

Dismissal of Charges Against an Incompetent Defendant

Zachary D. Torry, MD
Fellow in Forensic Psychiatry

Kenneth J. Weiss, MD
*Clinical Associate Professor and Associate Director
Forensic Psychiatry Fellowship Program*

*Department of Psychiatry
University of Pennsylvania School of Medicine
Philadelphia, PA*

Maryland Court Upholds Mandated Dismissal of Attempted Murder and Assault Charges Against Defendant Incompetent to Stand Trial After Five Years

In *Ray v. State*, 978 A.2d 736 (Md. 2009), the Maryland Court of Appeals reversed a trial court's denial of the defendant's motion to dismiss attempted murder and assault charges under Md. Code Ann., Crim. Proc. § 3-107 (2001, 2007 Supp). The Section, in light of *Jackson v. Indiana*, 406 U.S. 715 (1972), mandates dismissal of charges against an incompetent defendant after a specified interval, unless there is a determination of "extraordinary cause to extend the time." Extraordinary cause has not been defined operationally, either in § 3-107 or in subsequent case law. Based on four psychiatric opinions that the defendant was dangerous and that his competency was restorable, the trial court determined that extraordinary cause existed, thus refusing the motion for dismissal. The appellate court, in a six-to-one decision, reversed this judgment, stating that dangerousness and restorability cannot form the bases of an extraordinary-cause determination.

Facts of the Case

John Wesley Ray was a mentally ill defendant charged with attempted first-degree murder, attempted second-degree murder, first-degree assault, and second-degree assault against his girlfriend in 2001. He had a documented history of at least two psychiatric hospitalizations for violent behavior and had faced prior criminal charges for sexual assault against his daughter and for assault and battery. In January 2002, Mr. Ray was adjudicated incompetent to stand trial and subsequently was committed to

Clifton T. Perkins Hospital in Jessup, Maryland, for treatment and competency restoration.

From the start of his commitment until sometime in 2004, Mr. Ray refused treatment. It was only after his brother was appointed guardian that he began to take medication. In 2005, after Mr. Ray was treated with antipsychotic medication, the treating psychiatrists believed that he had achieved sufficient competency to stand trial. Accordingly, he was referred for a pretrial criminal-responsibility evaluation. During the evaluation, he expressed paranoid beliefs that the victim was still attempting to poison him. Hence, the pretrial evaluator determined that Mr. Ray was not competent to stand trial at that time.

In 2005 and 2006, Mr. Ray continued to show only partial improvement. He maintained manifestly delusional beliefs that he was a psychic and wrote to government agencies claiming that he was helping to solve crimes. In January 2007, defense counsel filed a motion to dismiss Mr. Ray's charges. He contended that, pursuant to Md. Code Ann., Crim. Proc. § 3-107 (2001, 2007 Supp), the charges had to be dropped, as the specified length of time had passed. The state opposed this motion, asserting that Mr. Ray's dangerousness and restorability to competency constituted "extraordinary cause to extend the time." At a hearing in October 2007, the court heard testimony of four psychiatrists from Perkins Hospital. They diagnosed paranoid schizophrenia, testifying that he had delusions involving various government agencies and paranoid beliefs involving the victim. They concluded that although Mr. Ray continued to be dangerous, he was restorable to competency.

The psychiatrists based their opinions about Mr. Ray's restorability on the following: he had been responding partially; he had not yet had an "exhaustive trial of all the available antipsychotic medications . . ." (for example, clozapine); his competency had been restored in 2005 when they referred him for pretrial evaluation; and his competency could be restored again. Lack of cooperation, however, was cited as a hindrance to his treatment and restoration.

Despite Mr. Ray's partial symptomatic improvement, the four psychiatrists, the victim's husband, and two law enforcement officers considered him dangerous. This was evidenced by prior violent incidents outside the hospital and during prior hospitalizations. Prior hospital records described him as having "an explosive temper" and "periods of rage

followed by memory loss.” Two of the psychiatrists testified on the severity of his psychosis and the degree of involvement of the victim in his delusions. His lack of insight was cited as further evidence of dangerousness. He did not appreciate the need for medications, increasing the likelihood that he would discontinue them once released. The victim’s husband and the two law enforcement officers attested to Mr. Ray’s attempts to contact the victim and government agencies and the irrational and threatening nature of these communications. The state argued that the severity of his charges, his restorability, and his dangerousness constituted extraordinary cause to extend the time of his charges.

The defense argued that restorability and dangerousness do not constitute extraordinary causes. It is quite ordinary for patients in Perkins Hospital to be both dangerous and restorable. In fact, a prerequisite for admission to Perkins Hospital is the commission of a violent crime or otherwise posing a public safety risk; and the goal of the hospitalization is to treat the patients, thereby restoring their competency.

The judge found extraordinary cause to extend Mr. Ray’s charges, based on dangerousness and restorability, denying his motion. Facts included his refusal of treatment from 2002 until 2004, the victim’s testimony of ongoing threats, the delusional nature of the letters sent to government agencies, and the psychiatric testimony. Mr. Ray appealed the ruling, and the case was heard by the Court of Appeals of Maryland.

Ruling and Reasoning

In a six-to-one decision, the Maryland Court of Appeals determined that dangerousness and restorability cannot constitute extraordinary cause, thereby reversing the circuit court’s decision and remanding it to the circuit court. The judges reviewed the history of § 3-107, noting that its intent was to ensure due process and equal protection. It prevents incompetent individuals from “languishing indefinitely” and beyond the maximum sentence that they could serve for the crime charged. It ensures appropriate hearings to address the basis for detention, and it recognizes that mere pending criminal charges do not justly outweigh the state’s burden to warrant detention. That is, civil commitment has procedural and substantive requirements that must be met, and criminal charges do not imply different rights. Consistent with *Jackson*, § 3-107 mandates dismissal of

charges (without prejudice) after a specified interval (five years in Mr. Ray’s case). The court noted the two options available to the state: civil commitment and reinstatement of charges.

The court of appeals interpreted the extraordinary-cause provision to be limited to very rare circumstances. This interpretation excluded the seriousness of the charge and the dangerousness and restorability of the defendant. The court neither specified what would constitute “extraordinary cause” nor addressed its constitutionality.

Discussion

The appellate decision in *Ray* reflected the essence of *Jackson*: a mentally incompetent defendant cannot be held for trial unreasonably long. In the majority opinion in that case, Justice Blackmun stated that an incompetent defendant should not be held more than the “reasonable period of time” necessary to determine whether there is “substantial probability” that he will attain that capacity in the foreseeable future. Thus, that reasonable period of time bears no relation to the type of crime or to the dangerousness of the individual. Pursuant to *Jackson*, Maryland’s law on incompetent defendants presumably is based on their equal protection and due process rights. Maryland’s legislature provided the loophole of “extraordinary cause” to extend that time, but the court neither defined it nor reconciled it with *Jackson*. Moreover, the loophole perhaps reflects some resistance in implementing the full essence of Justice Blackmun’s opinion on the rights of incompetent defendants. Nonetheless, the decision to dismiss Mr. Ray’s charges was a categorical, not a dimensional, statement that neither dangerousness nor restorability would be determinative of extraordinary cause. The court stated that extraordinary cause must require “more than” dangerousness and restorability to extend the time and thereby obviate civil commitment, which requires greater procedural protection. Given the wording of § 3-107, it remains unclear what the legislature envisioned as sufficient grounds for sidestepping constitutional protections. In effect, then, the psychiatrists’ testimony on Mr. Ray’s dangerousness and restorability was irrelevant. If the defendant remained dangerous, the state could have filed civil commitment proceedings.

Another issue in this case was the two-year period during which Mr. Ray refused medications, cited by the trial court as a reason to deny his motion. It was

as if the court said that the five-year clock ran only when the defendant was compliant; otherwise, his rights under § 3-107 were nullified. The U.S. Supreme Court decided *Sell v. U.S* (539 U.S. 166 (2003)) while Mr. Ray was awaiting restoration. It appears that forced medication criteria under *Sell* were met in Mr. Ray's case: the crime was serious, medications would have been substantially likely to render the defendant competent, there were no less intrusive treatments, and medications would have been medically appropriate. Thus, if a *Sell* analysis had been applied, it seems likely that Mr. Ray would have been medicated earlier. In that event, either he would have been restored and brought to trial, or his nonrestorability would have been amply demonstrated to all parties at the five-year mark.

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Are Hospital Records That Document Adverse Events Privileged?

Susan E. Rushing, MD, JD
Fellow in Forensic Psychiatry

Robert L. Sadoff, MD
Clinical Professor of Forensic Psychiatry and Director
Forensic Psychiatry Fellowship Program

Department of Psychiatry
University of Pennsylvania School of Medicine
Philadelphia, PA

Documents Created for Internal and External Peer Review of Adverse Events Are Privileged Under Delaware Law

The Supreme Court of Delaware reviewed *Office of the Chief Medical Examiner v. Dover Behavioral Health System*, 976 A.2d 160 (Del. 2009), and a decision was rendered in June 2009. The issue in this case was whether documents created for a health care facility's internal or peer review of an adverse event are discoverable by agencies investigating the adverse event. The Delaware Supreme Court held that documents created for peer review are privileged and need not be turned over to investigating agencies if subpoenaed. The case addressed public policy favoring unfettered discussion between medical providers in reviewing and assessing practices within medical facilities.

Facts of the Case

Joseph Heverin, a man with Huntington's chorea, was in the care of Dover Behavioral Health System (DBHS) when he died on February 25, 2008. Mr. Heverin choked on food while eating lunch in the DBHS cafeteria. He was transported to an outside hospital where he was pronounced dead by the attending physician. On the death certificate, the medical examiner, Dr. Judith Tobin, certified that Huntington's chorea caused Mr. Heverin to have difficulty swallowing. She further certified that he died of asphyxia brought on by food aspiration. Delaware law requires the Office of the Chief Medical Examiner (OCME) "to investigate the cause and manner of death of any person who dies when unattended by a physician or in any suspicious or unusual manner" (*Dover*, p 162, citing Del. Code Ann. Tit. 29, § 4706 (2009)).

As part of its investigation, OCME requested a copy of the incident report, which detailed the circumstances surrounding Mr. Heverin's death. DBHS denied the request. OCME then requested all medical records and internal documents pertaining to Mr. Heverin. DBHS produced all medical records, but maintained that two reports were created for internal peer review and, as such, were privileged documents.

Ruling and Reasoning

The court held that, whereas the peer-review privilege prevented OCME from obtaining the specific document created as an incident report intended for peer review, the privilege does not prevent OCME from performing its statutorily mandated duty to investigate deaths unattended by a physician. OCME retains its broad power to investigate death. It may "subpoena witnesses, administer oaths and affirmations, and take affidavits from witnesses as to the facts surrounding Heverin's death" (*Dover*, p 169).

The peer review exception is meant to encourage discussion among medical professionals after adverse events. To encourage these discussions, the Delaware General Assembly legislated immunity from legal liability to members of peer review boards who participate in such discussions and to organizations that perform such reviews. As long as participants act in good faith, they are immune from "claim, suit, liability, damages or other recourse civil or criminal" resulting from their participation (*Dover*, p 163). The law promotes unfettered discussion of a health