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Constitutional Law - Due Process and Equal Protection - Commitment of Incompetent Defendant

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The *Rimmel* case should be overruled so that the courts can return to the state's traditional common sense standard to adjudge competency of minor witnesses to testify.

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CONSTITUTIONAL LAW—DUE PROCESS AND EQUAL PROTECTION—COMMITMENT OF INCOMPETENT DEFENDANT—The Supreme Court of the United States has held that Indiana's commitment of an incompetent defendant solely on the basis of his incapacity to stand trial violated the defendant's rights of equal protection and due process.

Jackson v. Indiana, 406 U.S. 715 (1972).

Jackson, a twenty-seven-year-old illiterate deaf mute with the mental capacity of a pre-school child, was arrested and charged with robbery. Before trial he was committed to the Indiana Department of Mental Health as incompetent to stand trial.[1] Jackson's counsel filed a motion for a new trial, arguing that commitment until Jackson was competent to stand trial[2] amounted to a life sentence[3] without his ever having been convicted of a crime. Jackson's counsel contended that this violated Jackson's rights of due process and equal protection.[4] The trial court denied the motion.[5] On appeal the Supreme Court of Indiana affirmed.[6]

1. IND. CODE §§ 35-5-3-2 (1971) provides:
When at any time before the trial of any criminal cause . . . the court . . . has reasonable ground for believing the defendant to be insane, he shall immediately fix a time for a hearing to determine the question of the defendant's sanity . . . . If the court shall find that the defendant has not comprehension sufficient to understand the proceedings and make his defense, the trial shall be delayed or continued on the alleged insanity of the defendant . . . . [T]he court shall order the defendant committed . . . . Whenever the defendant shall become sane the superintendent of the state psychiatric hospital shall certify the fact to the proper court, who shall enter an order . . . directing the sheriff to return the defendant . . . . Upon the return to court of any defendant so committed he or she shall then be placed upon trial . . . .

2. Although IND. CODE § 35-5-3-2 (1971) refers to the defendant's "sanity," the term is not defined. The Court read the word as if it were synonomous with competence to stand trial.

3. One examining doctor testified at the hearing that it was very unlikely that Jackson could ever learn to read and write or develop proficiency in sign language. He testified that Jackson's prognosis was dim. The other examining doctor testified that even if Jackson were not a deaf-mute, he would be incompetent to stand trial. He doubted that Jackson could ever develop the necessary communication skills. An interpreter from a state school for the deaf testified that Indiana had no facilities to teach Jackson the necessary communication skills. 406 U.S. at 718.

4. Jackson's counsel also contended that the commitment violated Jackson's eighth amendment rights. However, the Court did not decide on this issue. *Id.* at 739.

5. *Id.* at 719.

6. 253 Ind. 487, 255 N.E.2d 515 (1970).

Rehearing was denied.[7] The Supreme Court granted certiorari[8] and reversed,[9] holding that Indiana's indefinite commitment of Jackson, solely on the basis of his incompetence to stand trial, violated Jackson's rights of equal protection[10] and due process.[11]

In addition to the provisions relating to the commitment of individuals who are charged with a crime, the state of Indiana has two statutory provisions for the commitment of individuals who are not charged with a crime.[12] An Indiana statute[13] provides for the commitment of feebleminded persons who are not insane.[14] The other section of this statute[15] deals with the commitment of persons who are mentally ill.[16] The procedures used for commitment in all three instances are basically the same.[17]

In deciding the equal protection issue the Court reasoned that a comparison of the three commitment statutes showed that Jackson was subjected to a more lenient standard of commitment and a stricter standard of release than those people civilly committed, thus depriving him of the equal protection of the laws.[18] The Court rejected the state's argument that Jackson's commitment was not an indefinite one.[19]

A state may, in the application of its police power, make certain classifications.[20] However, a classification must be based on differences that have a reasonable relationship to the purposes of the law.[21] The Su-

7. 406 U.S. at 719.
8. 401 U.S. 973 (1971).
9. 406 U.S. at 720.
10. *Id.* at 730.
11. *Id.* at 731.
12. This type of commitment will be referred to as a civil commitment, as opposed to a criminal commitment.
13. IND. CODE § 16-15-1-3 (1971).
14. A person committed under this section may be released "at any time" provided that "in the judgment of the superintendent, the mental and physical condition of the patient justifies it." IND. CODE § 16-15-4-11 (1971).
15. IND. CODE § 16-14-9-1 (1971).
16. A mentally ill person is one who is:
> . . . afflicted with a psychiatric disorder which substantially impairs his mental health; and, because of such psychiatric disorder, requires care, treatment, training or detention in the interest of the welfare of such person or the welfare of others of the communty in which such peson resides . . . .

Id. These people are released in the discretion of the superintendent of the mental institution to which they were assigned. IND. CODE § 16-14-9-23 (1971).
17. 406 U.S. at 722.
18. *Id.* at 730.
19. The state argued that because the record failed to affirmatively disclose that Jackson will never improve, his commitment was not really an indefinite one. *See* note 3 *supra.*
20. *See* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).
21. *See* Morey v. Doud, 354 U.S. 457 (1956); Walters v. City of St. Louis, 347 U.S. 231 (1954).

preme Court applied these principles in *Baxstrom v. Herold*,[22] the leading case in the application of the equal protection clause to the area of commitments.[23] In *Baxstrom* a prisoner nearing the end of his sentence was civilly committed without the jury review available to all others civilly committed.[24] The Supreme Court held that for purposes of granting a jury determination of the question whether a person is mentally ill, there is no conceivable basis for distinguishing persons nearing the end of a prison sentence from all other persons civilly committed.[25] In the instant case the Court used *Baxstrom* as a basis for its equal protection holding that the mere filing of criminal charges was insufficient to justify less procedural and substantive protection against indefinite commitments.[26]

The Court also held that Indiana's indefinite commitment of Jackson, solely on the basis of his incompetence to stand trial, was a violation of his fourteenth amendment right of due process.[27] The Court first noted that the federal statute[28] governing commitment of individuals is very similar to the Indiana statutes.[29] If a defendant is found incompetent to stand trial[30] he is committed until he becomes competent or until the charges have been disposed of according to law.[31] Section 4247 provides for commitment if the prisoner is insane or mentally incompetent, is dangerous, and care for him in a state facility is not available.[32] Persons committed under this section are eligible for release when any of the three conditions is no longer present, "whichever event shall first occur."[33] In *Greenwood v. United States*[34] the Court upheld the pre-trial

22. 383 U.S. 107 (1966). A previous case had given an indication of the decision in *Baxstrom*. *See* United States *ex rel.* Carroll v. McNeill, 294 F.2d 117 (2d Cir. 1961), *appeal dismissed as moot*, 369 U.S. 149 (1962).
23. *See* United States *ex rel.* Schuster v. Herold, 410 F.2d 1071 (2d Cir.), *cert. denied*, 396 U.S. 487 (1969).
24. Petitioner in *Baxstrom* was committed to an institution for the dangerously insane without a judicial hearing to determine his dangerous propensities, as well as committed without the jury review available to all others civilly committed. 406 U.S. at 724.
25. 383 U.S. at 111.
26. 406 U.S. at 724.
27. *Id.* at 731.
28. 18 U.S.C. §§ 4244-48 (1970).
29. Although the federal government has no *parens patriae* power to commit people civilly, it derives its power to commit from its power to prosecute. *See* Greenwood v. United States, 350 U.S. 366 (1956).
30. 18 U.S.C. § 4244 (1970).
31. *Id.* § 4246.
32. *Id.* § 4247. On its face, the statute is applicable only to prisoners. But, in *Greenwood* the Court held that it applied to defendants awaiting trial as well. *See* 383 U.S. at 111.
33. 18 U.S.C. § 4248 (1970).
34. 350 U.S. 366 (1956).

commitment of a defendant under this federal statute.[35] However, the decision addressed only the narrow constitutional question of whether the commitment in the circumstances of that case and therefore the legislation authorizing it was within congressional power.[36] Greenwood was ostensibly committed under section 4244 and could not be released until he became competent.[37] Like Jackson, his chances of recovery were small. But the district court had also found that Greenwood would be dangerous if released and therefore applied section 4247.[38] Thus, Greenwood would be eligible for release when he was no longer dangerous.[39]

The Court noted that after *Greenwood* the federal courts have refused to uphold commitments solely on sections 4244 and 4246 grounds when the defendant has little or no chance of gaining competence to stand trial.[40] The cases hold that sections 4244 and 4246 authorize only a temporary commitment. A defendant committed solely under these sections can be held only for the reasonable length of time necessary to determine if he will ever gain competency to stand trial.[41] If it is determined that he will not gain such competency, he must be given a section 4247 hearing or released.[42] Thus, the Court rejected the state's argument that *Greenwood* supported Jackson's commitment, noting that an indefinite commitment under the federal statute will be sustained only on a finding of dangerousness,[43] a factor not considered in Jackson's commitment.

The power of the states to commit an incompetent defendant who will be released only when he attains competence to stand trial has been tested relatively few times in federal or state courts.[44] In *United States ex rel. Wolfersdorf v. Johnston*,[45] a federal court held that a state's twenty-year commitment of a defendant as incompetent to stand trial violated the due process clause.[46] In *People ex rel. Myers v. Briggs*,[47] the

35. *Id.* at 375.
36. *Id.*
37. 18 U.S.C. § 4246 (1970).
38. 125 F. Supp. 777, 779 (W.D. Mo. 1954).
39. 18 U.S.C. § 4248 (1970).
40. *See* United States v. Klein, 325 F.2d 283 (2d Cir. 1963); Cash v. Circone, 312 F. Supp. 822 (W.D. Mo. 1970); Royal v. Settle, 192 F. Supp. 176 (W.D. Mo. 1959).
41. *Id.*
42. Justice Blackmun labeled this the "rule of reasonableness" imposed by the federal courts. 406 U.S. at 733.
43. *Id.* at 736.
44. *Id.* at 735.
45. 317 F. Supp. 66 (S.D.N.Y. 1970).
46. *Id.* at 68.
47. 46 Ill. 2d 281, 263 N.E.2d 109 (1970).

Illinois Supreme Court held that a defendant who had been committed for four years as incompetent to stand trial should be given an opportunity to stand trial or be released.[48]

The Court in *Jackson* also based its due process decision on the fact that Jackson's commitment did not rest on proceedings that considered any of the bases used by the state in its exercise of its power of indefinite commitment.[49] In addition, the Court noted that the nature and duration of Jackson's commitment bore no reasonable relation to the purpose for which he was committed, that purpose being the state's ability, by care and treatment, to aid Jackson in attaining competence to stand trial.[50]

The Court in *Jackson* imposed the federal "rule of reasonableness"[51] on the states, holding that if a person is charged by a state with a criminal offense and committed solely on the basis of his incompetence to stand trial, he cannot be held more than the reasonable amount of time necessary to determine if there is a substantial probability that he will attain that competence in the foreseeable future.[52] If it is found that this is not the case, he must be committed under the usual civil commitment proceedings or he must be released.[53] Even if it is found that he will attain the necessary competence in the foreseeable future, his continued commitment must be justified by progress toward that goal.[54]

Commentators have noted the confusion on the part of judges, lawyers, and psychiatrists over the test for incompetency and the test for mental illness.[55] It has been pointed out that this confusion often results in the incompetency rule working an injustice on the incompetent defendant rather than protecting him.[56] For example, prior to the decision in *Jackson* an incompetent defendant could be committed indefinitely solely on the basis of his incapacity to stand trial. This would often result in the defendant's serving more time in an institution than

48. *Id.* at 288, 263 N.E.2d at 113.
49. Examples of the bases used by the state in its exercise of its power of indefinite commitment are the person's ability to care for himself and society's interest in his restraint. IND. CODE §§ 16-15-1-3, 16-14-9-1 (1971). The Court noted that Jackson's commitment rested on proceedings that did not consider as relevant either of these bases. 406 U.S. at 737-38.
50. 406 U.S. at 738.
51. 350 U.S. at 375.
52. 406 U.S. at 738.
53. *Id.*
54. *Id.*
55. Lewin, *Incompetency to Stand Trial: Legal and Ethical Aspects of An Abused Doctrine*, 1969 LAW & THE SOCIAL ORDER 233 [hereinafter cited as Lewin]; *see* A. MATHEWS, MENTAL DISABILITY AND THE CRIMINAL LAW 20 n.24 (1970).
56. Lewin, *supra* note 55, at 239.

was provided for by the sentence for the crime of which he was accused.[57] The Court's holding in *Jackson* changed this because now an incompetent defendant cannot be held more than the reasonable amount of time necessary to determine if he will ever become competent. However, in remedying this injustice the Court may have added unnecessarily to the existing confusion by deciding Jackson's case on due process and equal protection grounds. It can be argued that the due process grounds alone provided the best vehicle for obtaining the result.

The standard commonly used for determining incompetency to stand trial is that the defendant must understand the nature of the charges against him and be able to participate in his defense.[58] The standards for determining whether a person should be civilly committed are quite different.[59] But psychiatrists have tended to correlate, incorrectly, the test for incompetency and the test for mental illness. Thus, they have based their recommendations to commit the defendant on an incorrect standard—the standard for mental illness or civil commitment.[60] An example of the confusion over the two standards in statutory form is the Indiana statute used to commit Jackson: "[w]hen . . . the court . . . has reasonable ground for believing the defendant to be *insane* . . ."; and "[w]henever the defendant shall become *sane*. . . ."[61] The equal protection holding in *Jackson* added to this confusion. The Court held that Jackson was denied equal protection of the law because he was committed on a different substantive standard than those persons who were civilly committed. The Court implies from this holding that the traditional standards for incompetency can no longer be used to commit a defendant. The Court implies that to use these standards would be a violation of the defendant's right of equal protection because they are different from the standards used to commit people civilly. Thus, judges, lawyers, and psychiatrists will be encouraged, if not required, to continue to use the incorrect test of mental illness rather than the traditional test for incompetency when determining if a defendant is mentally capable of standing trial.[62]

57. *See* Comment, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 456 (1967-1968); Lewin, *supra* note 55, at 238-39.

58. Dusky v. United States, 362 U.S. 402 (1960).

59. Examples of standards for determining whether a person should be civilly committed are dangerousness to self or others, need of the patient for care and treatment, whether the patient's welfare and the welfare of others require his hospitalization, and "insanity." F. LINDMAN & D. MCINTYRE, JR., THE MENTALLY DISABLED AND THE LAW 17 (1961).

60. Lewin, *supra* note 55, at 240.

61. IND. CODE § 35-5-3-2 (1971) (emphasis added).

62. It may be argued that the holding on equal protection grounds was not aimed at

It may be argued that the Court could have protected Jackson's rights adequately without adding to the confusion over the different tests for the commitment of individuals. This could have been accomplished by deciding Jackson's case solely on due process grounds.

As a result of the due process holding in *Jackson*, an incompetent defendant cannot be committed for more than the reasonable amount of time necessary to determine if there is a substantial probability that he will attain the capacity to stand trial in the foreseeable future. It appears that the main objective of the Court's decision in *Jackson* was to protect the incompetent defendant from an indefinite commitment based solely on his incapacity to stand trial.[63] This objective is accomplished by the due process holding because if it is found that the defendant lacks the capacity to stand trial and that he will not attain that capacity within the foreseeable future, the state must release him or institute customary civil proceedings. The equal protection holding, read in light of the additional confusion it generated and since the Court's main objective could have been accomplished without it, seems unnecessary.

It is also interesting to note the precedent which the Court used as a basis for its equal protection holding. The Court cited *Baxstrom* for the principle that ". . . there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments."[64] From this the Court reasoned:

> If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice.[65]

But it should be pointed out that *Baxstrom* did not deal with the substantive standards by which a person is committed. That case concerned a procedural issue only: whether a prisoner who was being committed at the expiration of his sentence was entitled to a jury trial available to all other persons civilly committed. Even though an incompetent defendant is entitled to the same procedural safeguards, such as a jury

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the standards for commitment, but rather at the standards for release because Jackson's commitment was, in effect, permanent. 406 U.S. at 730. However, the Court's broad holding on equal protection grounds includes both commitment and release. *Id.*

63. Thus, the Court states: "Were the state's factual premise that Jackson's commitment is only temporary a valid one, this might well be a different case." *Id.* at 725.

64. *Id.* at 724.

65. *Id.*

trial, available to persons civilly committed, it does not follow that he should be judged on the same substantive standards as persons civilly committed when it is being determined whether he should be committed at all. This is because of the inherent substantive differences between the test for incompetency to stand trial and the test for mental illness.

In light of the additional confusion over the different substantive tests for commitment generated by the equal protection holding and the Court's use of questionable precedent as a basis for that holding, and because the Court's objective could have been accomplished without it, it is this writer's opinion that the due process grounds should have been the sole basis for the Court's decision in *Jackson*.

Paul M. Puskar

CONSTITUTIONAL LAW—FIFTH AMENDMENT—COMPELLED TESTIMONY—USE AND DERIVATIVE USE IMMUNITY—The United States Supreme Court has held that use and derivative use immunity is coextensive with the privilege against self-incrimination and is therefore sufficient to compel testimony over a claim of the privilege.

Kastigar v. United States, 406 U.S. 441, *rehearing denied*, 408 U.S. 931 (1972).

The petitioners were subpoenaed to appear before the United States grand jury in the central district of California. Anticipating the petitioners' unwillingness to testify, the Government applied to the district court for an order pursuant to Title 18 of the United States Code, sections 6002 and 6003,[1] which compels a witness to respond to the

1. § 6002. Immunity generally
Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
(1) a court or grand jury of the United States,
(2) an agency of the United States, or
(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination: but no testimony or other information