Expedited Diversion to Court-Ordered Treatment (EDCOT)

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What is EDCOT?

- An expedited civil commitment process for diverting offenders with serious mental illness from the criminal system as soon as possible to inpatient and outpatient treatment as clinically indicated. Diversion is non-contingent; charges are dropped.
- As envisioned, EDCOT would channel **a large proportion** of offenders with serious mental illness out of jails and prisons and into a treatment-oriented system that would provide acute services, discharge planning, and problem-solving management in the community.
- Expedited diversion to the civil process would avoid a competence (CST) assessment and restoration process rife with inefficiencies, pointless proceedings, and high costs
- An EDCOT diversion is predicated on (i) a prosecutorial judgment that the EDCOT commitment serves the interests of society better than prosecution and criminal justice processing; (ii) a decision by a competent defendant or a designated surrogate that the commitment is in the defendant's best interests; and (iii) judicial findings of the prescribed commitment criteria.
- **EDCOT: A preliminary proposal, not a finished product**
- **Legislative study now underway in Virginia**

Publications

- Hoge SK, Bonnie RJ: A new commitment pathway for offenders with serious mental illness: Expedited Diversion to Court-Ordered Treatment. Psychiatric Services 2021; 72:969-971

- Hoge SK, Bonnie RJ: Expedited diversion of criminal defendants to court-ordered treatment. Journal of the American Academy of Psychiatry and the Law, 2021; 49:517-25

Outline

- Magnitude of the Problem (brief summary)
- Focus on Costs (and Questionable Therapeutic Benefits) of Trial Competence Assessments and Restoration Interventions
- Is EDCOT a Sensible Solution?

Magnitude of the Problem

- Increasing proportion (~16%) of arrestees and persons in jails and prisons have a SMI; most also have co-morbid and difficult-to-treat conditions and are released without re-entry planning; not surprisingly, they have high rates of recidivism. Big Problem
- Focus here on "problem within the problem": Number of arrestees whose competence to stand trial is in question (requiring assessment), though difficult to estimate, is probably ~ 150,000/year – and rising

Practice of CST Assessment and Treatment Requires Fundamental Change

- CST process rests on definitive and sensible legal principle: Criminal prosecution may not proceed unless defendant is competent for criminal adjudication. CST assessments are specialized evaluations focusing on capacities to assist counsel and understand the adjudication process.
- However, NB: The primary assignment of forensic assessment system is to assess and restore CST, **NOT** to serve the defendants' treatment needs.
- The endpoint is to achieve a minimum level of assessed competence and return defendants to the CJS for adjudication
- **As now being administered, CST process for assessment and treatment is complex, expensive and wasteful**

Do CST Assessments and Restoration Interventions have Therapeutic Benefits?

- Among defendants hospitalized for restoration of capacity: treatment largely limited to pharmacotherapy for acute disturbance and education targeted to address gaps in knowledge about the legal process
- The endpoint is achieving a minimum level of assessed competence and returning defendants to the CJS

High Costs of Inpatient CST Assessment and Restoration

- SAMHSA 2014 data, based on comprehensive financial and patient data collected from state mental health agencies

- 3375 patients hospitalized for pretrial evaluations in 30 states at any one time, at an annual cost over $1B

- 4562 patients hospitalized for restoration at any one time at an annual cost of $1.36B

- These figures do not include the costs of attorneys, court or clerical staff, security, or transportation [or of outpatient assessments].

Trajectory of CST Costs

- In 2014, states spent $9B on inpatient mental health services, of which $4.1B was for inpatient forensic services (representing 43.7%)

- The proportion of public hospital expenditures devoted to inpatient forensic services has grown steadily from 25.7% in 2001, to 36.4% in 2008, to 43.7% in 2014 [and presumably higher now].

Despite High Cost, Scant Treatment Benefits of CST Assessment and Restoration Process

- Forensic CST restoration generally does not have the therapeutic objectives of a typical civil hospitalization: e.g., achieving discharge readiness, arranging services to enable patient to function successfully in the community
- It has been said that forensic patients "disappear" from engagement with community mental health services.
- The process makes little contribution to defendants' overall well-being. The needs relating to discharge and transition planning, housing, transportation, federal entitlements are tyically not assessed; and no plans made for successful re-entry into the community.

Overall, CST "Systems" are in Crisis

- CST services in growing demand; long waitlists and delays; longer jail times; lawsuits in many states by inmates waiting in jail for assessment hospitalization
- Increasing CST hospitalizations are reducing beds available for civil patients
- One-third of states have implemented jail-based competence-restoration programs in response, thereby **further attenuating the connection of disordered defendants to the public mental health system and treatment resources.**
- Many defendants who are restored to competence in jail will be released with no housing, no means of support, and insufficient medication.

Is EDCOT a Solution?

- Expedited diversion from the CJS into a mandated treatment system. An involuntary civil commitment pathway.
- The commitment is a variation of ordinary civil commitment governed by the principles enunciated in *O'Connor v. Donaldson* (1975) and *Addington v. Texas* (1979)
- As a formal diversion (even though it originated in a criminal prosecution), EDCOT is envisioned as a therapeutic process **rooted in the** *parens patriae* **authority** of the state.
- As with ordinary civil commitment, the criteria take account of the ways in which defendants' behaviors affect public peace and security as well as their own well-being.

EDCOT: Therapeutic-Orientation

- EDCOT commitment relies mainly on mandatory outpatient treatment designed to reduce the risk of further deterioration, instability, or distress if the respondent remains untreated.
- EDCOT is a variant of ordinary civil commitment. It is NOT intended to be a risk-averse, incapacitative form of commitment analogous to NGRI confinement.
- However, EDCOT is more protective than ordinary civil commitment in authorizing short-term intensive intervention, including confinement, in response to noncompliance or other indicators of instability and probable relapse.

EDCOT: Defining the Target Population

- **EDCOT commitments are for seriously mentally ill defendants whose criminal behavior is found by a court to be sufficiently related to a serious mental illness that they are likely to reoffend in the absence of aggressive treatment interventions and social supports addressing criminogenic factors.**
- *EDCOT is intended to apply more broadly than ordinary civil commitment and to include long-term risk.
- Cases suitable for EDCOT are those in which the predicate illness and associated criminal behavior justify an array of mandatory interventions designed to stabilize functioning and prevent future deterioration and recidivism
- In our view, the focus on longer-term risk associated with a deteriorating course fully satisfies the accepted constitutional grounds for preventive intervention under contemporary mandatory outpatient statutes.

EDCOT Process

- Initiation:
  - By petition of the prosecution
    - "Involuntary" – but often patient will lack decisional capacity
    - Statute will assure appropriate representation of incompetent defendant's preferences and interests
  - By consensual disposition: very likely in less serious offenses
  - Any request for CST evaluation would trigger judicial consideration of the appropriateness of an EDCOT commitment as an alternative course

- Expectation:
  - Many of the SMI offenders in jail would be diverted to EDCOT with charges dropped
  - This would occur early in the process so that most SMI defendants would not enter the costly CST system

EDCOT: Procedures

- Request for EDCOT would lead to a mental health assessment on outpatient basis (including jail or detention facilities), or a designated inpatient facility; rapid: no more than 30 days
- Evaluation would determine the presence of a mental illness, summarize history of past problematic behavior, and identify risks and triggers for criminal behavior, as well as other factors that affect social adjustment.
- Formulation of a treatment plan.

EDCOT Hearing

- Governed by current commitment requirements: right to notice, counsel, hearing, proof by clear and convincing evidence, right to appeal

EDCOT Commitment Criteria

- Serious mental disorder as defined by state law
- The person engaged in criminal conduct that was related to mental illness (NOT to be confused with legal criteria for insanity defense)
- Significant likelihood of future reoffending in absence of intensive treatment interventions
- Mental health expert evidence that mental health and accompanying community interventions and services will reduce the risk of reoffending
- Assessment of relation of mental disorder and offending is treatment-oriented, not responsibility oriented. Would providing the recommended services reduce the likelihood of re-offending? (NOT asking if disorder or its symptoms "caused" the offending (or affected the person's appreciation of the consequences or wrongfulness of his conduct).

EDCOT Commitment

- Judicial order identifying required services and providers, inpatient and outpatient treatment as clinically indicated, and other services: ACT, residential services, day treatment, and supports.

- Judicial monitoring of treatment: review reports of the providers, status hearings AT LEAST once every 6 months

- In the event of substantial noncompliance, the court has authority to order short-term custodial orders to provide assessment, intervention, and problem-solving

Length of Commitment

- Statutory ceilings to be set by state legislatures with ceilings related to the seriousness of the predicate offense
- Individualized judicial judgments on the basis of clinical progress, degree of stability in the community
- In some jurisdictions, commitment to ordinary “civil” MOT may be appropriate for individuals facing misdemeanor charges, if clinically indicated and sufficient oversight is available

Length, Serious Offenses

- Misdemeanor offenses: maximum six months or one year
- For others: the ceiling be tied to the seriousness of the offense; examples:
- Underlying nonviolent felony offenses (three years?)
- For more serious violent offenses: (five years?)
- If longer incapacitation is thought to be justified, EDCOT is not the right tool.
- Commitments would be terminated at any time upon a judicial determination the person is no longer in need of supervision for public safety reasons

Goals

- Rationalize nation's approach to the care and management of SMI individuals who become involved in the CJS
- Effect on systems:
  - Reduce misallocated hospital expenditures for CST ($4.3B); repurpose funds to meeting treatment needs
  - Reduce the number of SMI in jails and prisons (potentially a $15B saving)
  - Reduce the size of the Forensic and CST systems
  - Increase the size of the civil system: increase expenditures on short-term inpatient beds, and mandated intensive outpatient treatment systems
  - Improve the quality of care for individuals with SMI who are CJS-involved