Exploring the Competency Dilemma Facing People with Intellectual and Developmental Disabilities in the Criminal Justice System

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1-3 PM EDT
The Arc's National Center on Criminal Justice and Disability® (NCCJD®)
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Introduction

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Director, Criminal Justice Initiatives
Ashley Brompton, J.D., Criminal Justice Fellow
Ariel Simms, J.D., Criminal Justice Fellow
Thank You to Our Presenters

- Robert Fleischner, Assistant Director, Center for Public Representation
- Claudia Center, Senior Staff Attorney, Disability Rights Program, American Civil Liberties Union
- Robert Dinerstein, Professor of Law, American University Washington College of Law
- Brooke Boutwell, J.D. Candidate
- Andrew Flood, J.D. Candidate
- Hillary Frame, J.D. Candidate
Capacity versus Competency

• Capacity
  – Ability to understand the nature and effect of one’s acts at one specific moment in time
  – Fluid concept

• Competency
  – A legal determination
  – Individual’s mental capacity at various points during a legal proceeding
Capacity versus Competency

Capacity

Competency
Competency to Stand Trial: Mental Illness and Intellectual Disability

Bob Fleischner
Assistant Director,
Center for Public Representation
Northampton, Massachusetts
Test for Competency to Stand Trial

- Does the defendant have
  - Sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding; and
  - A rational and factual understanding of the proceedings; and
- Can assist counsel in his or her defense.
If not, then what?

- Incompetent defendants (IST) cannot be tried
- But defendant can be tried if and when the defendant is competent, if that happens in a reasonable time.
- Defendant may be committed to a facility for restoration/attainment of competency.
  - Civil commitment standards may/may not apply.
For how long?

- May be held no longer than “reasonably necessary to determine whether there is a substantial probability that he will attain [competency] in the foreseeable future.”
  – Jackson v. Indiana, 406 US 715 ((172)
Reliable statistics are not available, but...

- Perhaps 12,000 defendants a year are IST
- Between 6% and 16% of defendants found IST are people with ID.
- Of defendants referred for evaluation
  - between 12.5% and 36% of defendants with ID
  - Between 45% to 65% of defendants with mental illness

are determined to be IST.
Comparisons – Defendants w/ID and those with mental illness (MI)

- It appears less likely a defendant with ID will be found IST as compared one with MI.
- Defendants with ID are less likely to attain competence and stand trial at a later date.
Comparisons

- Defendants with ID are less likely to have been competent in the past.
- Strategies to attain competency for defendants with ID may be more complex than ones to restore competency for those with MI
- Commitment facilities may be ill equipped to assist defendants with ID
Where IST Defendants with ID are Sent

- Facilities
  - Often state psychiatric hospitals
  - Sometimes (secure) I/DD facilities
  - Sometimes jail (either for restoration or awaiting transfer to other facility)

- Seldom home or community-based program even if statues allow it
“Achieving” Competence

• Only about $\frac{1}{3}$ to $\frac{1}{2}$ of IST defendants with ID are eventually found to be competent
• Average length of time from IST to competency is much longer for IST defendants with ID.
Common Issues

- Clinical predications whether an IST defendant will become competent may not be reliable.
- Court determinations whether a “reasonable time” has passed vary.
- Nature of the alleged crime may impact both clinical and court decision making.
- Dismissing charges and returning IST defendant to community may be difficult depending on charges and available programs.
Conclusion

- The criminal justice system’s IST processes appear to be designed more for defendants with mental illness.
- The serious shortcomings faced by defendants with MI are exacerbated for defendants with ID.
Clients Under Guardianship: Best Practices for Attorneys

Claudia Center
Senior Staff Attorney, Disability Rights Program
American Civil Liberties Union
Guardianship ≠ Incompetent to Stand Trial

- Two separate assessments under state laws
  - Different purposes and contexts
    - Guardianship (or conservatorship) – about ability to care for self
    - Incompetent to stand trial – about ability to participate as defendant in criminal proceedings
  - Outcome of one does not determine outcome of another
Guardianship ≠ Incompetent to Stand Trial

- Guardianship
  - Unable to provide for basic daily needs, even with supports
- Competency to stand trial
  - Unable to understand the proceedings against them or assist in their own defense
Guardianship and the Attorney-Client Relationship

• Guardianships are imposed for many reasons
  – Parents or others may seek for "best interests," to participate in education/health care
    • Most don’t know about alternatives
  – Care/service providers may require for consent
  – Guardianships may be old, granted years prior

• Court may grant without careful review
Guardianship and the Attorney-Client Relationship

- Guardianship ≠ unable to participate in attorney-client relationship
- Rule of thumb: presume competence to participate in the attorney-client relationship, and adjust strategies as needed
  – Consult ABA Model Rules, Rule 1.14 & Comment
ABA Model Rule 1.14 - Client with "Diminished Capacity"

- As far as reasonably possible, maintain normal client-lawyer relationship with client
  - Assume that client, when properly advised and assisted, is capable of making decisions about important matters
  - Give client attention and respect
  - Communicate with client

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ABA Model Rule 1.14 - Client with "Diminished Capacity"

- Strict client confidentiality applies
  - However: okay to have family members or others participate in communications if client wishes and presence is necessary to representation (beware of attorney-client confidentiality issues – in some jurisdictions, having third parties like family members present can negate confidentiality protections)
  - Exception: may make limited disclosure necessary to consult or take protective action of client at risk of substantial physical, financial, other harm
Best Practices to Enhance Representation

- Accessible communication
  - Simple, accessible language
    - Use short, declarative sentences
    - Replace legalese with explanations using common words
  - Written materials in plain language
  - Repeat important information
  - Multiple formats as needed
Best Practices to Enhance Representation

- Include supporters
  - Existing support networks can help with communication and decision making
  - See comments to Rule 1.14

- Flexibility and time
  - Accommodate client's needs, abilities, and preferences

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Supported Decision Making and the Criminal Justice System

Robert Dinerstein
Professor of Law
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Supported Decision-Making (SDM)

- A less restrictive alternative to guardianship
- Consistent with an individual's retention of capacity and competency
- Witnesses and defendants alike increasingly will be taking advantage of SDM arrangements and actors in the criminal justice system need to know what it is and how it might work in that system.
SDM - Definition

• "Supported Decision-Making can be defined as a series of relationships, practices, arrangements and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life."

Support for SDM

• Article 12 of the UN Convention on the Rights of Persons with Disabilities, Equal recognition before the law

• Increasing number of laws in countries or regions of countries – Canada (British Columbia), Bulgaria, Israel, Australia (South Australia), etc.

• US – Texas, court decisions (e.g. Ross v. Hatch, In re Damreis L., In re Michelle M.)
Context for SDM

- Usually thought of in the context of the civil justice system – as an alternative to guardianship, as a way to permit people with disabilities to be involved in decisions related to their education, finances, relationships, choice of residence, etc.
- Conceptually, no reason not to apply SDM to the criminal justice system.
SDM in the Criminal Justice System for People with I/DD

• Victims:
  – Assist victim with understanding the crime and communicating key information to the prosecutor and police
  – Provide emotional support to victim as he or she recounts the experience
  – Victim retains agency
  – See Article 16 of CRPD (appropriate forms of support for PWDs in the criminal justice system)
SDM in the Criminal Justice System - Continued

- Witnesses:
  - Assistance in interpreting testimony before the trier of fact
  - Assistance in interpreting for the witness the meaning of questions posed to him or her
  - SDM assistance should not be seen as negating the competency of the witness [a witness may not testify in a case unless competent – see FRE 601]
SDM in the Criminal Justice System - Continued

• Defendants:
  – Constitutional right to understand and participate in their defense
  – SDM supports can dovetail with ADA requirements that the defendant receive reasonable modifications/accommodations
  – Examples of SDM: use of plain language, presentation of a witness who can explain defendant's behavior or manner of expression
SDM in the Criminal Justice System - Continued

- Recent example from a civil case:
- Reed v. State of Illinois [808 F.3d 1103 (7th Cir. 2015)] - pro se civil plaintiff with tardive dyskinesia should have been allowed to have the assistance of an interpreter who could help her articulate her thoughts and explain to the jury the nature of her disability and its affect on her presentation and behavior in court.

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Thank you!

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Suggestions for Importing Definitions of Intellectual Disability from the Capital Context to Competency Proceedings

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Where We Are: Definitions Under Atkins and Hall

- Brief explanation of *Atkins* and *Hall*
- Three prongs following DSM-5
- No rigid IQ cut-off scores under Prong I (*Hall*)
- Diagnoses of intellectual disability should be based on “clinical assessment”
  - Vague importance of adaptive behavior

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Where the Supreme Court Has Fallen Short

- Other forms of error on IQ Tests (Flynn Effect)
- Lack of guidance on Prong II (adaptive behavior – Moore v. Texas)
Expert Testimony

- No official criteria
- Ethnicity-based upward adjustments
- Experts in Texas: Denkowski and Briseño
Why Competency?

- Current doctrine does not account for I/DD
  - Cloak of Competence
  - Inadequacy of “restoration”
- Competency hearings involve detailed inquiries into cognitive functioning
- Efficiency: “gateway” role of competency
Recommendations

- Clearer definitions of methods and practices for measuring I/DD, especially adaptive behavior
- Increased accountability for I/DD experts
- Reforming competency to account for I/DD: possible litigation strategies
Competency Wait Time Litigation

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An Overview of the Issue

• When competency of an individual to stand trial is questioned, due process requires that the individual be evaluated to determine if he or she understands the trial that is before him or her and if he or she are able to aid in their own defense.

• While waiting to be evaluated for competency or restoration of competency, individuals with I/DD as well as mental illnesses are being kept in jails.

• Some individuals are waiting weeks, months, or even years in jails for appropriate treatment. Some states have faced lawsuits due to this practice.
Washington

- *Trueblood v. Washington State Department of Social and Health Services*
- Court ordered competency wait times to be no more than 7 days.
- Gave no solutions. Lack of funds was not a defense.
- A year later, the judge began to hold services in contempt for not complying.
Pennsylvania

• The ACLU filed a class action lawsuit for competency wait times.
• Resulted in a settlement aimed at providing solutions and resources to fix competency wait times.
• 120 new treatment options must be created, half within the first 120 days and the remainder within 180 days.
California

• ACLU of Northern California recently filed a class action on behalf of the families of criminal defendants with I/DD.
• Many defendants with I/DD are found incompetent to stand trial and spend over a year in jail waiting for treatment.
• Case is currently being litigated and has survived motions to dismiss and demurrers.
Texas

• In 2007, Disability Rights Texas (DRT) filed a lawsuit against the Texas Department of State Health Services.
• Judge held for a 21 day maximum.
• Texas originally brought down its wait time, but in recent years, it has risen to a 122 day wait time.
• Texas is trying to fix the problem before another lawsuit is filed.
Competency versus The Insanity Defense

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Pop Culture and Competency/ Insanity

- Often confused and misunderstood
- Frequently cited in crime novels, movies, and television
- The differences are more nuanced
Competency to Stand Trial

- A pause in the criminal case
- Timeline is highly structured
- The judge has the final say in a defendant's competency to stand trial
- Defendants can remain in custody while their competency is "restored" for varying lengths of time, depending on the jurisdiction
The Insanity Defense

• Used as a defense; claims that the defendant should not be held responsible for a crime
• There are various standards for the defense
• It is only used in .93% of cases. A 1991 study found that “[a]pproximately 10% of those pleading insanity were discharged, withdrawn, or found not guilty, while 64% were found guilty and 26% were acquitted NGRI.”
Insanity Standards

- M’Naughten Rule: at the time that he committed the act, the defendant was laboring under such a defect of reason, from disease of mind, that he did not know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.
- Irresistible Impulse Rule: at the time he committed the act, the defendant was laboring under such a defect of reason, from disease of the mind, that he had lost the power to choose between right and wrong.
- The Durham Rule: the defendant is not criminally responsible if his unlawful act is the product of a mental disease or defect.
- American Law Institute Model Penal Code: at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.
Defendants with I/DD

- Takes longer to restore them to competency
- A diagnosis of I/DD does not automatically make a person insane or incompetent to stand trial
- It is more common to raise an incompetency concern than to use the insanity defense in general – this trend is also true for people with I/DD
Questions?

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