Competency to be Resentenced and the Rockefeller Drug Law Reform Act: How Does It Affect the Mentally Ill?

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Many of the mentally ill prisoners in this country have been convicted of drug crimes. New York State's Rockefeller Drug Laws from the 1970s established harsh sentences for drug crimes to quell a perceived epidemic. These laws were reformed in 2004 to allow the option of resentencing, with the possibility of lighter sentences. However, there is no formal mechanism in New York for a postconviction hearing for competency to be resentenced, thus affecting the severely mentally ill who were sentenced under the old Rockefeller laws. The purpose of this article is to highlight the psychiatric and legal difficulties that can arise without an option for a resentencing competency hearing and to argue that despite the low number of inmates to whom this would apply, there is an important duty to ensure due process to the mentally ill.

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Since the 1960s, when deinstitutionalization and an increase in the recognition of civil rights prompted state hospital closures and left a large number of mentally ill individuals without appropriate community treatment options, the correctional system in the United States has become one of the largest care providers for the country's mentally ill. As of 2005, 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates reported a history of mental health symptoms in the preceding year.[1] Of those who reported mental health problems, three-fourths also met criteria for substance dependence or abuse.[1] On any given day, there are approximately 7,680 people with mental illness in New York State's jails and prisons; at least 2,850 of those are in Rikers Island, the New York City jail and arguably the state's largest psychiatric facility.[2] There is no question that mental disorders and substance abuse are common in the correctional system.

The fact that so many prisoners and detainees are mentally ill raises concerns regarding such prisoners' receiving appropriate mental health care and equitable rehabilitation through the criminal justice system. According to an American Psychiatric Association Task Force in 2000,[3] the role of correctional psychiatrists is to provide inmates with as close to community-level care as possible. Meeting this goal can often be difficult given the stressors facing this patient population: incarceration, potentially dangerous interaction with other inmates, lengthy and frustrating legal cases, and separation from outside support. Equilibrating standards of care in correctional institutions with standards in the community remains a challenge.

Beyond the difficulty of accessing mental health care, hospitalizations (both for treatment and for restoration of competency), stigmatization, poor coping skills and judgment, and mental illness itself all may contribute to difficulties in navigating the criminal justice system. Over the past 30 years, the psychiatric and legal communities have come to accept that efforts should be made to protect mentally ill inmates from making incompetent legal decisions. In New York State, Article 730 of the Criminal Proce-

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dure Law (CPL 730; Fitness to Proceed)[4] is designed to ensure competency until sentencing by authorizing the court to order a competency examination at any time before sentencing. However, there is no formal mechanism in place to assure competency in the event of resentencing. This shortcoming has been recognized in recent years in New York State, as reforms in the Rockefeller Drug Laws have created a subpopulation of mentally ill inmates who find themselves at increased risk of such adjudicative incompetence.

In light of what the authors feel is a deficiency in the Rockefeller Drug Law Reform Act as it relates to mentally ill offenders—namely, no formal provision for a competency evaluation to be resentenced—two questions arise. Should there be a standard for competency to be resentenced as legislation changes and more prisoners become eligible for alternative sentences? And if there should be such a standard, what should it be?

The purpose of this article is to address the first question and argue in favor of a resentencing competency standard by discussing the Rockefeller Laws and subsequent Reform Act, providing a case scenario of how current deficiencies in the Act affect the mentally ill, and exploring criminal competency standards. Although the second question is outside the scope of this article, we will mention it briefly in the discussion.

History of the Rockefeller Drug Laws

In 1973, the New York State Legislature passed a set of drug laws intended to be some of the most severe in the country. Named for then Governor Nelson Rockefeller, the Rockefeller Drug Laws established mandatory prison sentences for the unlawful sale and possession of controlled substances.[5] These laws were prompted by the idea that the only way to quell the perceived drug epidemic was through the application of inflexible and severe punishment.[6] Under these laws, jail sentences were based solely on the quantity of drugs possessed or sold by the offender, without any consideration of the nature or level of the offender's involvement in the transaction.[7] The penalties were also applied without regard to the offender's character, background, or mental status.

Over the past several years, the Rockefeller Drug Laws have been increasingly criticized for contributing to the overcrowding of state prisons and for unjust enforcement, primarily against nonviolent, low-level dealers or addicts who are caught with a large quantity of drugs. For example, the harshest provision of this statute mandated a judge to impose a prison term of 15 years to life on anyone convicted of selling two ounces or possessing eight ounces of any narcotic substance.[8,9]

Consequently, in December 2004, then Governor George Pataki signed into law the Rockefeller Drug Law Reform Act, which significantly affected both future and existing prison sentences for Class A-I felony drug convictions.[7] The reform was expanded to include lower level Class A-II drug felonies in August of 2005. As a result of the new laws, inmates currently serving indeterminate sentences (e.g., 15 years to life) for Class A-I and A-II drug convictions under the old law have become eligible for discretionary resentencing to determinate (i.e., fixed-duration) sentences.[5,7,10]

Under the Reform Act, approximately 1,000 New York State inmates are eligible for resentencing.[11,12] A procedure has been established for affected inmates to apply to the court for resentencing, and if accepted, an inmate has the option to accept or reject the new sentence.[10] This decision should not be made lightly. In some cases, an inmate may be eligible for release on parole under the old indeterminate sentence earlier than the expiration date of the new determinate sentence.[10] However, parole requires a hearing and is not a guaranteed outcome, while the new determinate sentence would expire on a certain date. Thus, the inmate must be able to weigh the advantages of both the old and new sentences before coming to a decision.

Given that the Reform Act triggers a potentially complicated decision and that competency at trial does not necessarily last for the duration of one's sentence, an inmate's competency should be considered at resentencing. Questions regarding an offender's understanding of the court proceedings and the resentencing options, as well as his ability to make an informed decision, may arise during the subsequent resentencing hearings. CPL 730 applies only to pre-sentenced prisoners. Article 390 of the Criminal Procedure Law,[13] which allows for a psychiatric examination of a defendant to provide guidelines to the court regarding relevant treatment options and to raise concerns about competency before sentencing, also only applies to pre-sentenced prisoners. Therefore, as it stands, the approximately 1,000 state pris-

oners eligible for resentencing under the Reform Act do not have access to an official competency hearing.

The Problem for Mentally Ill Prisoners

Imagine the following case scenario, a realistic one in our clinical experience, and consider the problems that may arise when official competency hearings are not available for prisoners being resentenced. A middle-aged man with no known psychiatry history before his incarceration is arrested and sentenced under the Rockefeller Drug Laws on felony drug charges. Over time, he begins to behave bizarrely, reports perceptual disturbances, and becomes increasingly disheveled and odd, laughing and talking to himself. He seems to meet criteria for schizophrenia, undifferentiated type.

Following the Rockefeller Drug Law Reform Act, an attorney files a motion for him to be resentenced. When he appears before the judge, he is clearly psychotic, and the judge orders that he receive mental health treatment in a hospital, as occurs in pretrial competence evaluations. However, correctional officials do not follow through on the judge's order to remove him to the hospital because he is already a sentenced prisoner and therefore does not qualify for the same restoration of competence treatment as pretrial detainees. He remains in jail for some time and becomes increasingly psychotic. Eventually, he is transferred to an inpatient service, where he is treated involuntarily and has only modest improvement in his condition. He continues to believe that he can walk out of the hospital or jail whenever he wants.

His attorney, meanwhile, tries unsuccessfully to vacate the inmate's original sentence so that he can attain the status of a pre-sentenced prisoner and be eligible for forensic hospitalization under CPL 730. The attorney then lobbies for a competency examination, claiming that despite the inmate's status as a sentenced prisoner, he has a constitutional right to be resentenced and to understand what that involves. The judge agrees and orders a competency evaluation, implying that he feels it is the most appropriate option, since the Reform Act does not provide guidance for such contingencies. Following the evaluation, the inmate is found not competent.

After more than a year of disagreements over procedure and agency responsibilities among government officials, the inmate is finally transferred to a facility to receive treatment to restore competency. After two years, he is eventually considered competent and is resentenced to a determinate term.

Criminal Competency

Evaluations of competency to stand trial are critical for the maintenance of fair jurisprudence in this country; it is considered inappropriate and unfair to try, convict, or punish a defendant who is incompetent.[14] Society also has an interest that the defendant be a conscious and intelligent participant in the adversarial system.[15]

It is commonly believed that the concept of competency first arose at least as early as the 17th century when the English courts encountered defendants who stood mute when required to make a plea. The individual could then be found "mute of malice" or "mute by visitation from God" (Ref. 15, p 126). The latter category initially referred to the literally deaf and mute, but over time it also included lunatics, and these individuals were not expected to enter a plea.[15] Early English court decisions similarly endorsed the idea that subjecting certain types of individuals to trial was unfair. In *Frith's Case* in 1790,[16] the court postponed trial until "by collecting together his intellects, and having them entire, [the defendant] shall be able so to model his defense and to ward off the punishment of the law" (Ref. 16, p 307). English common law influenced the development of American criminal law, including the concept of competency. In 1899, the Court of Appeals case of *Youtsey v. United States*[17] linked trial competency to the U.S. Constitution. The common law prohibition against trials *in absentia* represents the earliest foundation of the legal construct of competency. "Just as a criminal defendant has the basic right to be *physically* present at trial to confront his or her accusers, a defendant must be *mentally* present or aware enough of the legal situation to meaningfully confront his or her accusers" (Ref. 18, p 360, emphasis in original).

In 1960, the U.S. Supreme Court first established a federal standard for competence to stand trial in *Dusky v. United States.*[19] In that decision, the Court outlined the two prongs of competence: the capacity to understand the criminal process ("a rational as well as factual understanding of proceedings against him" [Ref. 19, p 402]), and the ability to function in that process ("a sufficient present ability to consult with his attorney with a reasonable degree of rational understanding" [Ref. 19, p 402]).

There are nuances in this decision that warrant consideration. First, *Dusky* established that competence focuses on present ability, distinguishing it from the test for criminal responsibility (mental state at the time of the offense). Second, the *Dusky* test refers to capacity as opposed to willingness. Therefore, unless the defendant's unwillingness to participate is the result of psychopathology, the mere lack of motivation will not lead to a lack of competency. Third, the standard states that the defendant must have a reasonable degree of understanding; perfect understanding is not required. Finally, the *Dusky* standard emphasizes the presence or absence of rational as well as factual understanding. Therefore, even if a defendant understands the sentence associated with his criminal act, such as in the case scenario we described, he may still be found incompetent if, for example, as a result of mental illness, he psychotically believes that he will be able to leave prison whenever he wants.

The *Dusky* formulation has constitutional status and is followed by many state courts; others have incorporated it into similar standards. For example, the New York State statute defines an "incapacitated person" as "a defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense."[20]

Although the term competency to stand trial implies only the evaluation of a defendant's ability at trial, the U.S. Supreme Court's decision in *Godinez v. Moran*[21] allowed the same standard of competence to be applied across a spectrum of legal decisions in all federal jurisdictions and most states. This broad application has included decisions regarding competency to confess, competency to plead guilty, and competency to waive one's right to counsel. Although *Godinez* helped clarify competency in presentenced prisoners, most states apply the test for competency to stand trial during the sentencing phase,[22] when the state of being competent to stand trial is presumed still to be in effect.[23]

Discussion

The legal process allows for raising the matter of a defendant's competence at any point in criminal legal proceedings, including during trial and at sentencing.[24] There are formal mechanisms in place for this evaluation to occur until sentencing, but not in the event of resentencing. Although in the case scenario we described the question of the defendant's competence was not raised at trial or sentencing, his apparent lack of competence after sentencing and before resentencing raises significant concerns.

Given the complicated nature of the choice that the Reform Act presents to eligible inmates, we feel that a formal competency evaluation should be considered for inmates who seem potentially unable to make a reasonable or rational decision. In our case scenario, successful resentencing occurred only after much disagreement over procedure and multiple hospitalizations and with the persistence of a diligent attorney. There are mentally ill inmates in prison who are not competent to be resentenced. Without the benefit of sustained advocacy, we wonder what will happen to them. We recommend that the New York State Legislature consider formalizing this competency evaluation, as for pre-sentenced prisoners under CPL 730, to ensure that defendants in circumstances similar to those we have described are afforded a fair opportunity to participate in legal proceedings.

We see the strongest argument against such a proposal as primarily political. With only a thousand defendants eligible for resentencing under the Reform Act and only a small percentage of that thousand likely to be mentally ill and/or incompetent, the legislature may be hard pressed to justify the devotion of time, energy, and political impetus to amend a law that has taken over 30 years to reform. However, the legislature and the courts have repeatedly endorsed the importance of ensuring competency to stand trial. CPL 730 itself is a manifestation of the legislature's understanding of this long-accepted principle. The numerous cases referenced herein suggest the judiciary's upholding of the legislature's intent. The need to ensure due process by implementing procedures to protect an individual's right not to be tried or convicted while incompetent should extend to the resentencing phase described in the Reform Act. This protection should be required regardless of the number of people affected.

We do not propose specifics about a competency standard for resentencing as that would involve a much lengthier discussion. However, it should be noted that there is precedent (despite *Godinez*), in the forensic literature and in case law, for considering alternate standards in assessing competency at various points in legal proceedings. For example, Slobogin[25] argues that pleading guilty entails a higher level of competency than standing trial and

that waiving counsel requires an even greater capacity than standing trial or pleading guilty, as the consequences of waiving counsel are much more difficult to comprehend. It has also been argued that the standard for competency to be sentenced should warrant a different test because it "incorporates an ability to realistically perceive best interests in relation to potential dispositions and sanctions" (Ref. 23, p 278).

Finally, the recent 2008 U.S. Supreme Court case, *Indiana v. Edwards*,[26] raises the question of whether a single competency standard should be used to decide different legal decisions. Ahmad Edwards, diagnosed with schizophrenia and charged with attempted murder while trying to steal a pair of shoes, was denied self-representation after being found competent to stand trial. Despite the Indiana Supreme Court's order for a new trial, the U.S. Supreme Court held that "the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves" (Ref. 26, p 12). This suggests a different standard when considering competency to stand trial and competency to represent oneself in court.

The literature and the contours of the case scenario that we have presented suggest the emergence of a movement away from a universal standard of criminal competency and toward more individual and task-specific requirements. While more task-specific standards may be ideal, we feel that at a basic level, a formalized evaluation at key points in the course of an individual's legal proceedings (e.g., trial, sentencing, and resentencing) is both constitutionally mandated and necessary to provide timely and appropriate psychiatric care.

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