in court, often within 2 hours. That determines whether they need inpatient treatment. To some extent this is the result of the extraordinarily rare bail hold process.

Judge Matthew D'Emic (Presiding Judge of the mental health court in the New York State Supreme Court in Brooklyn, New York)

- There are significant differences between the city and the rest of the state.
- In New York, restoration is not treatment. It is more of a legal education model.
- Judge D'Emic frequently sees people who are found competent after restoration services were successful, then they go back to jail (Rikers), decompensate, and start all over again. One successful response is that when competency is restored, they are assigned to mental health court dockets/judges.
- In New York, misdemeanors result in a 90-day treatment opportunity, but there is no restoration process option.

Judge Michael Hintze (Phoenix Municipal Court, Phoenix, Arizona)

- Restoration is often in jail, at least in Maricopa and Pima counties; outpatient is available, but there aren't enough community evaluators and providers. Pre-screens occur in the municipal courts, and doctors turn those around in a day or two. They are coordinated to be at the courthouse on mental health calendar days.
- They do a pre-screen (triage) to determine if a full competency evaluation is necessary.
- Arizona is working now to adopt best practice standards for the competency and restoration process.
- The Arizona Supreme Court certifies and trains competency evaluators.
- Judge Hintze's court uses some many problem-solving court principles, so e.g. the judge, prosecutor and defense attorney operate as a team in competency proceedings. This consistency makes for much quicker and more effective processes and decisions.
- Arizona is working on uniform database and information sharing system. They are currently trying to arrive at a consensus single identifier for defendants, across systems.
- Peer support in the jails has been very successful.
- Misdemeanor restoration isn't done, largely because there are 30, 120 and 180 days for the various misdemeanor offense levels. That's generally too quick to restore, except for the severe 180-day-level offenses.