

## OUTSIDE COUNSEL

### Regarding Mental and Cognitive Issues, Criminal Justice System Must Catch Up

Katherine Bajuk, New York Law Journal

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Our society is finally evolving in its understanding of and approach to mental health issues. State and city governments have recently launched initiatives to remove the stigma of those with mental illness. For example, in November 2015, Mayor Bill de Blasio and First Lady Chirlane McCray launched ThriveNYC. This plan was comprised of over 20 new initiatives related to mental health in New York City, where one in five New Yorkers are reported to have a mental health issue.

On both the local and national level, greater funding has been apportioned for mental health programs and facilities. In July 2015, NYC earmarked \$30 million dollars for mental health services for low income New Yorkers. The same year, the state revised the way it organized and funded publicly supported mental health facilities. Yet while society at large has progressed commendably on this issue, one segment of it, the criminal justice system, has been slow to adapt. And New York, regrettably, has been no exception.

#### New York's Article 730

In New York, Article 730 of the Criminal Procedure Law governs issues of "Mental Disease or Defect Excluding Fitness to Proceed." A person charged with a crime is deemed "incapacitated" if, as a result of a mental disease or defect, that person cannot presently assist in his or her own defense, or if that person lacks a present ability to understand the proceedings and/or charges against him or her. The CPL does not define what constitutes "mental disease or defect" but it is generally understood to include formal diagnoses of mental illness, developmental or intellectual disabilities, and cognitive or neurological impairments.

At any stage of a criminal proceeding, the defense attorney, prosecutor, or even the defendant's probation or parole officer may request that the presiding court order a psychological evaluation of the accused to assess his or her fitness to proceed.<sup>1</sup> Whether requested or not, the court must issue an order of examination whenever it is of the opinion that the defendant may be an incapacitated person. If ordered, the examination is conducted by two qualified examiners (either two psychiatrists, two psychologists, or one of each).

The exam itself is a standard battery of questions designed to test an accused's present intellectual and cognitive abilities. Part of its focus is on whether the subject is able to understand the criminal proceedings. This includes the difference between a trial and a plea bargain as well as the varying roles of the judge, prosecutor, and defense attorney. The central question here is whether the accused can rationally discuss the charges and any defenses with his or her attorney.

A finding that a defendant is "not fit to proceed" greatly affects the underlying criminal case; to what extent depends on whether a felony or misdemeanor is charged. If someone charged with a misdemeanor or violation is found incapacitated, the criminal charges are dismissed with prejudice and that person is remanded to the commissioner of the Office of Mental Health under a final order of observation. Once

admitted to an Office of Mental Health facility, this person must be evaluated within 72 hours and be either civilly committed under the Mental Hygiene Law, converted to voluntary status, or released. For incapacitated individuals charged with felonies, the criminal charges are not dismissed. And while the individual is similarly committed to an OMH facility, the stated purpose of the placement there is to restore the individual to fitness to stand trial and resume prosecution of the case.

With respect to felonies, the orders of commitment also differ depending on whether or not an indictment has been obtained. Individuals deemed incapacitated who have already been indicted are held in an OMH facility under an Order of Commitment that is valid for up to one year. If not restored to fitness, a patient may be retained in the facility for up to two-thirds of the maximum sentence he or she faced if convicted on the top charge (CPL §730.50). Unindicted defendants are committed to an OMH facility under a temporary order of observation that is valid for 90 days. If a patient is not restored to fitness within this time, OMH converts that patient to civil commitment status. Per CPL §730.40, if the patient is not indicted within six months of expiration of the temporary order, the criminal case is dismissed.

### Insufficient for Modern Society

This procedural scheme, both statutory and practical, is largely familiar to New York criminal practitioners. It is also badly in need of reform. The scheme is purportedly based on common law principles of fundamental fairness and due process. It is intended to afford protection for the rights of a highly vulnerable subset of criminal defendants—those who have significant mental illness or cognitive issues. But since its inception in the 1970s, it has not sufficiently matured to reflect modern society's evolving understanding in this area. Its aim must be to afford greater protection to those unable to even help others advocate for them, but it fails in manifold ways.

Take something as simple as the scheduling of the forensic exam. Too often, understaffing of the forensic facilities that provide the exams, or a lack of coordination between court clerks or defense attorneys with the clinics creates unnecessary delays in resolving this critical question that may determine the nature or even viability of the pending criminal prosecution. Recently in New York County, for example, defendants for whom psychological evaluations were ordered by the court in mid-November were not able to be scheduled for examination until mid-January. Even taking into account the various holidays during this period, this kind of delay is arguably a per se denial of due process for this extremely vulnerable population. This is particularly so because of the ethical conundrum it can present to this individual's attorney. That attorney must balance whether or not to employ the statutory protections due her client against the practical consideration that this will likely result in her client being placed on remand status for a prolonged time. This is especially problematic where that same client could receive the equivalent of a time served sentence by pleading guilty and forgoing those protections.

The current scheme should create ethical quandaries for prosecutors as well. Recall that CPL §730.40 calls for dismissal of a felony complaint if there is no indictment against an incapacitated person within six months of the expiration of the temporary order of observation. Meanwhile CPL §730.30 allows a prosecutor to proceed with indictment against an incapacitated individual without regard for his or her rights to testify in the grand jury. This setup thus perversely creates incentive for prosecutors to indict felony cases where all parties agree that the accused is not mentally competent to understand the proceedings or charges against him or her.

Even more troubling is the practice of securing an indictment against an individual for whom an exam has been ordered but who has not yet been evaluated. Here there is no danger of the underlying case being dismissed before presentment, as the time allotted for 730 examinations is plainly excludable for speedy trial purposes.<sup>2</sup> Nonetheless, prosecutors are permitted to present these cases to grand juries, which they do, while the accused resides in a kind of legal limbo arising out of tangible evidence of their mental "unfitness." These defendants are thus victimized by a truly Kafkaesque series of events whereby a terrible situation they may lack the mental competency to understand is made markedly worse without even the possibility of their input.

### Looking Forward

The system is broken, but not irreparably. Proper funding is urgently needed statewide to reduce the burden on the providers responsible for forensic evaluations so that unnecessary delay can be eliminated. Defense attorneys and/or court clerks should consult with the forensic clinic's schedule before adjourning cases for exam results instead of relying on an outdated timeframe "standard" of how much time the clinic will need. The statutory framework that permits prosecutors to indict a mentally ill or cognitively impaired defendant who's been found not fit to proceed or, worse, is suspected of being such but has not yet been evaluated because of systemic inefficiency, must be amended. Until then, prosecutors, who after all are charged with pursuing overall justice over any specific result, should refrain from engaging in what is essentially a wholesale violation of the spirit of fundamental fairness. Whatever the specific course, continuing as is should not be an option.

Our system is centered on the notion that the individual facing criminal prosecution by his government is living a nightmare that entitles them to special protections. For the individual who has mental illness or cognitive issues and faces criminal prosecution, that nightmare is at least doubled. Society has made great strides in recognizing the heightened vulnerability of those considered incapacitated. The criminal justice system must catch up.

### Endnotes:

1. See *Matter of Lopez v. Evans*, 25 N.Y.3d 199 (April 7, 2015), wherein the Court of Appeals held that if "a parolee lacks mental competency to stand trial, it is a violation of his or her due process rights to conduct a parole revocation hearing."
2. CPL §30.30(4)(a) specifically excludes any delay related to "proceedings for the determination of competency and the period during which defendant is incompetent to stand trial."

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