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Between Unfitness and Commitment: Difficulties in the Disposition of Unfit Defendants in Illinois, 9 J. Marshall J. Prac. & Proc. 905 (1976)

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BETWEEN UNFITNESS AND COMMITMENT: DIFFICULTIES IN THE DISPOSITION OF UNFIT DEFENDANTS IN ILLINOIS

INTRODUCTION

In Illinois, there is currently a difference between the substantive standards for unfitness to stand trial and those necessary for civil commitment to a mental hospital. Due to a procedural change in the disposition of an unfit defendant, both standards must now be utilized. Prior to 1972, the Illinois statutory procedure prescribed that an accused felon found unfit for trial be automatically committed to a mental institution.[1] Shortly after this procedure was abolished by the legislature, a similar scheme was held to be unconstitutional by the United States Supreme Court.[2] However, constitutional violations still exist under the present Illinois statute whereby an unfit defendant is remanded to the Department of Mental Health for a civil commitment hearing.[3] The procedural change in the disposition

1. Law of August 22, 1967, ch. 38, § 104-3, [1967] Ill. Laws 2829 (repealed 1972):

(a) A person who is found to be incompetent because of a mental condition shall be committed to the Department of Mental Health during the continuance of that condition.

(b) When reasonable grounds exist to believe that an incompetent is now competent the court in the county wherein the incompetent is confined or the court in which incompetency was found shall conduct a hearing in accordance with this Article to determine the person's present mental condition. Reasonable notice of such hearing shall be given to the State, the incompetent and to his attorney of record, if any. If the court, following such hearing, finds the person to be competent the proceedings pending against him shall be resumed.

(c) A person committed to the Department of Mental Health under the provisions of this Article who is thereafter sentenced for the offense charged at the time of his commitment shall be credited with the time during which he was committed and confined in a public or private institution and that portion of his sentence shall be considered served.

2. Jackson v. Indiana, 406 U.S. 715 (1972), discussed at notes 47-62 *infra*.

3. ILL. REV. STAT. ch. 38, § 1005-2-2 (1973):

(a) If the defendant is found unfit to stand trial or be sentenced, the court shall remand the defendant to a hospital, as defined by the Mental Health Code of 1967, and shall order that a hearing be conducted in accordance with the procedures, and within the time periods, specified in such Act. The disposition of defendant pursuant to such hearing, and the admission, detention, care, treatment and discharge of any such defendant found to be in need of mental treatment, shall be determined in accordance with such Act. If the defendant is not ordered hospitalized in such hearing, the Department of Mental Health shall petition the trial court to release the defendant on bail or recognizance, under such conditions as the court finds appropriate, which may include, but need not be limited to requiring the defendant to submit to or to secure treatment for his mental condition.

(b) A defendant hospitalized under this Section shall be re-

of unfit defendants now juxtaposes the differences between the substantive standards for unfitness to stand trial[4] and those

turned to the court not more than 90 days after the court's original finding of unfitness, and each 12 months thereafter. At such re-examination the court may proceed, find, and order as in the first instance under paragraph (a) of this Section. If the court finds that defendant continues to be unfit to stand trial or be sentenced but that he no longer requires hospitalization, the defendant shall be released under paragraph (a) of this Section on bail or recognizance. Either the State or the defendant may at any time petition the court for review of the defendant's fitness.

(c) A person found unfit under the provisions of this Article who is thereafter sentenced for the offense charged at the time of such finding, shall be credited with time during which he was confined in a public or private hospital after such a finding of unfitness. If a defendant has been confined in a public or private hospital after a finding of unfitness under Section 5-2-6 for a period equal to the maximum sentence of imprisonment that could be imposed under Article 8 for the offense or offenses charged, the court shall order the charge or charges dismissed or motion of the defendant, his guardian, or the Director of the Department of Mental Health.

(d) An order finding the defendant unfit is a final order for purposes of appeal by the State or by the defendant.

4. ILL. REV. STAT. ch. 38, § 1005-2-1 (1973):

(a) For the purposes of this Section a defendant is unfit to stand trial or be sentenced if, because of a mental or physical condition, he is unable:

(1) to understand the nature and purpose of the proceedings against him; or

(2) to assist in his defense.

(b) The question of the defendant's fitness may be raised before trial or during trial. The question of the defendant's fitness to be sentenced may be raised after judgment but before sentence. In either case the question of fitness may be raised by the State, the defendant or the court.

(c) When a bona fide doubt of the defendant's fitness to stand trial or be sentenced is raised, the court shall order that a determination of that question be made before further proceedings.

(d) When the question of the defendant's fitness to stand trial is raised prior to the commencement of trial, the question shall be determined by the court, or by a jury. The defendant or the State may request a jury or the judge may on his own motion order a jury. When the question is raised after commencement of the trial, the question shall be determined by the court.

(e) Subject to the rules of evidence, matters admissible on the question of the defendant's fitness to stand trial or be sentenced may include, but shall not be limited to, the following items:

(1) the defendant's social behavior or abilities; orientation as to time and place; recognition and correlation of persons, places and things; performance of motor processes; and behavioral functions, habits, and practices;

(2) the defendant's knowledge and understanding of the nature of the charge; of the nature of the proceedings; of the consequences of a finding, judgment or sentence; of the courtroom facilities and personnel; and of the functions of the participants in the trial process;

(3) the defendant's abilities before and during trial to observe, recollect, consider, correlate and narrate occurrences, especially those concerning his own past and those concerning the incidents alleged; to communicate with counsel; and to reason and make judgments concerning questions and suggestions of counsel before trial and in the trial process.

(f) Any party may introduce evidence as to the defendant's fitness.

(g) If requested by the State or defendant, the court shall appoint a qualified expert or experts to examine the defendant and

necessary for civil commitment.[5] The result of this dichotomy is that a person charged with a felony may be found unfit to stand trial, but not sufficiently in need of mental treatment under current standards to be committed.

When a defendant is found unfit to stand trial, but not sufficiently in need of mental treatment to be civilly committed, the accused is returned to jail and the Department of Mental Health is instructed to petition the trial court to release the accused on bail or recognizance.[6] If bail is denied or set at an amount which the defendant is unable to pay,[7] the accused may remain

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testify regarding his fitness. The court shall enter an order on the county board to pay the expert or experts.

(h) No statement by the defendant in any examination regarding his fitness, shall be admissible on the question of guilt.

(i) The burden of proving the defendant is not fit is on the defendant if he raises the question and on the State if the State or the court raises the question.

(j) The party raising the question has the burden of going forward with the evidence. If the court raises the question, the State shall have the burden of going forward with the evidence. At a fitness hearing held at the instance of the court, the court may call and examine witnesses on the question of fitness.

5. ILL. REV. STAT. ch. 91½, § 1-11 (1973):

'Person in Need of Mental Treatment', when used in this Act, means any person affected with a mental disorder, not including a person who is mentally retarded, as defined in this Act, if that person, as a result of such mental disorder, is reasonably expected at the time the determination is being made or within a reasonable time thereafter to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury or to provide for his own physical needs. This term does not include a person whose mental processes have merely been weakened or impaired by reason of advanced years.

6. ILL. REV. STAT. ch. 38, § 1005-2-2(a) (1973).

7. It has not been determined whether release by bail or recognizance is mandatory under § 1005-2-2(a). The issue has been presented to the Illinois Supreme Court, but the Court did not resolve the problem. People *ex rel.* Martin v. Strayhorn, Illinois Supreme Court Docket No. 47777 (Jan. 26, 1976). In light of the wording of § 1005-2-2(b) it seems that release on bail or recognizance is mandatory, *i.e.*, "the defendant *shall* be released under paragraph (a) of this Section, on bail or recognizance." ILL. REV. STAT. ch. 38, § 1005-2-2(b) (1973) (emphasis added). If an unfit defendant, who has been hospitalized but no longer requires hospitalization, must be released under § 1005-2-2(b), an unfit defendant who needs no hospitalization seemingly must be released under § 1005-2-2(a). If release is mandatory, it may be on financially securable bail, recognizance or treatment as a condition of bail. As a medical proposition, out-patient treatment is desirable. *See* Engleberg, *Pretrial Criminal Commitment to Mental Institutions: The Procedure in Massachusetts and Suggested Reforms*, 17 CATH. L. REV. 163, 182 (1968).

Some situations may make bail inappropriate. "All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great." ILL. CONST. Art. I, § 9 (1970).

> . . . [T]he constitutional right to bail must be qualified by the authority of the courts, as an incident of their power to manage the conduct of proceedings before them, to deny or revoke bail when such action is appropriate to preserve the orderly process of criminal procedure.

People *ex rel.* Hemingway v. Elrod, 60 Ill. 2d 74, 79, 322 N.E.2d 837, 840 (1975). The right to bail must be balanced against the general public's right to receive reasonable, protective consideration by the courts. *Id.* The right to bail is not absolute. *Id.* If it appears that the defendant

in jail for an indeterminate period without proceeding to trial or receiving treatment. Thus, the accused is denied his right to a speedy trial, due process, and equal protection.

The result under the present statutory procedures is that an accused may not be committable for treatment, not triable on the criminal charge, and not releasable on bail. The ultimate issue thus is whether such an accused felon should be tried although unfit or whether he should be released. This comment will examine several cases wherein this situation was presented to the courts, and the compliance of the current Illinois procedures with the constitutional guidelines established by the United States Supreme Court.[8] The problems inherent in the trial of the unfit defendant will be noted, with possible solutions proposed that may help to alleviate these difficulties.

THE SUBSTANTIVE STANDARDS

Unfitness to Stand Trial

In all state and federal courts, it is the general rule that no person can stand trial in a criminal proceeding if he is adjudged unfit.[9] The rationale of this rule is that it would be

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will not appear for trial, bail may be denied. Stack v. Boyle, 342 U.S. 1 (1951).

Thus it seems that bail may be denied in some instances. It follows then that bail might be set at an amount which is insecurable by the defendant. If bail can be denied, release on recognizance cannot be mandatory. Therefore it will be assumed that bail can be denied or set at an amount which is insecurable by an unfit defendant not in need of mental treatment.

8. Jackson v. Indiana, 406 U.S. 715 (1972); Baxstrom v. Herold, 383 U.S. 107 (1966).

9. ALA. CODE ANN. tit. 15, §§ 424-26 (1959); ALAS. STAT. ANN. §§ 12.45.100 *et seq.* (1972); ARIZ. REV. STAT. ANN. § 13-1621.01 (Supp. 1973), § 13-1622 (1956); ARK. STAT. ANN. §§ 43-1301 *et seq.* (Supp. 1975), § 59-411 (1971); CAL. PENAL CODE ANN. §§ 1368-1374 (West Supp. 1975); COLO. REV. STAT. ANN. § 39-8-6 (Perm. Cum. Supp. 1969); CONN. GEN. STAT. ANN. § 54-40 (Supp. 1975); FLA. STAT. ANN. RULE CRIM. PROC. § 1.210 (1968); GA. CODE ANN. §§ 27-1502 to 1504 (1972); HAWAII REV. STAT ANN. §§ 711-91 to 92 (1968); IDAHO PENAL AND CORRECTION CODE §§ 18-404 *et seq.* (Session Laws 1971, ch. 143); ILL. ANN. STAT. ch. 38, §§ 1005-2-1 to 2 (Smith-Hurd 1973); IND. STAT. ANN. § 9-1708 (Burns Supp. 1974); IOWA CODE ANN. §§ 783.1 *et seq.* (1950), §§ 783.3 to .4 (Supp. 1975); KAN. CODE CRIM. PROC. §§ 22-3301 *et seq.* (1974); KY. REV. STAT. ANN. RULE CRIM. PROC. § 8.06 (1972); LA. STAT. ANN. CRIM. PROC. §§ 641 *et seq.* (1967); ME. REV. STAT. ANN. tit. 15, § 101 (Supp. 1975); MD. ANN. CODE art. 59, § 23 *et seq.* (1972); MASS. GEN. LAWS ANN. ch. 123, §§ 15-16 (Supp. 1974); MICH. STAT. ANN. § 14.800(1020) (Supp. 1975); MINN. STAT. ANN. § 631.18 (Supp. 1975); MISS. CODE ANN. § 99-13-03 *et seq.* (1972); MO. ANN. STAT. § 552.020 (Supp. 1976); MONT. REV. CODES ANN. § 95-504 (Supp. 1965); NEB. REV. STAT. ANN. § 29-1823 (Cum. Supp. 1974); NEV. REV. STAT. §§ 178.400 *et seq.* (1973); N.H. REV. STAT. (Ann. § 135:17) (Supp. 1972), § 135:18 (1964); N.J. STAT. ANN. § 2A:163-62 (1971), 30:4-82 (Supp. 1975); N.M. STAT. ANN. §§ 41-13-2.1 to 3.2 (1953); N.Y. CODE CRIM. PROC. §§ 658 *et seq.* (McKinney 1958), 730.10-.40 (McKinney Supp. 1970); N.C. GEN. STAT. ANN. §§ 122-83 *et seq.* (1974); N.D. R. CRIM. P., Rule 12.2 (1974); OHIO REV. CODE ANN. §§

fundamentally unfair to try the unfit defendant because he is unable to assert matters known only to him on behalf of his own defense.[10] In Illinois when a doubt is raised as to the defendant's fitness by the defendant himself, the state, or the court, the court must suspend all proceedings and determine the defendant's ability to stand trial.[11]

The Illinois standard states that a ". . . defendant is unfit to stand trial or be sentenced if, because of a *mental or physical* condition, he is unable: (1) to understand the nature and purposes of the proceedings against him; or (2) assist in his defense."[12] This statutory criterion conforms essentially with the constitutional standard delineated by the United States Supreme Court in *Dusky v. United States*.[13]

Although the substantive standards for unfitness have remained essentially unchanged in Illinois,[14] the procedural dis-

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2945.37-.38 (Page 1954); OKLA. STAT. ANN. tit. 22, §§ 1161 *et seq.* (Supp. 1975); ORE. REV. STAT. § 503.1 (Supp. 1973); PA. STAT. ANN. ch. 19, §§ 1351-52 (1964), ch. 50, §§ 4408-09 (1969); R.I. GEN. LAWS ANN. §§ 26-4-1 *et seq.* (Supp. 1976); S.C. CODE ANN. §§ 32-969 to 970 (1964); S.D. COMP. LAWS ANN. §§ 23-38-1 to 9 (1967); TENN. CODE ANN. §§ 33-708 (1974); TEX. CODE ANN. art. 46.02 (Supp. 1972); UTAH CODE ANN. §§ 77-48-2 *et seq.* (1955); VT. STAT. ANN. tit. 13, §§ 4821-2 (1974); VA. CODE ANN. §§ 19.2-167 to 178 (1975); REV. CODE WASH. ANN. § 117.1-30 (Supp. 1973); W. VA. CODE ANN. § 827-6A-1 to 8 (1966); WIS. STAT. ANN. § 974.03 (Supp. 1975); WYO. STAT. ANN. § 7-242.1 (Supp. 1975). *See also* D.C. CODE ENCYC. ANN. § 24-301 (Supp. 1975). Delaware apparently has no statutory provision, but does follow the common law rule. Mills v. State, 256 A.2d 752 (Del. 1969).

The words "unfit" and "incompetent" are basically interchangeable under these statutes. In Illinois there was a change in the terminology of the unfitness statute in 1973. "Unfit" replaced the word "incompetent." The Council Commentary explains.

> Fitness speaks only to a person's ability to function within the context of a trial, whereas the term competence is a mental health term dealing with whether an individual should be committed to an institution or not, and excludes consideration of physical fitness.

ILL. ANN. STAT. ch. 38, § 1005-2-1, Commentary at 220 (Smith-Hurd 1973).

10. 4 W. BLACKSTONE, COMMENTARIES * 395-96 (9th ed. 1783). *See* United States v. Chisolm, 149 F. 284 (S.D. Ala. 1906); Youtsey v. United States, 97 F. 937 (6th Cir. 1899).

11. ILL. REV. STAT. ch. 38, § 1005-2-1(b)(c) (1973). People v. Barkan, 45 Ill. 2d 261, 259 N.E.2d 1 (1970); McDowell v. People, 33 Ill. 2d 121, 210 N.E.2d 533 (1965); People v. Davis, 25 Ill. App. 3d 1007, 324 N.E.2d 58 (5th Dist. 1975).

12. ILL. REV. STAT. ch. 38, § 1005-2-1(a) (1973) (emphasis added).

13. 362 U.S. 402 (1960). The test is "whether he has 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 of the proceedings against him." *Id.*

14. "Physical defects" were added to the statutory standard for determining unfitness in 1973. *See* text accompanying note 12 *supra*. The prior statute was only concerned with mental disorders. ILL. REV. STAT. ch. 38, § 104-1 (1971):

> For the purpose of this Article, 'incompetent' means a person charged with an offense who is unable because of a mental condition: (a) To understand the nature and purpose of the proceedings against him; or (b) To assist in his defense; or (c) After a death sentence has been imposed, to understand the nature and purpose of such sentence.

position of one deemed unfit to stand trial was changed with the passage of the Unified Code of Corrections of 1973.[15] Prior to this enactment, an accused defendant found unfit to stand trial was automatically committed to the Department of Mental Health for as long as that condition continued.[16] The Unified Code changed this procedure by transferring an unfit defendant to the Mental Health Department for a civil commitment hearing in order to determine whether he is a person in need of mental treatment.

In Need of Mental Treatment

Upon statutory remand to the Department of Mental Health, the unfit defendant receives a hearing according to the procedures and time limits specified in the Mental Health Code.[17] This hearing is a civil proceeding which is not limited to criminal defendants, but is applicable to all persons subject to involuntary commitment. The criterion used in determining whether the person is in need of mental treatment is as follows:

> [A]ny person afflicted with a mental disorder . . . if that person, as a result of such mental disorder, is reasonably expected . . . to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury or to provide for his own physical needs.[18]

If a criminal defendant is found to be so afflicted, he may then be civilly committed.[19]

The criterion for unfitness includes both physical and mental defects causing an inability to understand or aid in the proceedings. The standard for commitment relates only to mental disorders and potential danger to oneself or others. Thus, a defendant could be unfit to stand trial, yet not be sufficiently in need of mental treatment to warrant civil commitment. An accused is then caught between these divergent standards and may languish in a statutorily-created limbo, neither receiving treatment nor proceeding with trial. This effect can be seen in the case of Tommy Hall.

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15. *Id.* ch. 38, § 1001 *et seq.* (1973).
16. *Id.*, § 104-3 (1971).
17. *Id.* ch. 91½, § 1-1 *et seq.* (1973). For a discussion on the civil commitment procedures of the Mental Health Code of 1967, *see* Beis, *Civil Commitment: Rights of the Mentally Disabled, Recent Developments and Trends*, 23 DEPAUL L. REV. 42 (1973).
18. ILL. REV. STAT. ch. 91½, § 1-11 (1973). This standard was sanctioned by the United States Supreme Court in O'Connor v. Donaldson, 422 U.S. 563 (1975).
19. ILL. REV. STAT. ch. 91½, § 9-6 (1973). This section instructs the court to consider alternate forms of treatment or care including but not limited to hospitalization.

THE EFFECT OF THE DISCREPANT STANDARDS: AN EXAMPLE

Tommy Hall was arrested and jailed for armed robbery in October of 1972.[20] Over a year later, in January of 1974, he was found unfit to stand trial, and his case was thereafter remanded to the Department of Mental Health pursuant to the unfitness statute.[21] One month later it was determined that defendant was not in need of mental treatment, and he was discharged from the custody of the Department and returned to jail.[22] In accordance with the statutory mandate,[23] the Department of Mental Health filed a petition with the trial court for the release of the defendant on bail or recognizance. A hearing was set for March, 1974, but was continued until the middle of April, 1974, at which time the trial court did not rule on the petition, but once again found the defendant unfit for trial. The accused was remanded to the Department of Mental Health, where he was once again found not to be in need of mental treatment. He was again discharged from the custody of the Department and returned to jail.[24]

In June of 1974, upon a renewed petition for bail or recognizance, the trial judge denied the petition and once again ordered the defendant into the custody of the Department of Mental Health despite the earlier discharge order of that office.[25] The accused was next examined in March of 1975, and found to be unfit for trial. In May of the same year he was found not to be in need of mental treatment at a civil commitment hearing. The judge at that hearing again ordered the defendant to be discharged from the Department's custody, but Hall was not released.[26] Thus, defendant had been found unfit to stand trial on three separate occasions, yet upon each mandatory remand to the Department of Mental Health, he was found not sufficiently in need of mental treatment to be civilly committed and confined. Nonetheless, his confinement continued.

As a result of the trial judge's failure to rule on the previous petitions for bail or recognizance, a petition for an original

20. People v. Hall, Indictment No. 72-3219 (Cook County, Ill. 1972).
21. ILL. REV. STAT. ch. 38, § 1005-2-2(a) (1973). *See* note 3 *supra.*
22. *In the Matter of* Tommy Hall, File No. 74 CrNMT 013 (Cir. Ct. Cook County, Ill. 1974).
23. ILL. REV. STAT. ch. 38, § 1005-2-2(a) (1973).
24. *In the Matter of* Tommy Hall, File No. 74 CrNMT 070 (Cir. Ct. Cook County, Ill. 1974).
25. This had the effect of an automatic commitment without due process as was the case under the prior statute. ILL. REV. STAT. ch. 38, § 104-3 (1971). *See* People *ex rel.* Martin v. Strayhorn, Ill. Supreme Court Docket No. 47777 (Jan. 26, 1976).
26. *In the Matter of* Tommy Hall, File No. 75 CrNMT 080 (Cir. Ct. Cook County, Ill. 1975).

writ of mandamus was filed with the Illinois Supreme Court. The petition was denied, as was the motion by the petitioner for release on his own recognizance.[27] The case was remanded to the trial court with instructions to conduct a bail hearing and enter an appropriate order if it was determined that defendant remained unfit to stand trial but not in need of mental treatment.[28]

The supreme court did not determine whether release on bail or recognizance is mandatory.[29] Situations will arise when bail can either be denied or set at an amount which the accused cannot secure.[30] In such a situation the accused cannot stand trial due to his unfitness, cannot be civilly committed as he is not in need of mental treatment, and cannot be released from jail for lack of bail. Although Tommy Hall never received a bail hearing, his release was eventually obtained. The parties stipulated that he was fit for trial, and he pleaded guilty to a lesser charge and was released for time already served.[31] Tommy Hall spent approximately fifteen months in jail without going to trial or receiving treatment to become fit for trial. Because of the divergent substantive standards and the procedural difficulties in their implementation, Hall was denied due process, equal protection,[32] and his right to a speedy trial.[33]

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27. People *ex rel.* Hall v. Massey, Ill. Supreme Court Docket No. 46979 (Jan. 29, 1975).

28. In the Department of Mental Health's renewed petition for Hall's release on bail or recognizance, it states that:

> . . . [D]efendant has now been confined to a facility of the Department for well over one year from the date of the first order of discharge, and that there have been two subsequent orders of discharge; that such confinement violates the civil rights of defendant and exposes the Department to liability therefore; that the continued confinement of defendant in a Department facility places the Department in the position of violating valid orders of the Circuit Court of Cook County, thereby risking contempt thereof; that this situation places the Department in an untenable position not envisioned by the Legislature and caused solely by the failure of the trial court to entertain the Petition for Release on Bail or Recognizance and rule thereon.

People v. Hall, Indictment No. 72-3219 (Cook County, Ill. 1972).

29. In a case with a similar factual situation, the issue was presented to the Illinois Supreme Court. The Court stated "the posture of this action is not in the proper framework for resolving this question." People *ex rel.* Martin v. Strayhorn, Ill. Supreme Court Docket No. 47777 (Jan. 26, 1976).

30. *See* note 7 *supra.*

31. ILL. REV. STAT. ch. 38, § 1005-2-2(c) (1973).

32. In People v. Byrnes, 7 Ill. App. 3d 735, 288 N.E.2d 690 (1972), a writ of habeas corpus was granted to a defendant who was held in a mental hospital for over 17 months. He was automatically committed upon a finding of unfitness. In holding that Byrnes was denied due process and equal protection, the court relied heavily on Jackson v. Indiana, 406 U.S. 715 (1972). Byrnes also claimed that he had been denied his right to a speedy trial.

33. *See generally* Strunk v. United States, 412 U.S. 434 (1973); Barker v. Wingo, 407 U.S. 514 (1972); Klopfer v. North Carolina, 386 U.S. 213 (1967).

IMPETUS FOR CHANGE: THE CASE OF DONALD LANG

Rumblings of discontent concerning the automatic and indefinite commitment of an unfit defendant[34] surfaced in Illinois with the case of Donald Lang, *People ex rel. Myers v. Briggs*.[35] The case posed special problems for the Illinois courts in that Donald Lang was an illiterate deaf-mute who knew no recognizable sign language and could communicate only minimally.[36] Initially indicted for murder in 1965, Lang was found physicially unfit to stand trial because his mutism severely limited his ability to communicate. He was then determined to be mentally unfit to stand trial[37] and was committed to a mental hospital "until he shall have fully and permanently recovered from his mental incompetence."[38]

Two years after his commitment, the superintendent of the institution in which the accused was confined wrote a letter to the Special Counsel of the Department of Mental Health reporting on Donald Lang's status. The superintendent stated that the defendant would probably never acquire the communicative skills necessary to comply with the required standards of fitness. As there was little possibility that Lang would become fit in the future, the superintendent suggested that a court of law determine the disposition of the accused.[39] The letter was used as the basis for obtaining a writ of habeas corpus[40] which ordered the defendant's release from the institution and signalled the beginning of his trial.

Because the facts of the case were unique in American jurisprudence, the court, in deciding to proceed with the trial, relied

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34. ILL. REV. STAT. ch. 38, § 104-3 (1971).

35. 46 Ill. 2d 281, 263 N.E.2d 109 (1970) [hereinafter cited as *Myers*]. The full name of the case is The People *ex rel.* Lowell J. Myers, on behalf of Donald Lang v. John F. Briggs, Director of the Department of Mental Health. Attorney Myers was appointed by the court to represent Lang. Myers had many years of experience representing deaf-mutes and was deaf himself.

36. Lang was indicted for two murders, years apart, which occurred under similar circumstances. *See* text accompanying notes 69-72 *infra*. Donald Lang's plight in the criminal and mental health systems of Illinois is documented in a book entitled for Lang's nickname. DUMMY, TIDYMAN (1974).

37. ILL. REV. STAT. ch. 38, § 104-1 (1971). *See* note 14 *supra*.

38. People v. Lang, 37 Ill. 2d 75, 79, 224 N.E.2d 838, 840 (1967).

39. Based on our experience with Donald Lang, it now appears that he will never acquire the necessary communication skills needed to participate and cooperate in his trial. . . . The probability for his acquiring the necessary communication skills at any future date is unlikely. . . . It is apparent . . . that Donald's future must be decided in a court of law. He will not be able to communicate even in the limited sense as we had first anticipated.

46 Ill. 2d at 284-85, 263 N.E.2d at 111-12.

40. *See* ILL. REV. STAT. ch. 65, § 22 (1973). The letter constituted an act which had taken place after confinement whereby the defendant became entitled to his discharge. 46 Ill. 2d at 285, 263 N.E.2d at 112.

on the English case of *Regina v. Roberts*.[41] In dealing with a similar situation, the English court opined that a handicapped defendant could not be kept indefinitely in an institution without trial on the criminal charge because it ". . . might result in the grave injustice of detaining as a criminal lunatic a man who was innocent."[42]

Following the English reasoning, the Illinois Supreme Court ordered the trial to proceed with the trial judge "afford[ing] such a defendant reasonable facilities for confronting and cross-examining witnesses as the circumstances will permit."[43] The court did not state what specific procedures might be used to safeguard the disabled defendant. The court left it to the discretion of the presiding judge to prescribe protective standards according to the circumstances of each case. The case of Donald Lang never went to trial due to the death of the state's principal witness. After more than five years, the defendant was released.

The case of Donald Lang is significant in several respects. The Illinois Supreme Court indicated that certain unfit defendants might stand trial under certain circumstances and with adequate protective measures.[44] *Myers* also prompted reform in the disposition of an unfit defendant. In July of 1972, new legislation was passed abolishing automatic commitment upon a finding of unfitness.[45] Later that same year, the United States Supreme Court decided *Jackson v. Indiana*,[46] and held that an Indiana statute similar to that recently abolished in Illinois was unconstitutional.

The Supreme Court Standards: Jackson v. Indiana

Although the present Illinois statute[47] complies with the current Supreme Court guidelines, the standard for commitment of unfit defendants in Illinois is more stringent than the due process standards imposed by the Supreme Court. Illinois permits an indefinite commitment when an unfit defendant is also found to be in need of mental treatment at a civil commitment hearing. This procedure is in accord with equal protection standards set out by the Supreme Court in *Jackson v. Indiana*.[48]

41. 2 All England Reports 340 (1953).
42. *Id.*
43. 46 Ill. 2d at 287, 263 N.E.2d at 113.
44. This court is of the opinion that this defendant, handicapped as he is and facing an indefinite commitment because of the pending indictment against him, should be given an opportunity to obtain a trial to determine whether or not he is guilty as charged or should be released.
46 Ill. 2d at 288, 263 N.E.2d at 113.
45. ILL. REV. STAT. ch. 38, § 1005-2-2 (1973). *See* note 3 *supra*.
46. 406 U.S. 715 (1972).
47. ILL. REV. STAT. ch. 38, § 1005-2-2 (1973).
48. 406 U.S. 715 (1972) [hereinafter cited as *Jackson*].

However, the due process holding in *Jackson* allows for a limited commitment without a civil hearing for a reasonable period in order to determine whether there is a substantial probability that the accused will become fit in the near future. Illinois does not sanction this type of disposition of an unfit defendant.

Before examining the *Jackson* decision, it is helpful to look at its predecessor, *Baxstrom v. Herold*,[49] upon which the *Jackson* Court based its equal protection holding. Baxstrom was convicted of assault and sentenced to two and one-half to three years imprisonment. During his confinement, he was determined to be mentally ill and transferred to a security hospital under the control of the Department of Corrections. When Baxstrom's penal sentence was about to terminate, the director of the hospital filed a petition seeking that Baxstrom be civilly committed upon the termination of his sentence.[50] At a hearing without a jury, as was required for civil commitments of non-criminals, Baxstrom was found to be committable. He was returned to the same security hospital, after the Department of Mental Health determined at an *ex parte* hearing that Baxstrom was unfit for confinement within a civil hospital. In holding that the petitioner was denied equal protection of the laws, the Court stated that the civil commitment standards for non-criminals and convicted criminals upon expiration of their sentence should be the same, with each requiring a jury review.

In *Jackson*, the accused was a 27 year old, mentally defective deaf mute. He could not read, write, or otherwise communicate except through a primitive sign language. He was charged with two separate robberies, one for four dollars and the other for five dollars. Upon a plea of not guilty, a hearing was held and Jackson was found unfit to stand trial.[51] He was then automatically committed until such time as he was found to be fit.[52]

The *Jackson* Court relied heavily on *Baxstrom* in determining that Jackson was denied equal protection by being automatically committed for an indefinite period under a more lenient standard than those not charged with a crime merely because he was found unfit to stand trial. Utilizing *Baxstrom* and borrowing from *Commonwealth v. Drucken*,[53] the Court reasoned that if one *convicted* of a crime can be committed for an indefinite period only by using the same substantive and pro-

49. 383 U.S. 107 (1966) [hereinafter cited as *Baxstrom*].
50. N.Y. CORRECTION LAW § 384 (McKinney 1966).
51. IND. STAT. ANN. § 9-1706a (Supp. 1972).
52. *Id.* §§ 22-1201 to 1256 (1972).
53. 356 Mass. 503, 254 N.E.2d 779 (1969). The Supreme Judicial Court of Massachusetts held that an accused criminal could only be committed under the same procedures used for civil commitment.

cedural standards that are used in a civil proceeding, then one who is merely *charged* with a crime must be afforded the same protection.[54]

As the record indicated that the defendant probably would not become fit to stand trial, the Court additionally found that the defendant was being denied due process in that his indefinite commitment amounted to a life sentence.[55] "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[56] Due process requires that any commitment due to one's unfitness to stand trial be for the purpose of treating the accused so that he may eventually stand trial. The possibility of a life commitment not based on civil commitment standards did not meet this requirement. Since the defendant's indefinite commitment bore no reasonable relation to the purpose for which he had been committed, and because he was committed under a more lenient standard due to his unfitness to stand trial, Jackson was denied his right to due process and equal protection.

The Court related the standard for the time one may be committed due to unfitness to stand trial:

> . . . [A] person charged . . . with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a *substantial probability* that he will attain that capacity in the *foreseeable future*. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.[57]

Although the Court further stated that any continued commitment for unfitness must be justified by progress towards the defendant's ability to stand trial, it did not relate the disposition of the unfit defendant found not to be civilly committable.

Thus, *Jackson* and *Baxstrom* hold that equal protection demands that any commitment for an indefinite term of a criminal defendant must apply the same procedures and substantive standards that apply to all persons civilly committed for an indefinite time. The present Illinois law complies with this constitutional mandate.[58] However, the *Jackson* Court also sanc-

54. 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.
406 U.S. at 724.
55. *Id.* at 725.
56. *Id.* at 738.
57. *Id.* (emphasis added).
58. ILL. REV. STAT. ch. 38, § 1005-2-2 (1973).

tioned the commitment of an unfit defendant without using civil standards if such commitment is only for a reasonable time in order to determine whether there is a substantial probability that the defendant will become fit in the foreseeable future. Illinois, rather than allowing for such a limited commitment without a civil hearing, restricts the commitment of an unfit defendant to a single civil commitment standard—a mental disorder and dangerousness to oneself or others[59]—determined at a civil hearing. Although the Illinois statutory procedures minimally satisfy the requirements of *Jackson*,[60] these statutes have created a different, yet analogous problem which remains unresolved.

A defendant charged with a felony may be found unfit to stand trial yet not sufficiently in need of mental treatment to be civilly committed. The accused is then returned to jail.[61] Upon the judge's refusal to set bond, or upon the defendant's inability to pay bond,[62] he remains incarcerated without treatment and without proceeding to trial. Thus, although having the foresight to evade the constitutional violations denounced in *Jackson*, the Illinois legislature has unwittingly created a statutory void depriving a number of unfit, uncommittable felons their right to due process, equal protection, and a speedy trial.

The Trial of an Unfit Defendant

Rather than continue to attempt the implementation of the present statute, it is essential that additional procedures be enacted by the legislature. Difficulties arise when the defendant is unfit to stand trial, is not in need of mental treatment, and is denied or cannot afford bail. Since the defendant is not committable to a hospital for treatment, not releasable from jail, and not triable, the legislature must determine whether the accused should be tried although unfit or be released.

Despite the long-standing rule that an unfit defendant cannot be tried on a criminal charge,[63] there have been indications that the trial and conviction of an unfit defendant may be upheld. In *Jackson*, the Supreme Court intimated that the trial of an unfit defendant may be permitted.

> We do not read this Court's previous decisions . . . to preclude the States from allowing, *at a minimum*, an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pretrial motions through counsel.[64]

59. *Id.* ch. 91½, § 1-11 (1973).
60. People v. Lang, 26 Ill. App. 3d 648, 325 N.E.2d 305 (1975), *cert. denied* 44 U.S.L.W. 3412 (U.S. Jan. 20, 1976).
61. *See* text accompanying note 22 *supra*.
62. *See* note 7 *supra*.
63. *See* notes 9 and 10 *supra*.
64. 406 U.S. at 741 (emphasis added). The court cited the previous

In *Myers*, the Illinois Supreme Court allowed for trial of an unfit defendant in the first murder case of Donald Lang only if reasonable procedures were afforded the defendant to compensate for his disabilities.[65] Although the court did not specify any procedures, they may include complete pretrial discovery including depositions, special jury instructions, corroborating eye-witnesses, and a heavier burden of proof.[66] Other jurisdictions have upheld the trial and conviction of deaf and blind defendants[67] while some states sanction the trial, but not the conviction, of an unfit defendant.[68]

After Donald Lang's release in *Myers*, he was indicted for another murder in 1971.[69] No fitness hearing was held and it was presumed that Lang continued to be unfit to stand trial.[70] Rather than subject his client to the possibility of an automatic life commitment, Lang's attorney chose to proceed with trial as allowed in *Myers*. Lang was tried, convicted, and sentenced to a term of 14 to 25 years. Due to defendant's total lack of ability to communicate, the Illinois Appellate Court reversed the conviction, stating that there were "no trial procedures which could effectively compensate for the handicaps of a deaf mute with whom there could be no communication."[71] The case was remanded to the trial court with directions to proceed under the present fitness statute. The United States Supreme Court denied certiorari.[72]

Even if the Illinois legislature were to enact a statute calling for the trial of an unfit defendant not in need of mental treatment, certain procedures must be implemented in each case to compensate for the accused's handicap. However, as *Lang* indicates, there may be no adequate procedures available to protect a particular unfit defendant's constitutional rights. If such compensating procedures are not devised, defendants cannot be con-

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decisions of Pate v. Robinson, 383 U.S. 375 (1966) and Bishop v. United States, 350 U.S. 961 (1956). In *Pate*, the Court held that defendant's right of due process had been violated because he was convicted even though the question of his fitness was raised but never formally determined at trial. In *Bishop*, the Court overturned defendant's conviction and remanded the case in order to determine defendant's fitness to stand trial.

65. *See* text accompanying notes 34-44 *supra*.

66. Burt and Morris, *A Proposal for the Abolition of the Incompetency Plea*, 40 U. CHI. L. REV. 66 (1972).

67. *See* Annot., 80 A.L.R.2d 1084; 21 AM. JUR. 2d *Criminal Law* § 338 (Supp. 1975).

68. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 123, § 17 (1972).

69. People v. Lang, 26 Ill. App. 3d 648, 325 N.E.2d 305 (1975), *cert. denied* 44 U.S.L.W. 3412 (U.S. Jan. 20, 1976) [hereinafter cited as *Lang*].

70. Upon an initial finding of unfitness, a defendant is presumed to remain unfit until it is adjudicated otherwise. People v. Santoro, 13 Ill. App. 3d 426, 301 N.E.2d 175 (1973).

71. 26 Ill. App. 3d at 653, 325 N.E.2d at 308.

72. 44 U.S.L.W. 3412 (U.S. Jan. 20, 1976).

victed. Conversely, if by statutory mandate the unfit defendant not in need of mental treatment is released and the charges are dropped, further difficulties are encountered. An unfit defendant who has a mental defect but is not dangerous to himself or others, and therefore not committable under the present standard,[73] may be released without undue public concern because of the fact that he is not dangerous. However, it is apparent that crimes are likely to be repeated by an unfit defendant who cannot be committed because he has no apparent mental disorder but is still dangerous.[74]

Although neither a trial with procedures to compensate for physical unfitness, nor the release of an unfit defendant not in need of mental treatment, may provide the ultimate solution in the narrowest circumstances, both should be considered by the legislature in conjunction with other proposals which may restrict the possible use of either procedure.

A Proposal

In view of the inherent difficulties involved in the present statutory scheme, two new procedures should be enacted by the Illinois legislature. First, a commitment for a limited time upon a finding of unfitness should be implemented within the sanctions espoused in *Jackson*. Second, the defendant should be afforded the option of having an evidentiary hearing prior to any civil commitment to determine if the state has sufficient evidence to convict.

Limited Commitment

Upon a finding of unfitness under the present statute,[75] the court or jury will review testimony and other such relevant evidence that will aid in determining whether or not there is a "substantial probability" that the defendant, with treatment, will become fit in the "foreseeable future."[76] If it is found that the accused is "temporarily unfit," he may be committed. Since the *Jackson* opinion suggests that such an unfit defendant may be held only for a "reasonable period of time," it is necessary to establish a maximum limit for such commitment to insure that discretion does not lead to abuse. Other jurisdictions allow lim-

73. Ill. Rev. Stat. ch. 91, § 1-11 (1973).
74. As an example, Donald Lang was indicted for two murders, years apart, which happened under similar circumstances. *See* note 36 *supra*. Tommy Hall was also recently indicted again for armed robbery. Indictment No. 75-5893 (Cook County, Ill., 1975).
75. Ill. Rev. Stat. ch. 38, § 1005-2-1 (1973).
76. This is the due process standard sanctioned in *Jackson*. *See* text accompanying note 57 *supra*.

ited commitment anywhere from six months to a period equivalent to a maximum sentence for the crime of which the person stands accused.[77] The Illinois legislature should consider a commitment period of six to eighteen months while requiring periodic reports informing the court of the defendant's progress.

If the court or jury finds that there is not a substantial probability that the defendant will become fit in the time allowed, the accused would then be remanded to the Department of Mental Health and receive a civil commitment hearing under the present standards and procedures.[78] If the defendant is not in need of mental treatment, he must then be either tried or released.

Upon finding a substantial probability that the defendant will become fit within a specified period of time, the accused will be committed for that period. If it is determined that the defendant is fit by the end of that period or at any time during that period, he will be tried. A determination of continued unfitness will cause the court to remand the accused to the Department of Mental Health for a civil commitment hearing. If the defendant is in need of mental treatment, he will be committed. If the defendant is not in need of mental treatment, he will be tried although unfit with compensating procedures taken by the trial court, or released.

Evidentiary Hearing

In conjunction with the passage of a limited commitment statute, it is also suggested that there be a provision allowing for an evidentiary hearing. At any time after a finding of unfit-

77. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-40 (1975) (maximum sentence); MASS. GEN. LAWS ANN. ch. 123, § 17 (1974) (six months with a one year extension). *See* Drendel v. United States, 403 F.2d 55 (5th Cir. 1968) (eighteen months).

78. *See* text accompanying notes 17-18 *supra*. Upon civil commitment all charges should be dropped. The *Jackson* Court did not decide this question because it was not sufficiently "ripe." 406 U.S. at 739. An accused who is civilly committed is not likely to become fit in the foreseeable future. Due to the indefinite length of civil commitment, trial upon release from civil commitment may deny defendant's right to a speedy trial. United States *ex rel.* von Wolfersdorf v. Johnston, 317 F. Supp. 66 (S.D.N.Y. 1970); United States v. Jackson, 306 F. Supp. 4 (N.D. Cal. 1969). There is also the possibility that the threat of future prosecution might inhibit the patient's amenability to treatment.

Under the present unfitness statute, it seems inconsistent that one who is found unfit due to physical defects only is remanded to the Department of Mental Health for a hearing concerning mental disorders. Therefore a defendant who is found unfit due to physical defects only should be remanded to an appropriate state facility instead of the Department of Mental Health. Some situations may arise where a severe physical handicap may have a close connection to functional retardation. Such an unfit defendant may be committed. *See, e.g., In the Matter of* Johnny Lee Murphy, File No. 75 CrNMT 009 (Cir. Ct. Cook County, Ill. 1975).

ness, but before civil commitment,[79] defense counsel may, by motion, request a hearing before the court to determine if the state has a sufficient case to support conviction.

This hearing would be similar to the pretrial motions allowed in other states where such motion does not require the participation of the defendant.[80] Examples of these motions include dismissal due to insufficiency of the indictment, dismissal because the statute of limitations has run, suppression of illegally obtained evidence, and other affirmative defenses.[81] In *State v. McCreedeen*,[82] the Wisconsin Supreme Court sanctioned a procedure to be used by the state's circuit courts when the question of defendant's sanity arose. The procedure required that a hearing be held to determine probable guilt. If the state failed to prove that probability, the defendant was discharged.

The benefits of such a procedure would not run solely to the defendant, but to the court and the prosecution as well. By enacting a similar procedure with provisions allowing for the relaxation of the rules of evidence and discovery, the state is able to preserve the testimony of witnesses for any subsequent trial.[83] The court may also be better able to determine the mental state[84] of the accused shortly after the commission of the alleged crime as opposed to waiting until a later date.

The accused is afforded the opportunity of establishing his innocence, or at least the improbability of his guilt. He will be discharged before any civil commitment if the court's finding is that of improbable guilt. If the decision indicates that there is probable guilt, the determination of substantial probability of fitness in the foreseeable future or civil commitment must then be made in accordance with the procedures previously outlined.

CONCLUSION

By allowing an evidentiary hearing and the possibility of a limited commitment, the chances of an unfit defendant not in need of mental treatment being tried or released are decreased. In this way, the state will have a procedure, sanctioned by the

79. Upon civil commitment, charges would be dropped. *See* note 78 *supra*.

80. *See, e.g.*, MONT. REV. CODE ANN. § 95-506 (Supp. 1975); N.Y. CODE CRIM. PRO. § 730.60(5) (McKinney Supp. 1975); WIS. STAT. ANN. § 971.14 (6) (1971).

81. *See* Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832 (1960).

82. 33 Wis. 2d 661, 148 N.W.2d 33 (1967).

83. In the first Lang murder case, Lang never went to trial because the state's principal witness died in the five years between arrest and the time set for trial. *See* text accompanying notes 34-44 *supra*.

84. ILL. REV. STAT. ch. 38, § 6-2 (1973), describes and defines the mental states as utilized in the application of the Illinois Criminal Code.

United States Supreme Court in *Jackson*, that may be implemented before proceeding to more drastic measures. There remains, however, the extreme situation in which these procedures will not dispose of the defendant's case. In this instance the legislature should sanction the trial of an unfit defendant not in need of mental treatment or allow for his release.

In the narrowest of circumstances there still remains the possibility that the trial or release of an unfit defendant not in need of mental treatment will not sufficiently dispose of the accused. If there are no adequate procedures implemented at trial to compensate for the defendant's particular handicap, he cannot be convicted. If an unfit defendant is deemed dangerous but not in need of mental treatment, it would be difficult to rationalize his release in light of the necessity of public protection. The utmost care must be taken in the consideration of each such case in order to determine whether there are any sufficient compensating procedures to enable the commencement of trial. The potential danger of each accused must be weighed heavily to determine if he can be released on bail or otherwise. Each such case will be different and judicial discretion plays a key role.

Admittedly there are few cases where a defendant is not bailable, not triable, and not committable. Nonetheless, the fact remains that there have been such cases. The defendants in those cases have been subjected to statutes that do not protect the rights of due process, equal protection, and a speedy trial. Legislative change is urgently needed.

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