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PSYCHIATRY AND THE NEW CRIMINAL PROCEDURE LAW: THE PROBLEM OF COMMUNICATION BETWEEN COURTS AND PSYCHIATRIC EXAMINERS

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INTRODUCTION

The New York Criminal Procedure Law, a product of almost eight years of work by the Temporary State Commission on Revision of the Penal Law and Criminal Code, "represents the State's first comprehensive modernization of procedures for the administration of criminal justice in this century."[1] Within this new law are eleven sections and one article dealing at least in part with psychiatry. Six sections set forth procedures to be followed when there is a defense of mental disease or defect; one article is devoted entirely to the subject of mental disease or defect excluding a defendant's fitness to proceed; and five sections cover miscellaneous subjects. But space does not permit a description of all sections dealing with psychiatry. Instead, this article is addressed to a particular problem that exists in several of these sections: the problem of communication between courts and psychiatric examiners. In the areas of pre-sentence reports,[2] youthful offender treatment[3] and fitness to proceed,[4] the court is empowered to call upon the assistance of a psychiatric examiner. However, for such assistance to be of any value, there must be effective communication between the courts and these psychiatric examiners.

If the system were such that psychiatrists were present in every courtroom and the court calendars were not what they are, there would be little, if any, problem in communication. The psychiatrists could see for themselves the defendant's behavior in court. Then, in the course of discussions with the judge, district attorney, defense counsel and probation officer, the bases for a psychiatric examination could be clearly set forth. Following such an examination another meeting could be held in which the findings and recommendations of the psychiatrists

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1 N.Y. CRIM. PROC. LAW (McKinney 1970, Governor's memo.) [hereinafter CPL].

2 CPL § 390.30(2).

3 *Id.* § 720.20(5).

4 *Id.* § 730.30(1).

could be discussed. Things being what they are, however, such an ideal is not, and probably never will be, possible.

One practical alternative, of course, is written communication. Such a method can be reasonably effective, as long as it is recognized that such communication must be a two-way process. The problem is that, while some judges and probation officers do recognize this fact, many others do not. More importantly, neither the old Code of Criminal Procedure nor the new Criminal Procedure Law provides proper guidelines for effective two-way communication. It is the purpose of this paper to examine this problem more closely and to offer some suggestions for improvement.

Pre-Sentence Reports

In setting forth the scope of pre-sentence investigations and reports, section 390.30(2) provides as follows:

> Whenever information is available with respect to the defendant's physical and mental condition the presentence investigation must include the gathering of such information. In the case of a felony or a class A misdemeanor, or in any case where a person under the age of twenty-one is convicted of a crime, the court may order that the defendant undergo a thorough physical or mental examination in a designated facility and may further order that the defendant remain in such facility for such purpose for a period not exceeding thirty days.

At first glance this looks like a most laudable statement, for it authorizes the court to gain some very worthwhile knowledge about a defendant prior to sentencing. However, the law does not go far enough. While provision is made for the gathering of information from the examining physicians, no provision whatsoever exists for furnishing them with any information. The statute, as it now stands, forces the examining physicians to operate completely in the dark. Before a psychiatrist can assess a defendant and formulate a pre-sentence recommendation, he must have the type of information that a probation officer includes in a pre-sentence report, *i.e.*, "the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education and personal habits."[5]

Interestingly enough, the Criminal Procedure Law recognizes the importance of such information once the defendant has been sentenced.[6]

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[5] *Id.* § 390.30(1).
[6] *Id.* § 390.60(1).

As stated in the Staff Comment, "[a] copy of the pre-sentence report is essential to institutional and parole authorities if they are to provide prompt and intelligent programs of treatment for the offender."[7] If such information is essential to correctional authorities, it is just as vital to psychiatric examiners. Furthermore, section 390.60 not only requires the furnishing of such a report but even empowers the correctional facility "to refuse to accept custody of such person until the required report is delivered."[8] This right to refuse admission should apply where a defendant is ordered into a facility for the purpose of a pre-sentence psychiatric examination.

It must be borne in mind that defendants so committed will not be voluntary patients. Ordinarily it is hard enough to obtain meaningful personal information from a patient who has voluntarily sought treatment within the confidentiality of a private psychiatrist's office. It is enormously more difficult to obtain such information from a defendant who has been ordered to undergo an involuntary examination, the outcome of which will affect his life for many years to come. The courts must offer the examining psychiatrist some assistance.

Accordingly, the following recommendation is made:

RECOMMENDATION NO. 1: Whenever a mental examination is ordered as part of a pre-sentence investigation, the examining psychiatrist should first be provided with a copy of the probation officer's report. If the order involves confinement within a facility, the person in charge should be authorized to refuse to accept custody until the required report is delivered.

Fitness to Proceed Examinations

Here, too, the statute is directed at only one half of what should be a two-way communication process. Although the Criminal Procedure Law sets forth fairly detailed requirements as to the contents of an examination report,[9] it says nothing about furnishing the psychiatric examiners with any information. Section 730.10(3) merely states the following: " 'Order of examination' means an order issued to an appropriate director by a criminal court wherein a criminal action is pending against a defendant, directing that such defendant be examined for the purpose of determining if he is an incapacitated person."

Here the need for information should be even more obvious than in a pre-sentence investigation. The psychiatric examiners are required

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7 Proposed N.Y. Crim. Proc. Law 267 (McKinney 1967).
8 CPL § 390.60(2).
9 *Id.* § 730.10(9).

to decide whether a defendant "lacks capacity to understand the proceedings against him or to assist in his own defense."[10] How can this be done without knowledge of the significant details concerning the defendant's alleged actions? The mere name and Penal Law number are only vague generalities; they are certainly not enough. A defendant, for instance, may be charged with murder. On examination he might say that he is charged with stabbing a man to death in Forest Hills on Washington's Birthday, when in actuality he is charged with choking a woman to death in Far Rockaway on Labor Day. In the absence of any specifics, how would the psychiatric examiner know whether such a person was fit to proceed? The psychiatric examiner needs some realistic "yardstick" to which he can compare the defendant's statements.

In addition, there are many defendants who, on examination, state that they do not know the charges against them. Regardless of whether they are being truthful in this claim of ignorance, a recital of the specifics of the charges usually has a salutary effect. Once they have heard the details, they are usually able to remember and/or understand them and respond appropriately.

Still another piece of information that is vital to the psychiatric examiner is the reason behind the court's doubting the defendant's capacity. Here the problem goes even deeper than communication. Section 730.30(1) states that "the court . . . must issue an order of examination when it is of the opinion that the defendant may be an incapacitated person." As the statute now stands, however, there is no requirement that the court justify its having reached such an opinion.[11]

Quite clearly, serious consequences may result. Section 730.20(2) provides for outpatient fitness to precede examination, assuming that there are such facilities, for someone who is not in custody. However, the court may well refuse to consider the question of a defendant's bail or release in his own recognizance until after it receives an examination report that the defendant does not lack capacity. Section 730.30(1) gives a court the absolute power to deprive a defendant of his right to plead or apply for bail, and to order him into a maximum security prison facility containing seriously and dangerously mentally disturbed individuals — without any requirement whatsoever that the court justify its decision.

The principle that there must be both reasonable ground for such a commitment and a record of such ground was expounded by Judge

[10] *Id.* § 730.10(1).

[11] At least in sections 658 and 870 of the Code of Criminal Procedure there had to be "reasonable ground" for believing that a defendant was incompetent. The Criminal Procedure Law requires no ground whatsoever.

Froessel more than thirty years ago. Before a commitment for psychiatric examination can be ordered, he wrote:

> [I]t must appear that there is reasonable ground and the court must exercise discretion. It cannot be done arbitrarily, or merely because of the nature of the charge . . . . Moreover, some record should be made as the basis for action . . . I can conceive of a situation whereby the magistrate's inspection of a defendant and his actions in the courtroom and the latter's prior record might be sufficient, but at least some record, however informal, should be made of the facts from which it appears that there is reasonable ground for the magistrate's action.[12]

Only recently, Judge O'Connor reaffirmed this same attitude:

> [T]he committing magistrate must at least make entry upon the record to indicate any bizarre or unusual or irrational conduct either in the courtroom or at any other prior occasion that may be brought to the Court's attention, that entry must be made on the record in order to sustain the commitment of this kind.[13]

The Commission's attitude about this whole subject seems surprisingly cavalier: "When a court issues an order of examination without any grounds appearing for such action, the defendant's remedy is habeas corpus [People *ex rel.* Schildhaus v. Warden, 1962, 37 Misc. 2d 660, 235 N.Y.S.2d 531]."[14] Habeas corpus, it is true, is the time-honored remedy;[15] but if it is wrong to deprive someone of his freedom by committing him for a psychiatric examination without justifiable cause, then this principle should be set forth in the statute itself. If the Commission can codify accepted procedure elsewhere in the Criminal Procedure Law,[16] then why not here? Such a statement would serve to remind the court of its obligations. In situations where the defendant and the court disagree as to what constitutes reasonable ground, habeas corpus would be appropriate; but to excuse the court from ever having to give any ground seems most unjust.

Accordingly, the following recommendation is made:

RECOMMENDATION NO. 2: The court should have reasonable ground for issuing an order of examination and should so state it for the record.

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12 People *ex rel.*, Apicella v. Superintendent of Kings County Hosp., 173 Misc. 642, 643, 18 N.Y.S.2d 523, 524 (Sup. Ct. Kings County 1940).

13 People v. Malice, No. 1994 (Sup. Ct. Queens County Oct. 9, 1970).

14 *Supra* note 7, at 463.

15 It was habeas corpus, of course, which led to the two decisions just cited.

16 *See, e.g.*, CPL §§ 60.20, 130.20, 380.30.

The situation may arise, however, where despite the existence of a reasonable ground, defense counsel objects to the court's order. Should the court have the right to order a fitness to proceed examination over the objections of counsel? I think not. The purpose of the examination at this point in the proceedings is not to make a psychiatric diagnosis, nor is it to help the court understand the defendant's behavior, or to advise the court in sentencing. The whole purpose of a fitness to proceed examination is to assess a specific, current legal ability. If the defendant has been able to discuss the case rationally with his own attorney, then he should not be denied his right to face the criminal charges against him.[17]

Accordingly, the following recommendation is made:

RECOMMENDATION NO. 3: Under no circumstances should the court be permitted to issue an order of examination when defense counsel states for the record that he has been able to confer with the defendant and that the defendant is fit to proceed.

Assuming that the court has reasonable ground for issuing an order of examination, that it has stated it for the record, and that defense counsel has no objection to a fitness to proceed examination, this information must be communicated to the psychiatric examiner. Ordinarily, a criminal defendant is presumed fit to proceed until such time as someone raises doubts. The specific grounds for those doubts are of crucial importance to the psychiatric examiners. Without such information they have no idea where to begin their examination and may, in fact, never even cover the specific area that gave rise to the initial doubts. Furthermore, if the psychiatric examiners are aware of the precise reasons for the court's doubts concerning the defendant's competency, their report to the court will certainly be more pertinent and of greater value.

It must be borne in mind that the defendant is seldom the one who

[17] This actually was one of the grounds for the writ of habeas corpus in People v. Malice, No. 1994 (Sup. Ct. Queens County Oct. 9, 1970). The defendant was committed for psychiatric examination as to his competency to stand trial despite the objections of defense counsel, who insisted in court that he had had no difficulty whatsoever in conferring with his client. The supreme court found the commitment defective on other grounds and never really addressed itself to the question. It did, however, note the following:

> Again, I must comment [that] the record before me, indeed, the record before Judge Skodnick indicates this defendant not only protests his innocence, but that he is clothed with the presumption of innocence, *he likewise strongly protests his sanity, as was testified here by the defense counsel.* Therefore, under all the circumstances, it is the finding of this Court that the writ is sustained. [emphasis added].

requests the psychiatric examination. Even when the request is made by defense counsel, the defendant himself is rarely aware of the reason. Unless the court provides the psychiatric examiners with some clue, they will be operating with a distinct handicap.

What kind of statement is needed? Only the simplest kind. Certainly, no one is asking for a psychiatric diagnosis from a layman. A mere sentence or two stating the basis is usually enough.[18] Certainly, no profound psychiatric knowledge or lengthy psychiatric examination is required on the part of the court. "Common sense" statements are all the psychiatric examiners are requesting.

If the practical benefits of such measure are not convincing enough, then the justice of it should be. Section 730.20(4) permits the court to hospitalize a defendant for up to thirty days or, under extenuating circumstances, even sixty days. It seems only right that the court make some statement as to the grounds for thus depriving a person of his freedom.

The final pieces of information required by the examining psychiatrists concern the identity of the defense attorney. There are many occasions when the psychiatrists would like to confer with counsel. We have seen cases where a malingering defendant would "come clean" only in the presence of his attorney. There are other times when a defendant, while not malingering, will simply refuse to talk unless his attorney is present. Often the psychiatrist might want some amplification of the reasons behind counsel's request for an examination or more details concerning defendant's behavior in court. At other times the psychiatrist, after examining the defendant, may want to inform the defense attorney that, even though the defendant is fit to proceed, there is a good case for lack of criminal responsibility. It should also be kept in mind that not every defendant knows the name of his attorney.

Accordingly, the following recommendation is made:

RECOMMENDATION NO. 4: When a defendant is ordered to undergo a psychiatric examination for the purpose of determining if he lacks capacity, a copy of the accusatory instrument, a brief statement of

[18] Such statements might be of the following type: "Defendant was in Brooklyn State Hospital last year;" or "Defendant's attorney says he cannot make sense out of the defendant's statements to him;" or "Defendant claims he is God and therefore this court has no jurisdiction over him;" or "Defendant's parents state that he has been behaving bizarrely at home prior to the present arrest, *e.g.*, he talks to imaginary people;" or "Defendant's attorney indicates that he is planning to enter a plea of not guilty by reason of mental disease under section 30.05 of the Penal Law;" or "Defendant refuses to answer any questions or make any statements in court; instead, all he does is mumble to himself;" or "Defendant was just returned from Matteawan after having been committed there two years ago from your hospital as incompetent to stand trial."

the grounds on which defendant's fitness to proceed is being questioned, and the name, address and telephone number of his counsel should be provided.

YOUTHFUL OFFENDER TREATMENT

Section 720.20(5) provides that, upon ordering an investigation to help determine whether a defendant shall be accorded youthful offender treatment, "the court may direct that it include a physical and mental examination of the defendant." Furthermore, the defendant has no real choice in the matter: "Notwithstanding any other provision of this section, if the defendant does not consent to such an examination as so directed the court may retract its order of investigation and summarily deny the request for youthful offender treatment."

Like the two sections just discussed, this statute also makes no provision for furnishing the examining physician with any information. But the problem here is even greater. Most psychiatrists, especially those who regularly examine criminal defendants for the court, have some concept of the various sentences available,[19] and the Criminal Procedure Law clearly states the requirements for fitness to proceed. The section on youthful offender treatment, however, provides no guidelines whatsoever to the examining physician. There is simply no statement as to what shall be included in a youthful offender investigation or what shall be the criteria for granting or denying youthful offender treatment.

In considering who shall be accorded youthful offender treatment, the Criminal Procedure Law establishes three categories of defendants, based on the severity of the present charges and the past criminal history.[20] If the defendant is in the best category, he can be granted youthful offender treatment without an investigation;[21] if he is in the worst category, he can be denied youthful offender treatment without an investigation.[22] If he is in either category, the court may order an investigation, which will then serve as the basis for granting or denying the request for youthful offender treatment; if he is in the middle category, the court must order such an investigation.[23] Interestingly enough, the law says nothing about who shall conduct these investigations, how much time shall be allowed, what aspects of the defendant's life shall be

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19 If not, they can at least look it up in the Penal Law.
20 CPL § 720.20(1).
21 *Id.* § 720.20(2)(a).
22 *Id.* § 720.20(4)(b).
23 *Id.* § 720.20(3).

included in the investigation,[24] and what form the report shall take.[25] Above and beyond his past criminal history and the present charges, which are already known, what should an investigator be looking for that will help a court decide who shall be spared the stigma of a criminal conviction? These are questions that may ultimately be answered by the Judicial Conference or each administrative judge.

In any event, it is hard to see the value of a psychiatric examination in this instance. Assuming that the defendant is fit to proceed,[26] for what should the examining psychiatrist be looking? Should mental illness be a factor considered in granting youthful offender status? Are there some mental problems which warrant youthful offender treatment and some which do not? Should the examining psychiatrist be expected to explore the possible motivation for the crime committed by someone who is reluctant to talk because he is still clothed in the presumption of innocence?[27] I think not. I think that a psychiatrist has nothing of value to offer the court at this stage of the proceedings and that any such examination is best postponed until there has been a conviction.

Accordingly, the following recommendation is made:

RECOMMENDATION NO. 5: There should be no physical or mental examination of a defendant as part of a youthful offender investigation. Any such examination should be performed as part of a pre-sentence investigation following a conviction.[28]

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24 Should it be as complete as a pre-sentence investigation, *supra* note 5? This is exactly what the New York City Department of Probation stopped doing several years ago because of the tremendous waste of time and manpower. It developed a short form which concentrated primarily on the defendant's criminal, educational and occupational history. Psychiatric examinations, it was agreed, were of no importance in this determination.

25 *Cf.* CPL § 390.30(3), which states that the pre-sentence report must contain "an analysis of as much of the information gathered in the investigation as the agency that conducted the investigation deems relevant to the question of sentence. The report must also include any other information that the court directs to be included." CPL § 730.10(9) specifies the requirements for an examination report as to fitness to proceed.

26 That examination would have been ordered under CPL § 730.30(1).

27 No statement made by a defendant in the course of a youthful offender investigation can be used as evidence against him, although it may be taken into consideration by the sentencing court. CPL § 720.20(6). This is, however, a distinction that is apt to be missed by most defendants.

28 Subsequent to the writing of this paper the 1971 Legislature repealed Article 720 of the CPL, entitled "Youthful Offender Treatment," and substituted a new Article 720, entitled "Youthful Offender Procedure." The new Article 720 conforms perfectly with the above recommendation. There is no provision for physical or mental examination of a defendant as part of a youthful offender investigation. In fact, there is no such thing any more as a youthful offender investigation per se. Once a youth who is eligible for youthful offender treatment has been convicted of the criminal charges, the court must order a *pre-sentence investigation* and then determine at the time of sentencing whether the convicted youth should, instead of being sentenced, be adjudicated a youthful offender. Although the new article makes no specific reference to a psychiatric examination, such an examination could obviously be ordered pursuant to CPL § 390.30(2).

CONCLUSION

Communication means sharing information commonly understood by both sender and receiver. The court rightfully expects to receive pertinent communications from its psychiatric examiners; but in order for the psychiatrists to be able to communicate in this manner, they must first be provided with certain essential data. It is not enough for the court simply to order a psychiatric examination if there is to be a worthwhile examination and report, the court must furnish the psychiatrist with the necessary amount of information.