Traumatic Brain Injury and Competency to Stand Trial: Issues and Advocacy (with support from the Health Resources Services Administration under a Contract with NORC)

This is Bob Fleischner at the Center for Public Representation. This is a webcast on Traumatic Brain Injury and Competency to Stand Trial: Issues and Advocacy for the National Disability Rights Network with support from the Health resources Services Administration and NORC. I'm Bob Fleischner. I’m an attorney at the Center for Public Representation in North Hampton, Massachusetts. CPR is one of the legal backup centers for NDRN, and we provide consultation and technical assistance through protection and advocacy agencies throughout the country. I will give you some contact information for me at the end of the presentation.

There are three parts to the following presentation. The first is – I’ll say a few words, which are probably familiar to many of you who are watching, about traumatic brain injury and a few words about things that may be a little less familiar, the criminal justice system. After that, I will address how the criminal justice system interacts and has an effect on how people with traumatic brain injury have an effect on the criminal justice system itself and some of the issues and problems that arise for clients with a traumatic brain injury. Then I will discuss some possible advocacy ideas that advocacy organizations working with their friends and colleagues may be able to pursue to address some of the problems that we’ll identify.

As you probably know, there are many causes of traumatic brain injury. The most common are that people suffer falls and injuries to their heads in a fall. They may be injured in an automobile crash or in an assault. Sports injuries are becoming much more – recently known to be causes of traumatic brain injuries and other brain injuries, particularly in contact sports like football, in some instances soccer, and so on. And even more recently a lot of attention has been focused on TBI in the military on active military personnel who are serving in war zones where traumatic brain injury may be caused by being near or in blasts.

The extent of traumatic brain injury is actually pretty surprising, I think, to many people. Defining TBI as a blow or jolt to the head or penetrating head injury is one that disrupts the functioning of the brain. The extent of the injury can be classified from mild to severe. 1.4 million people in the United States sustain a traumatic brain injury each year. 235,000 of those people who sustained such an injury have to be hospitalized to treat that injury. Now it’s likely that the number of people who report brain injury is much lower than the number of people who actually sustain traumatic brain injury and that the only measure is the people who are treated – the only way to measure is people who are treated by doctors or emergency rooms. Even with that, the figure is very high.

Some of the consequences of traumatic brain injury, particularly in relation to what we’ll be talking about today, the criminal justice system, some of the possible long-term consequences include that a person with TBI may need assistance in activities of daily living, things like eating, getting around, getting from place to place, getting dressed, brushing teeth. Some people with TBI have problems with thought process -- with their thought processes, that should not be a surprise, and may have learning disabilities. In fact, kinds of thought processes that might be affected include things like the ability to retain information, long or short term memory, concentration, attention span. Learning difficulties could be – you know, could be the kinds of difficulties for the student or older person might have in taking in information, remembering it, reasoning with it.

Some people with TBI have speech and communication problems. Some may have aphasia, which is an inability to retrieve words even though they fully understand what’s going on and know what they want to say, and they have a difficulty expressing it. Speech may be slurred, it may be inappropriate in some ways. These kinds of speech and communication problems in particular, have particular types of consequences of TBI that can be misunderstood and misinterpreted, although that’s true with each of these potential consequences. Some people with TBI experience behavioral or emotional difficulties, may undergo personality changes,
occasionally people with TBI are violent. And many people – some people at least – with TBI can experience mental health problems. Occasionally, things that are symptoms of a traumatic brain injury may be misinterpreted and misdiagnosed as mental health difficulties and the treatment – the proposed treatment may be inappropriate given the misdiagnosis.

People in the criminal justice system, a remarkable number of people in the criminal justice system have a history of traumatic brain injury. Studies report wide variations in the actual percent, for example, of prisoners and detainees, that is people waiting trial, would mostly be in jail, who have a history of traumatic brain injury. The low percentage of inmates with a head injury or TBI in the studies is about 25% and some studies indicate that as many as 87% of prisoners have reported some history of brain injury and traumatic head injury or traumatic brain injury. Whatever the figure is, even if it’s as low of 25%, that’s still three times -- nearly three times the prevalence of people with brain injuries in the population as a whole, as compared to those in prisons.

Women and children are particularly – are particularly – particularly have a history of traumatic brain injury. Female inmates, particularly those convicted of violence, have high incidence of pre-crime TBI and of other physical abuse. A substantial amount of the physical abuse of the brain injuries suffered by female inmates are the result of physical and relationship abuse. And the studies that have looked at children in the criminal justice system find that significant numbers of children and adolescence who are wrapped up in the juvenile justice or criminal justice system have a history of traumatic brain injury.

Now one of the places in the criminal justice system where a person’s brain injury or TBI may have an impact on what happens to them and how they’re affected by that system. TBI may have impact at arrest. An arresting police officer, for example, may misinterpret certain behaviors that are related to a TBI to be something other than that. It certainly can have an impact on the relationship with police throughout the process. It can have an impact during booking, during charging for crimes, during granting of bail.

For the purpose of this presentation, we’re going to take a look at two parts of the post-arrest process where TBI has an impact on the court process. And the first of those is incompetence to stand trial, and then we’re going to talk about criminal responsibility. Incompetence to stand trial is part of the pre-trial and pre-adjudication process. The criminal responsibility that I’ll talk about in a few minutes, is part of the trial process, it has to do with the defense. So, first let’s define incompetence to stand trial and criminal responsibility. Both of these concepts are rooted in ideas about fundamental fairness in our criminal justice system. In terms of incompetence to stand trial, it’s a fundamental principle of our law that we do not put a criminal defendant at risk of her life or liberty if she’s unable to participate, incapable of participating in her defense.

The Supreme Court, in a case called Dusky versus the United States, attempted to define precisely what they would – what our jurisprudences, is talking about, thinking about when it’s determining that a person – it would be unfair to put a person on trial because they’re incapable of understanding what’s happening. Based on an evaluation that usually takes place at any time in the process, whenever a question of competency is raised by any of the parties, the court must determine, based on that evaluation -- that is usually an evidentiary hearing -- must determine if the defendant had sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as factual, understanding about the proceedings against him.

There’s a couple of parts in this definition that are worth looking at. The first is that incapacity or incompetence to stand trial looks at the persons present ability, not in the past and not in the future, but at the time that the individual is before the court and is about to go to trial. So the person has to have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. So, one of the keys is the individual’s ability to participate in the preparation and presentation of his or her defense. And second, the defendant has to have a
rational, as well as a factual understanding of the proceedings against him, and usually that’s defined as both understanding what is – what the court is, what the nature of the judge is, what the role of the prosecutor and the defense lawyer is, as well as some rational understanding of what the charges are against the defendant.

When an individual is being evaluated for competency to stand trial and when the judge is determining whether the individual is competent, some of the things that the evaluator, the clinician, and the court may look at is whether the person is oriented to time and place; whether they have the ability to recall events and to relate them back to the attorney or to the court if they’re testifying; whether they have an understanding of the process of the trial, and the roles of the lawyer, the judge, jury, and the prosecutor; whether they have an ability to weigh options and make choices; that is, whether a lawyer can present to him, “Here’s the choice. We can go to trial or we can take this plea, and to make that choice, to weigh the options, the plusses and the minus of each decision; whether they have an ability to communicate with counsel. And let me just say peripherally here that this is factor that cuts two ways.

It is both the individual’s ability to communicate and make herself heard and the counsel’s ability to listen and to accommodate his or her attorney’s questioning and counseling process to the needs of the defendant. And many times, in my experience anyway, when the court or a lawyer is saying that they are having -- that they cannot communicate with their client, the problem is as much with the lawyer as it is with the client. Another factor that may be considered by a court in determining whether a person is competent to stand trial has more to -- less to do with their ability to understand what’s going on than their ability to withstand the stress of a trial.

Now, what about criminal responsibility? Criminal responsibility is determined later in the process. It is a defense. The lack of criminal responsibility is a defense that is raised by the defendant, which basically says that although I’m competent to stand trial and I understand what’s going on, our law does not allow me to be punished because I’m not responsible for my actions, by reason of a mental disease or defect, in most cases. This is usually known and colloquially known as the insanity defense, although it goes far beyond mental illness. The insanity defense is controversial, particularly since the shooting of President Reagan a number of years ago. A number of states have either moved to abolish the insanity defense or to modify it. And the insanity defense or the criminal responsibility defense is often not a successful defense, and it is particularly unsuccessful – appears to be particularly unsuccessful in high profile cases, cases where the harm that was done by the defendant is extreme or particularly heinous.

Criminal responsibility, again, like the incapacity and incompetency to stand trial is one of our ways of guaranteeing fundamental fairness in our process and in our criminal justice process. We don’t punish people who don’t understand why they’re being punished. It’s fundamentally the rule.

The Model Penal Code is probably the best place to go for a definition of criminal responsibility. Some states have adopted the Model Penal Code or some variation of it, where they do some different things with that law. Under the Model Penal Code the test is whether a defendant is responsible for his criminal conduct. He is not responsible if it’s a result of mental disease or defect, he or she – and these are the key terms – lacks the substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

So the first potential part of the criminal responsibility defense is that the person doesn’t appreciate that what he’s doing is wrong, is incapable of appreciating, does not have the capacity to appreciate that; or, second, that even if he appreciates that what he is doing is criminal behavior that because of some mental disease or defect he can’t conform his conduct to the requirements of the law.

Let’s go back to incompetency to stand trial and look and see how traumatic brain injury impacts on incompetency to stand trial process. Some people with traumatic brain injury who are charged with crimes may be or may appear to be incompetent to stand trial. He may not be. He may
appear not to be able to understand what is happening or to work with their lawyers. This might be because of communication difficulties, disordered thoughts, memory problems, attention deficits, any of which could interfere with the ability to understand the process or to cooperate with the lawyer.

The ways that a person – that a person with TBI might have an impact on the criminal responsibility defense are a little bit different. Remember, the criminal responsibility defense looks back to the time of the act and when it happened. A person with TBI might not have been criminally responsible for a behavior because; for example, the person -- it might be arguable that a person with TBI has some impairment of judgment or may experience a personality change or may not respond to or learn from negative consequences or may not be able to control impulsive behavior.

Now there are ways to accommodate or there may be ways to accommodate a person with traumatic brain injury in trial and pre-trial situations. Many of the difficulties faced by people with TBI in the criminal justice system can be mitigated by reasonable accommodations by courts, clinicians, and attorneys. People who are easily distracted; for example, might do better in an environment that reduces distraction. When a person with TBI is communicating with his lawyer or in some cases even testifying, it would be important and might be helpful to explain processes slowly step by step, by providing examples, by avoiding getting into an argument, and by reinforcing what the individual has learned.

Let’s assume that a person has – that the person has been to court, the person has a TBI, some party, either the defense lawyer or more likely the prosecutor or sometimes the court itself, has raised the question of whether the person is incompetent to stand trial, the person has been evaluated, the clinician has suggested the person is not competent, and the court has found that they’re incompetent to stand trial. The finding of incapacity to stand trial, an incompetence to stand trial, stays the proceeding, things that stop where they are.

So if the defendant is found incompetent to stand trial, he or she is usually committed to a locked facility for the purpose – often a mental hospital – for the purpose of restoring him or her to competency, called the “restoration process” in many states. In some states, beds are not available in state hospitals, readily, for this purpose, and some defendants with TBI may be held in jail for sometimes long periods of time awaiting transfer to a hospital.

Once the person is transferred to the hospital they can only be held for a reasonable time for restoration. The United States Supreme Court cited this issue in 1972 in a case called Jackson versus Indiana. The holding in Jackson essentially is that there must be a relationship between the institutionalization and the purpose of the commitment, between the length of the institutionalization and the purpose of it. So, if a reasonable time has passed and the person cannot be restored, then they either have to be – and it is unlikely that they ever will be restored in a reasonable time – they have to be returned to court, and generally, the charges are dropped. If the person is restored, if they get treatment or in the course of their difficulties they are able to reach a place where they can stand trial they are returned to court, found to be, at that point, competent to stand trial and the trial goes forward.

If the person can’t be restored, generally the charges are dismissed after some period of time. In some states, for example, the charges are automatically dismissed after the passage of a time that’s equal to what would be the longest time that a person could serve in prison if they had been convicted. So I’m charged with assault and battery and the longest term I can get for that is six years, and I’m found incompetent to stand trial and I spend six years in a mental hospital and I haven’t been restored, then generally, in most states, either then or sometimes earlier, the charges have to be dismissed. But that’s not the end of it and maybe, if I’m in that situation, I may find myself with the criminal charges dismissed having served time in a mental hospital equal to what I would have spent in prison and then facing civil commitment. We’ll come back to that.
After finding of “Not responsible” finding not responsible is a really different kind of an animal. 
After finding of not responsible is in most – in many states the equivalent of a finding of not guilty, 
because of a lack of criminal responsibility, not guilty by reason of mental defect. Charges are 
then dismissed. The person has been found not guilty, and the defendant is then either released 
or, if they meet the civil commitment standards, can be committed to a locked facility, usually a 
mental hospital. In states that have – in a number of states that have either abolished or partially 
abolished the insanity defense, the process will differ. Some states, for instance, have guilty but 
mentally ill, and the person may serve part of their sentence in a mental hospital and then if 
they’re no longer mentally ill, be transferred to a jail to serve – or prison to serve out the rest of 
their – rest of their time.

Now we’re now at the place where the person has been found incompetent to stand trial, the 
reasonable period for restoration is up, or the person has been found not guilty by reason of 
mental illness, and the state is then looking at committing the person to a mental health facility or 
some sort of facility for some period of time after that. The elements for that commitment -- and 
this is done under local commitment law, state commitment law -- the elements are usually that 
there’s some mental disability and the likelihood of danger. Same kinds of standards would apply 
to the commitment of a person with mental illness, or in some states personal or intellectual 
disability.

Some states, however, have no permissions for commitment of people with traumatic brain injury. 
In a case last year in Kansas, the State versus Johnson, the Kansas Supreme Court found that a 
person could not be committed to a mental hospital if their diagnosed was traumatic brain injury, 
even if they were also dangerous. Other states that may have a broader definition of mental 
abnormality or mental illness warranting commitment may find that a person with TBI can be 
committed to a state hospital.

In a 1994 case in Georgia, the Georgia Department of Human Resources refused to accept for 
admission, an individual with a traumatic brain injury who had been committed by a court, and the 
department was told by the Georgia Supreme Court that they had no – that they had no authority 
not to.

Now, what’s wrong with this? One of the problems is that in most states – state mental hospitals 
they’re not as expertise in people with TBI or cognitive, or if the people – if the individual is 
committed for a long-term commitment do not have the expertise of providing treatment. Mental 
hospitals are designed, for the most part, for treating and serving people with mental illness, and 
a traumatic brain injury is not a mental illness.

If the person spends time in a jail or a prison awaiting transfer the situation is even worse. Jails 
and prisons are particularly unsuited for working with people with traumatic brain injuries, and 
even short stays in jail while awaiting transfer to a hospital can result in serious harm to the 
individual and possibly to more criminal charges. If the person is in the facility and in the jail, gets 
in a fight or is misunderstood, gets into a difficulty and there may be more criminal charges and 
may be facing more time in jail, and the system may start all over again. Therefore, P&A 
advocates may want to work with others like state Brain Injury Association, with sympathetic 
clinicians or client groups, with their own clients, and with the court system to try to find ways to 
systemically address the unique needs of people with traumatic brain injury in the criminal justice 
system.

There are educational programs, which could be considered. There is systemic advocacy that 
can be done and this consciousness raiser – all of the actors, everything from the court to the 
clinicians to the prosecutors to the police and to the defense lawyers. Here are some things that 
P&As might want to consider in trying to address some of the difficulties people with TBI 
experience in the criminal justice system. It might be worthwhile working with other advocacy 
groups to approach courts, prosecutors, public defenders, and clinicians to properly train them, to
properly identify defendants with TBI so that they’re not either misidentified as being irrational or difficult or being mentally ill. But make sure that the systems for identifying defendants with TBI are in place. Work with courts and others to ensure that the courts and attorneys are familiar with the tests that are available, and the clinicians are familiar with the tests that are available to determine the extent and impact of a TBI on a defendant’s capabilities and behaviors. You might work to persuade courts and attorneys to make reasonable accommodations to defendants with TBI so that they’re competent to stand trial and can avoid long, unnecessary, and unhelpful hospitalization.

You might work to ensure the defendants with TBI do not needlessly spend time in jail. Several P&As have brought litigation on behalf of some of their clients with mental illness who have been languishing in jails awaiting competency restoration services in other settings. You can work to convince courts to use community-based evaluation resources rather than jails or hospitals to conduct evaluations. In most states the initial evaluation and initial time for evaluating whether a person is competent to stand trial can be done in the community, as well as a mental hospital. If there are resources in the community to do this, it is a far better place for anyone to be than languishing in jail. And if there aren’t the resources, the P&A could choose to work with other advocates to create those kinds of resources.

State mental hospitals are increasingly populated by so-called forensic patients, people coming through the criminal justice system for evaluation or after adjudication has been accomplished or after a successful responsibility – criminal responsibility defense. So there may be some openness to that kind of advocacy as it would open beds, either to be closed or open them for people who really need them for civil purposes.

It’s also possible to work to increase the availability of community-based services in lieu of long term commitment. Our office has litigated or settled a case called “Hutchinson versus Patrick,” which is designed to – the settlement is designed to move people with traumatic brain injuries out of inappropriate nursing homes and into newly-developed community projects.

So all of these are possible activities for a protection and advocacy agency to undertake. Here are some places that may be able to help: NDRN, National Disability Rights Network, well known to you; State Protection & Advocacy Systems; the Brain Injury Association of America, which has state chapters; and Centers for Disease Control has an event and a wealth of information about TBI on its website; and the Center for Public Representation as a backup to P&A agencies or for information about the Hutchinson.

The following slides list the references that are referred to in the materials. I think you’ll find many of these to be quite helpful if you can locate them, and there are three or four slides on that. I would urge you to consider systemic advocacy on behalf of individuals with TBI who are in the criminal justice – who find themselves in the criminal justice system. There are severe consequences for misdiagnosis, real possibilities for mistreatment, and a substantial possibility for people with TBI to needlessly lose their liberty and find their conditions exacerbated by a system that is unaware of their conditions and unable to deliver the kinds of services that people with TBI need in order to stay out of jail, stay out of prison, stay out of the criminal justice system, and remain in the community. Thank you very much for joining us in this presentation.