

the Fourth Circuit, 28 April 2005 [Amnesty International, 2006, p 120. Available at <http://www.amnesty.org/en/library/info/AMR51/003/2006>. Accessed September 22, 2008].

In some jurisdictions, an inmate found incompetent to be executed can remain indefinitely on death row with no prescribed treatment or alteration in sentence.

Providing expert testimony related to competency in general is a mainstay of forensic work. However, the death penalty complicates the question of competence at any stage of the case. The guidelines of the American Medical Association Council on Judicial and Ethical Affairs (CEJA) deems physician participation in the evaluation of competency to be ethical as long as a judge makes the final determination; however, it is unethical for psychiatry to participate in the restoration to competence of death row inmates. In 1989, the Board of Ethical and Social Responsibility in Psychology of the American Psychological Association opposed psychologists' participating in evaluations of competency to be executed unless it be for the purpose of "bringing new information which might change the legal verdict and subsequent death sentence" (Agenda, Meeting of May 5–7, 1989, p 117). Other psychologists view participation in evaluations as ethical but still controversial. Enduring are the ethics-related and professional challenges around death penalty cases, especially those that involve persons with mental illness. The legal decisions from the courts have served both to clarify and obfuscate the situation. It is unlikely that the ambivalence and collective emotion around the death penalty will be resolved by court rulings.

Incompetent Defendant Committed Under Massachusetts Sexually Dangerous Persons Laws

Michael Greenspan, MD
Fellow in Forensic Psychiatry

Charles Dike, MD, MPH, MRCPsych
Assistant Clinical Professor

Law and Psychiatry Division
Department of Psychiatry
Yale University School of Medicine
New Haven, CT

Lack of Competence Does Not Preclude a Nonjury Trial for Sexual Offenses

In *Commonwealth v. Burgess*, 878 N.E.2d 921 (Mass. 2008), the Supreme Judicial Court of Massachusetts reviewed the decision of the Franklin superior court. The superior court had held that Larry Burgess, the defendant, could be civilly committed under the Mass. Gen. Laws ch. 123A, § 15 (2008). This statute allows for a nonjury trial of incompetent defendants charged with sexual offenses, to determine if they did commit the act or acts charged. The Massachusetts Supreme Court considered the defendant's contention that his due process and equal protection rights were violated by engaging in the adversarial hearing as outlined in the state law.

Facts of the Case

In 1993, Larry Burgess was indicted in the superior court on two counts of rape of a child by force and five counts of indecent assault and battery on a child under 14. These charges stemmed from allegations that, over a three-year period, he had repeatedly sexually molested the three sons of his girlfriend at the time. His competence to stand trial was questioned by the court, and he was subsequently found not competent to stand trial following competency hearings in 1994 and 1998.

In 2000, seven years after the defendant's incarceration, the commonwealth filed a petition for the defendant's civil commitment as a sexually dangerous person pursuant to state statute, at which time Mr. Burgess was temporarily committed to a treatment center pending the outcome of that petition. Subsequent to his temporary commitment, he underwent multiple evaluations, most recently in 2003, all of which found him not competent to stand trial for his pending charges.

In 2004, a new judge convened a probable-cause hearing pursuant to Mass. Gen. Laws ch. 123A, § 12 (2008), which determined that there was probable cause to believe that Mr. Burgess was a sexually dangerous person. Given his lack of competence to stand trial, the judge ordered a second hearing pursuant to Mass. Gen. Laws ch. 123A, § 15 (2008), to determine whether Mr. Burgess had committed the acts with which he was charged.

The commonwealth's case rested primarily on the uncontested testimony of two of the alleged victims and their mother. The defense presented no witnesses, and Mr. Burgess did not testify on his own

behalf. At that hearing, the judge found, beyond a reasonable doubt, that Mr. Burgess had committed four of the acts with which he was charged. The other three charges were dismissed, as the alleged victim of those acts did not testify. Based on the numerous reports of prior psychological evaluations, which cited “serious cognitive defects, mild mental retardation, as well as a personality style that tends to extreme anxiety, tearfulness, and an inability to focus on the topic at hand when exposed to pressure” (*Burgess*, p 925), the judge found that Mr. Burgess could provide only minimal assistance to the defense counsel. However, she felt that while his lack of competence to stand trial “had some effect” (*Burgess*, p 926), it was not a determining factor in the outcome of the hearing.

In his appeal, Mr. Burgess contended that the court’s aforementioned guilty finding could not stand, as it was based on “inconsistent findings” that render the judgment “wholly contradictory and devoid of meaning” (*Burgess*, p 925). He also contended that being forced to take part in an adversarial hearing despite being found incompetent to stand trial was a violation of his constitutional rights of due process and equal protection.

Ruling and Reasoning

The supreme judicial court affirmed the decision of the superior court, finding that there was no inconsistency in the judge’s finding. It also held that Mr. Burgess’ equal protection and due process rights were not violated.

The supreme judicial court first discussed the pertinent statute, Mass. Gen. Laws ch. 123A, § 15 (2008), which clearly describes the legislature’s intent to allow for the nonjury hearing of a defendant who has been charged with a sexual offense and subsequently found not competent to stand trial. After this hearing, the court shall, among other things, “make specific findings relative to whether the person did commit the act or acts charged,” and determine, “the extent to which the cause of the person’s incompetence to stand trial affected the outcome of the hearing.” Although this is a civil hearing, the burden of proof established, similar to criminal cases, is beyond a reasonable doubt. Notably, however, findings from the hearing are not admissible in any subsequent criminal proceedings.

The court posited that the superior court judge did, in fact, consider Mr. Burgess’ mental state and

its effect on the hearing. She felt it likely that he could assist his attorney only minimally. However, she opined that these limitations were not a “determining factor” in the outcome of the hearing. The supreme judicial court relied on its decision in *Commonwealth v. Nieves*, 846 N.E.2d 379 (Mass. 2006). In *Nieves*, the court reviewed the decision of a Massachusetts superior court to deny a petition to hold a hearing to have the appellant, Ricardo Nieves, committed as a sexually dangerous person. The trial judge denied the petition based on Mr. Nieves’ being found not competent to stand trial before the hearing. In *Nieves*, the supreme judicial court reversed the lower court’s decision and held that due process was not offended by proceedings to commit a person found not competent to stand trial. The court rested its claims on the assumption that an incompetent defendant’s attorney could exercise the defendant’s statutory rights.

Given the clear statutory and case law guidance, the *Burgess* court concluded that the superior court’s holding was not wholly contradictory and that a defendant’s incompetence to stand trial does not necessarily preclude a hearing as described: “where the statute is clear, we interpret it as written” (*West’s Case*, 46 N.E.2d 760 (Mass. 1943)). The court also discussed the importance of developing a record to be used in subsequent commitment hearings to determine sexual dangerousness.

The court then turned to the constitutional challenges raised by Mr. Burgess. The ruling began by discussing how the requirements for minimum due process vary based on context, citing *Mathews v. Eldridge*, 424 U.S. 319 (1976), which requires that “the individual interest at stake must be weighed against the nature of the governmental interest and the risk of an erroneous deprivation of liberty or property.” Again citing *Nieves*, the *Burgess* court acknowledged that despite the potential deprivation of the defendant’s liberty, his interests “must, with appropriate safeguards, yield to the Commonwealth’s paramount interest in protecting its citizens.” The court went on to list several safeguards that were in place to protect Mr. Burgess’ liberty interests.

Moving on to the alleged equal protection violation, the court similarly argued that any difference in treatment (i.e., denying incompetent defendants the rights granted to all other sexually dangerous persons and all other incompetent defendants) is constitutional only if that difference is necessary to further a

“compelling state interest.” As clearly stated in its decision, the court felt that the protection of the public from sexually dangerous persons must be preserved, even if such protection requires an adversarial hearing involving an incompetent defendant. Furthermore, it argued, the hearing described under Massachusetts statute is a civil proceeding. As such, constitutional safeguards normally provided to criminal defendants, such as due process, do not necessarily apply.

Discussion

In *Burgess*, the court held that lack of competence to stand trial was not sufficient reason to shield the defendant from an adversarial nonjury trial to determine, beyond a reasonable doubt, guilt of sexual offenses. Such findings of guilt are ostensibly to be used in subsequent civil commitment hearings to determine sexual dangerousness. Several concerns brought up in this decision are worth closer examination by the forensic psychiatric community.

Most prominently, this holding continues the complex but important dialogue regarding the assessment and treatment of those deemed sexually dangerous. Although Mr. Burgess’ long duration of pre-trial commitment (11 years), presumably for restoration to competence to stand trial, is worthy of note, the holding that incompetent defendants can be subjected to a trial, jury or nonjury, is even more controversial. While the Massachusetts statute, on its face, is a civil statute, careful consideration must be given to its resemblance to criminal statutes. It does, in fact, allow for an adversarial hearing to determine guilt of a crime beyond a reasonable doubt. Again, this guilt is not admissible in future criminal proceedings, but it is admissible in future commitment hearings.

Furthermore, it is important to note that the risk assessment of those suspected to be sexually dangerous rests squarely on their history of sexual offenses. In cases such as this, the history is only alleged, and no criminal court has found the defendant guilty of his supposed crimes. It is also worth noting that this risk factor (i.e., history of having committed a sexual offense), is a static risk variable, and use of it may result in widespread long-term detention of those assessed.

Given the current national debate regarding sexual commitment laws, these questions raise concern that

such commitments appear to be penal as opposed to therapeutic. The forensic psychiatric community must continue to consider these concerns as it explores its level of comfort with commenting on the sexual dangerousness of defendants.

Involuntary Medication to Render a Defendant Competent to Stand Trial

Karla Blackwood, MD
Fellow in Forensic Psychiatry

Melvin Guyer, PhD, JD
Professor of Psychology

Department of Psychiatry
University of Michigan
Ann Arbor, MI

Harper-like Dangerousness Assessment Must Precede a Sell Hearing as a Condition for Forced Medication to Render a Defendant Competent to Stand Trial

In *U.S. v. Hernandez-Vasquez*, 513 F.3d 908 (9th Cir. 2008), the court considered the defendant’s appeal of the lower court’s order, following a *Sell* hearing, that he be forcibly medicated to render him competent to stand trial. While assessing the sufficiency of the *Sell* hearing, the appellate court also held that a *Harper*-like dangerousness assessment must be made as a condition antecedent to a *Sell* hearing. The appellate court construed the language of the Supreme Court’s decision in *Sell v. U.S.*, 539 U.S. 166 (2003), to mandate an initial consideration of “dangerousness” as a basis for forced medication of a defendant, before relying on a *Sell* hearing. The circuit court remanded the case to the trial court with specific instructions.

Facts of the Case

Jose Hernandez-Vasquez was indicted January 28, 2004, for illegal reentry after deportation, a U.S.C. § 1326 charge, subject to a maximum prison term of 20 years. Mr. Hernandez-Vasquez had previous convictions for aggravated assault on a corrections officer in Arizona and for lewd and lascivious acts with a minor child, for which he had received a three-year custodial sentence, and misdemeanor convictions for trespassing and annoying children. He was ordered