Prosecutorial Notification and Competency Restoration- Statutory Suggestions from a Victim's Perspective

Having both been victims in the Vermont Criminal Justice System as it has intersected with the Mental Health System we are most interested in looking at 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 emphasis 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 for S. 3 Forensic 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 Judiciary that:

(1) 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 7619 are not complying with the order or that the alternative treatment is not adequate to meet the individual's treatment needs, including any recommendation:
   (A) necessary to clarify that process
   (B) addressing what facts and circumstances should trigger the Commissioner's duty to notify the prosecutor
   (C) addressing the steps the prosecutor should take after receiving the notification.

Legislative History

In the version of the Bill passed by the Senate the following language was included in Section 3 as a proposed amendment to section 4822 of Title 13:

(2)(A) this subdivision (2) shall apply when a person is committed to the care and custody of the Commissioner of Mental Health under the section after having been found:

(i) not guilty by reason of insanity; or
(ii) incompetent to stand trial, provided that person's criminal case has not been dismissed.

(B) (i) When a person has been committed under that section, the Commissioner shall provide notice 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:

(I) at least 10 days prior to discharging the person from:
(aa) the care and custody of the Commissioner; or
(bb) commitment in a hospital or a secure residential recovery facility to the community on an order of non-hospitalization pursuant to 18 V.S.A. section 7618;
(II) at least 10 days prior to the expiration of a commitment order issued under this section if the Commissioner does not seek continued treatment ; or
(III) any time that the person absconds from the custody of the Commissioner

(ii) When the States' Attorney or Attorney General receives notice under subdivision (i) of this subdivision (B), the Office shall provide notice of the action to any victim of the offense who has not opted out of receiving notice.
(iii) As used in this subsection (B), "victim" has the same meaning as in section 5301 of this title

(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) alternative treatment has not been adequate to meet the person's treatment needs.

It should be noted that the language in subsection C is almost identical to the language currently used in 18 V.S.A. 7618 (b) which states that if at any time during the specified period of time (of the non-hospitalization order) 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 been adequate to meet the patient's 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.

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. Some of the concerns that were expressed in that process were related to the practicalities of providing notice to the Commissioner, what level of noncompliance would trigger notice, conflicts for the providers who were providing care for the individual but would also have the obligation to report the individual's noncompliance and what the State's Attorney or AG would with that information. Questions were also raised as to whether there was a compelling State interest in providing this kind of notice unless the statute specified what would be done with the notice.

When those testifying were unable to reach consensus around the language a small group was charged with bringing this subsection of the Bill back to the House Committee with suggestions for revising the Subsection. During subsequent hearings a consensus was reached that subsection C notice be deleted from Section 3 of S. 3 but that it be included as a charge for the Forensic Working Group created in Section 6 of S. 3 to propose revised statutory language concerning this notice to be enacted later. That legislative charge is stated above.

Statutory Recommendations.

From a victim's perspective we feel that there is value in including notice of the type identified above as a legislative requirement. 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 individual.

Some suggestions are as follows:

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 feel that this language may have been pulled from Title 18 section 7618 without an analysis of whether it could be practically applied to notification to the Prosecutor and whether it could be used in a way to improve 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 be in the best position to make a determination as to whether the noncompliance would present a potential danger to victims in the case or the public and who would best be able to provide victim notification.

Other things that could be considered in drafting this notification requirement:

Whether or not there should be a hierarchy of types of cases where this notification requirement is triggered.

In one version of the Senate Bill there was reference to this notice only for types of crimes listed in section 5301(7) of Title 13 pertaining to victim's rights with some exclusions for crimes that did not pose as high a risk to victim or public safety.

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.

Kristin Chandler with Vermont Care partners in testifying on this proposed notice requirement before the House Committee on S.3 stated that it would be helpful to include parameters over the level of the nonconformance that needs to be reported. That the nonconformance could be connected to compliance failures that are a threat to the victim- such as violating restrictions

that are written in the Order to protect the victim (staying a certain distance away from the victim) or are likely to result in a threat to public safety.

Restoration of Competency

Let's start by looking at the Victim's Rights Statute in Vermont whose stated purpose "seeks to ensure that crime victims are treated with the dignity and respect they deserve while functioning in a system in which they find themselves through no fault of their own. This chapter (Chapter 165 of Title 13) seeks to accommodate that objective and balance crime victims' needs and rights with criminal defendant's rights."

The Victim's interests as stated in Chapter 165 of the Victim's Rights Statute are consistent with the accused's constitutional interest in speedy prosecution. Chapter 165 of Title13, Section 5312 provides:

" (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 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.

As was stated in a memo submitted to the House Committee by the Attorney General (David Scherr, Assistant Attorney General) in support of the changes in S3, Section 4:

"The interest of justice weigh heavily in favor of 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 any 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 potentially emotionally fraught wait for a trial whose date is unknown. This committee heard powerful testimony from the relative of murder victim who had to endure such a wait."

The Attorney General also pointed out that "the longer a delay in trial the less reliable the evidence (such as witness testimony) may become. This is harmful in the interests of everyone involved in a trial." This was true in the case against Kathleen Smith's (Joanne Kortendick's sister) accused killer where an original examiner of DNA evidence removed from the crime scene died during the progress of the case. A subsequent examination of the remainder of that evidence by another examiner was less dispositive than the first sample.

Restoration of competence once the accused is found to be incompetent to stand trial is critical to moving the case forward. One of the legislative charges contained in Section 6, of S. 3 for the Forensic Working Group is to submit a final report which is to address in part opportunities to:

consider the importance of victim's rights in the forensic care process; (b) (1) (B)(ii)

and competency restoration models used in other states, including both models that do not rely on involuntary medication to restore competency and how cases where competency is not restored are addressed; (b) (2) (C)

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 Forensic Working group in one of its meetings 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 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."

Current Vermont statutes.

While 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, there are no provisions outlining the requirements for restoring such competence.

Title 13 sections 4820; 4821 and 4822 specifies the process for a commitment hearing including hearing procedures and orders 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. In any case involving personal injury of threat of personal injury, the committing court may issue an order requiring a court hearing before a person committed under Title 13 section 4822 may be discharged from custody.

In a paper published by the Georgetown University Law Center in 2019 on Reforming Competence Restoration Statutes it noted that nearly every state has a statute court rule governing competence restoration, it noted that in Vermont, criminal courts have the ability to commit a defendant who qualifies as "a person in need of treatment" meaning an individual who poses a danger to himself or other, but that power is not directly connected to a finding of incompetence as it is in other states FN 177.

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.

In the case of Kathleen Smith's accused killer, the court order required a periodic report on the status of the accused be filed with the court periodically. There was no requirement that efforts be made towards the restoration of competency to stand trial nor was progress towards restoration mentioned by his treating psychiatrists.

Need for a Statutory Framework

Minnesota Example

In a report published by a Community Competency Task Force in Minnesota in February of 2021 which was legislatively formed by Minnesota Legislature in 2019 the Task Force recognized as one of the key components necessary to create an equitable and responsive competency process in Minnesota was to enact a state statute to establish standards and processes for competency restoration. The Task Force stated:
"Currently no law in Minnesota mandates competency restoration. The only source for this process is Rule 20.01 of the Minnesota Rules of Criminal Procedure, but the Rule does not reflect the needs of today's court or mental health system. The result is a patchwork system that lends itself to confusion." The Task Force points out that "Rule 20.01 itself does not require that competency services be provided to an incompetent defendant, or that the defendant participate in competency restoration when they are found to be incompetent. Further, Minnesota's current patch work system requires the involvement of two courts (criminal and civil/mental health court- similar to Vermont which requires the involvement of both the criminal court and family court), which lends itself to confusion, inefficiencies and lack of communication." In the case of Kathleen Smith's accused killer at one point in the process the order of Hospitalization was being appealed in both the criminal court and the family court.

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 civil commitment criteria, and to include a competency curriculum which is flexible enough for a variety of users in various settings."

Statutory Recommendations- Diversion of individuals charged with misdemeanors.

As noted above unlike Vermont, Minnesota has a criminal regulatory procedure governing competency which includes a provision that misdemeanor charges be dismissed when an individual is found incompetent. The Task Force recommends that this remain a component of

The Minnesota Task Force report cites the following as the rationale for diverting individuals charged with misdemeanors out of the competency restoration system:

"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 also be taxed if continuing competency evaluations (referring to Rule 20.1, subd. 7) would have to be completed for misdemeanants until they are found competent."

This recommendation also appears in other recent studies and national task forces around the issue of restoration of competency. One of those studies is referenced above in the article 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 an advisory group of experts to agree upon strategies and best practices policy makers can use to improve their CST processes- including strengthening connections to community-based treatment so that the process can be avoided altogether when appropriate. The 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.

Another national study which includes the recommendation of restricting cases which are referred for competency evaluations and or restoration is one published by the National Judicial Task Force to Examine State Court's Response to Mental Illness, titled Leading Reform: Competence to Stand Trial Systems (A Resource for State Courts). The Task Force began by selecting eight 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 process. The report that was published in August of 2021 builds on those original recommendations and those of the National Center for State Courts set forth in the article "Just and Well" cited above.

The National Task Force study cited above notes that while "defense counsel has an obligation to explore all possible strategies on behalf of the client it does not follow that competence should be raised every time there is a colorable argument."

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

During the Forensic Working Group meetings comments were made from time to time by both the Defender General and Legal Aid Director about raising the competency defense wherever it could be raised.

The Legal Aid Director at one of those meetings expressed his opinion about whether a defendant whose was found not to be competent to stand trial would want his or her competency restored. He stated 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.

Kelly Carroll describes her experience in Bennington County as follows:

During the September Forensic Working group meeting we saw a slide with the number of evaluations statewide for the past couple of years. The data had been provided to the Department of Mental Health by the VT Attorney General's office.

Bennington's case is 7th in population but 3rd in the number of evaluations.

I am aware of a current case in Bennington where the defendant has 5 open criminal dockets that date back to May 2021, with some as recently as August of 2022. This person has an extensive prior criminal history and has been incarcerated in the past. Multiple attempts at diversion failed. The current charges involve assault, assault with a weapon, violations of a relief from abuse order and a hate crime.

In September during the latest relief from abuse violation hearing, our local public defender requested a "competency or insanity evaluation, whichever will work in this case". (9/12 CR-22-08106) The court granted that request and set a follow up for 2 weeks later. (9/26) At this point our public defender informed the court that it was going to take a year to get this evaluation completed and the court set the next calendar call for 6 months. Meanwhile the victims are still being harassed and threatened and the defendant has added more victims to the list. Ignore her (the defendant) the victims are told. She'll get bored and go on to her next victim the victims are told. Meanwhile the defendant is getting more and more agitated, the violations of release are getting increasingly more brazen and violent and with the "competency or insanity whatever will work in this case" strategy, the victims have no resolution in sight.

This is just one example of the current strategies being used by the Defender General and our local Public Defender's office. This may be a deliberate strategy to clog the system or this may simply be a lack of knowledge of the current system. Regardless, it's clogging our systems and

is a prime example of why statutory changes and the education around them are so needed in Vermont.

This person is progressing through Vermont's failing system just like my daughter's killer did. Another example is the alleged killer of the Wardsboro mom in August. This defendant has a record of 1 felony and 27 misdemeanor convictions. She stabbed her victim over 100 times but said she can't be held responsible because of her drug addiction.

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

In considering the enactment of a competency restoration statute in Vermont which includes provisions on diverting individuals with lesser crimes or dismissing charges, the Legislature might also want to take a look at its current statutes as to how certain crimes are currently categorized. Looking at available CST data would be helpful in that regard. 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 arrest or make the same crime a misdemeanor instead of a felony."

Responsibility and Accountability- use of Liaisons and Forensic Navigators

Another component for a successful competency restoration system cited in these studies is the need to promote responsibility and accountability across systems. The Just and Well report recommends that: "States should designate a specific person, multi-disciplinary 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 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."

One example of this is the Office of Behavioral Health that was created in Colorado in 2017. SB17-012 established the Office of Behavioral Health, as the entity responsible for the oversight of restoration education and the coordination of services necessary to competency restoration. In addition, it updated the statute on procedures to be followed after a determination of non-competency to stand trial including restoration procedures to be followed after the defendant is found incompetent to stand trial (something that is lacking in Vermont).

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

(a) Colorado's statutory scheme does not designate an entity responsible for competency restoration service, not does it provide a sufficient framework for the provision of outpatient restoration services to adults or 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 and accessible and take into account the public safety while still allowing for state-level standards and oversight;"

Following the adoption of SB17-012 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 Systems 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 pursuant to Article 8.5 of this title 16. The Program is further designed to promote positive outcomes for individuals living with mental health or co-occurring behavioral health conditions."

As part of a Bill overhauling Colorado Statutes related to Competency to Proceed the Colorado Legislature in 2019 allocated funds to the Office of Behavioral Health who created a 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.

The Just and Well study describes models used in other states including designated liaisons or forensic navigators to follow cases through the transition of systems 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; and
Supporting a person's return to the community (from the state hospital or jail)

The Study refers to Arizona who is establishing standardized descriptions and qualifications for "clinical liaisons"- "who coordinate care, and are providing additional 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."

The National Task force study cited above 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."

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 for the supervision of the individual in all settings and could report to the court on progress, or if the defendant is ready to be reexamined for competency sooner than the given timeline in 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."

Conclusion and Summary of Recommendations

We feel it would be helpful for the legislature to familiarize itself with the recommendations for the improvement of competency restoration statutes and systems made in the Just and Well report as well as the National Judicial Task Force to Examine State Court's response to Mental Illness which was created as a resource for State Courts. Both refer to successes and failures in the area of competency restoration and cite to reforms made by other states with their programs.

Recommendations provided in the Dartmouth Report provided to the Vermont House of Representatives- Health Care Committee might also be considered as it was created to aid Vermont officials in enacting updated competency restoration legislation. It focused on models that may be feasible in Vermont due to similarities in population, spending and policy approaches.

It cites a Florida example which addresses the issue of scarce public resources by hiring recent graduates from doctoral programs in addition to licensed practitioners. It also describes 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."

The Dartmouth Report also cites an example of a jail-based competency program utilized in Fulton County Georgia which is also referenced in the Just and Well report. The program was developed as a collaborative partnership between jail administrator and Emory University School of Medicine. 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 Dartmouth report describes the program as follows: "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 schedule structure around enhancing his problem-solving skills, attention, concentration and memory which are all key in restoring competency."

Summary of Statutory 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 services be provided to a defendant who is adjudged incompetent and requires the defendant to participate in a competency program and establishes a statutory framework which should include:

1. Standards and processes 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 systems and consideration of the use of liaisons/forensic navigators in accomplishing that.