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Florida's Incompetency-to-Stand Trial Rule: A Possible Life Sentence?

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FLORIDA'S INCOMPETENCY-TO-STAND-TRIAL RULE: A POSSIBLE LIFE SENTENCE?

I. INTRODUCTION

In Florida, as in most states, an individual charged with a crime cannot be tried if found by a court to be incompetent to stand trial.[1]

1. FLA. R. CRIM. P. 3.210(a) provides:

RULE 3.210. INSANITY

(a) At Time of Trial.

(1) If before or during trial the court, of its own motion, or upon motion of counsel for the defendant, has reasonable ground to believe that the defendant is insane, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The defendant shall designate his attorney to serve as his representative under Fla. Stat. § 394.459(11), F.S.A., in the event the defendant is found mentally incompetent. The court may appoint not exceeding three disinterested qualified experts to examine the defendant and to testify at the hearing as to his mental condition. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party.

(2) If the court decides that the defendant is sane, it shall proceed to trial.

(3) If the court decides that the defendant is insane, it shall commit him or her to the Division of Mental Health for hospitalization under the provisions of Fla. Stat. § 394.467, F.S.A.. The order of commitment shall request that the defendant be examined and a written report be furnished the court, stating (1) whether there is a substantial probability that the defendant will become mentally competent to stand trial within the foreseeable future and, if so, (2) whether progress toward that goal is being made. The defendant's attorney, as his representative, shall not waive any hearing authorized by Fla. Stat. Ch. 394, F.S.A., and shall file a report with the court within the first six months after hospitalization and each year thereafter stating what progress, if any, is being made in the treatment of defendant. Such representative shall be authorized to consent, on behalf of defendant, to necessary surgical or medical treatment and procedures. If at any time the Division of Mental Health shall consider that the defendant is mentally competent to stand trial, the proper officer of the institution where defendant is hopsitalized shall promptly notify the court to that effect in writing and place the defendant in the custody of the sheriff. The court shall thereupon conduct a hearing on the mental competency of the defendant.

(4) If at any time after such commitment the court decides, after hearing, that the defendant is competent to stand trial, it shall enter its order so finding and declaring the defendant sane, after which the court shall proceed with the trial.

(5) If at any time after such commitment the court decides, after hearing, (1) that there is no substantial probability that the defendant will become mentally competent to stand trial within the foreseeable future, or (2) that no progress is being made toward that goal, it shall enter an order accordingly and shall find and adjudge the defendant *not guilty by reason of insanity* and forthwith direct the institution of civil proceedings for the commitment of the defendant. The defendant shall remain in custody until determination of the civil proceedings. (emphasis added)

(6) For the purposes of any hearing held pursuant to subsection (a)(3) or subsection (a)(5), the court may appoint not more than three disinterested experts to examine the defendant and testify as to his or her mental condition at such hearing. Other evidence concerning the defendant's mental condition may be introduced at the hearing by either party.

Florida employs the common law test of competency:[2] whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding of the proceedings against him."[3] The policy underlying the prohibition against trial is the protection of the incompetent accused.[4] If the defendant is unable to consult rationally with counsel about the charges, a fair trial will be impossible.

Traditionally, the alternative to trial has been commitment to a mental institution until competency is regained.[5] However, commitment often subverts the protective interest in postponing trial; rather than benefiting the accused, it frequently works to his detriment. Not only is he barred from assisting in the preparation for trial, but will actually receive little treatment in most state mental hospitals. Many institutions are overcrowded and understaffed; patients rarely see medical personnel. Control over the care and treatment of patients is exercised by ward attendants who are generally nonmedical personnel with little training. Brutality, malnutrition, unsanitary conditions, and lack of health care are characteristics of many state institutions, including Florida's.[6] Consequently, commitment frequently results in a worsening of the defendant's condition. In addition to this failure to fulfill the enunciated purpose of protecting the incompetent defendant, commitment serves the rarely stated and certainly illegitimate function

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(7) If the defendant is declared insane during the trial and afterwards declared sane, his other uncompleted trial shall not constitute former jeopardy.

It is a common law precept that an incompetent may not be forced to stand trial. Youtsey v. United States, 97 F. 937 (6th Cir. 1899). This concept, based on equitable considerations, has been held by the United States Supreme Court to be a requirement of constitutional due process. Pate v. Robinson, 383 U.S. 375 (1966). Whenever the question of a defendant's competency is raised, before, during, or after a trial, a competency hearing must be held. A defendant cannot waive his right to have the issue heard. Thus the question can be raised for the first time on appeal. *Pate, supra*; *see also* Perkins v. Mayo, 92 So. 2d 641 (Fla. 1957); Cioli v. State, 303 So. 2d 82 (Fla. 4th Dist. Ct. App. 1974).

2. Deeb v. State, 158 So. 880, 881 (Fla. 1935). *See* Comment, *Florida's Incompetency to Stand Trial Rule: Justice in a Straightjacket*, 27 U. FLA. L. REV. 248, 250 (1974).

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

4. "[T]he purpose of Section 917.01 [now FLA. R. CRIM. P. 3.210 (a)] . . . is to protect the accused—to make sure that he will be able to assist his counsel in preparing the best defense possible to the crime with which he is charged." Daniels v. O'Connor, 243 So. 2d 144, 147 (Fla. 1971). *See also* Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 455 (1967).

5. *See, e.g.*, IND. ANN. STAT. § 9–1706a (Supp. 1971) (since amended); CAL. PENAL CODE §§ 1370–1372 (1970) (since amended); FLA. R. CRIM. P 3.210(a).

6. *See* Note, *The Rights of the Mentally Ill During Incarceration: The Developing Law*, 25 U. FLA. L. REV. 494, 495 (1973). *See also* Donaldson v. O'Conner, 493 F.2d 507, 511–13 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1975); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). These cases describe the conditions existing in state mental hospitals in Florida and Alabama, respectively.

of removing from society those who are accused of crimes but cannot be tried.[7]

This comment will examine Florida's incompetency to stand trial rule in light of recent United States Supreme Court decisions which have set standards under which states may commit their citizens to mental institutions. It is contended that the Florida rule, though drafted to comply with the Supreme Court's mandate, is still unable to survive constitutional attack.

II. THE JUDICIAL STANDARDS

Florida's present incompetency-to-stand-trial rule was revised in 1973[8] to comport with the United States Supreme Court decision in *Jackson v. Indiana*.[9] In *Jackson*, the Court was concerned with the constitutionality of an Indiana statute[10] similar to the original Florida incompetency rule. The defendant was a 27-year-old illiterate deaf-mute[11] charged with the robbery of a purse and cash worth a total of 9 dollars.[12] The trial court found him incompetent,[13] and he was committed to the Indiana Department of Mental Health until the department could certify that he had regained his competency. It seemed unlikely, however, that Jackson would ever become com-

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7. This question is discussed thoroughly in Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832 (1960); Note, *supra* note 4, at 466–68. Consider the case of United States v. Barnes, 175 F. Supp. 60 (S.D. Cal. 1959), discussed in Note, *supra* note 4, at 466–68. There, four defendants were indicted for a murder committed 10 years earlier. A motion was entered on their behalf to dismiss the indictment on the ground that it violated their sixth amendment right to a speedy trial. The indictment was dismissed against three of the defendants. The fourth, however, was found to be mentally incompetent; he was ordered committed until he regained his competency. The court admitted that its action was motivated by a desire to protect society as well as the defendant. *Id.* at 65. It is difficult, however, to see how the *defendant* benefited at all from the court's action.

8. The former rule was adopted in 1967, prior to which the procedure with respect to incompetent defendants was embodied in FLA. STAT. § 917.01 (1967). The rule essentially restated § 917.01, except it omitted a provision requiring the committing court's consent before the incompetent defendant could be released from the hospital. The 1968 committee note following FLA. R. CRIM. P. 3.210 states, somewhat ambiguously, that this provision is retained by statute. The Florida Supreme Court upheld the constitutionality of the requirement that the committing court consent to release of accused incompetents in Daniels v. O'Connor, 243 So. 2d 144 (Fla. 1971). Since 1973, the court's jurisdiction has been maintained through the combined provisions of FLA. R. CRIM. P. 3.210(a)(5) and 3.460. *See* notes 37, 38 *infra*.

9. 406 U.S. 715 (1973).

10. IND. ANN. STAT. § 9–1706a (Supp. 1971) (since amended).

11. 406 U.S. at 717.

12. Jackson v. State, 255 N.E.2d 515, 518 (Ind. 1970).

13. 406 U.S. at 717.

petent.[14] The Supreme Court noted that if charges had not been pending against him, Jackson probably would not have qualified for commitment under civil commitment criteria, which were that he be dangerous to himself or others or unable to care for himself.[15]

The state contended that Jackson's commitment was temporary since it could last only as long as he remained incompetent. The Supreme Court soundly rejected this argument: since Jackson would probably never improve, his "temporary" commitment amounted to a possible life sentence which was totally unwarranted under the civil commitment criteria. Subjecting Jackson to more lenient commitment standards combined with more stringent release standards than those applied to noncriminal patients, concluded the Court, deprived him of equal protection of the laws.[16]

The Indiana statute was also found deficient under the due process clause.[17] The Court held that due process requires the nature and duration of commitment to be reasonably related to its purpose.[18] If its purpose is the restoration of competency and if this purpose is not

14. Two psychiatrists appointed to examine Jackson testified that he was unable to understand the charges against him or to participate effectively in his own defense, would never learn to read or write, and would probably never be able to communicate proficiently in sign language. 406 U.S. at 718–19.

15. 406 U.S. at 727–29. These are the criteria for involuntary commitment embodied in IND. ANN. STAT. §§ 16–14–9.1–1 to 16–14–9.1–18 (Supp. 1975).

16. *Id.* at 730. The Court referred to its earlier decision in Baxstrom v. Herold, 383 U.S. 107 (1966), in which it held that fewer procedural and substantive safeguards against indefinite commitment could not be justified by the fact of criminal conviction and sentence. Therefore "the mere filing of criminal charges surely cannot suffice." 406 U.S. at 724.

17. *Id.* at 731. The Court noted that since its decision in Greenwood v. United States, 350 U.S. 366 (1956), federal courts, in considering the question of releasing a defendant with dim prospects for improvement, have consistently applied the so-called "rule of reasonableness" to the federal incompetency statute. 18 U.S.C. §§ 4244–46 (1970). Under this statute, a defendant found unable to stand trial may be committed until he "shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law." 18 U.S.C. § 4246 (1970). In *Greenwood,* however, the Court tempered the statute by holding that an incompetent defendant who would probably never regain the capacity to stand trial must be released unless there was a showing of dangerousness. 350 U.S. at 368–69. The Court based this result on 18 U.S.C. § 4248, which requires that a federal prisoner cannot be committed at the end of his prison term to a mental institution without a showing of both mental incompetency and dangerousness.

Since *Greenwood,* federal courts have held that § 4246 cannot be read except in conjunction with the qualification imposed by § 4248. United States v. Klein, 325 F.2d 283 (2d Cir. 1963); United States v. Walker, 335 F. Supp. 705 (N.D. Cal. 1971); United States v. Jackson, 306 F. Supp. 4 (N.D. Cal. 1969).

Cook v. Ciccone, 312 F. Supp. 822 (W.D. Mo. 1970) is typical of the federal courts' view. There the court noted the "inherent unfairness and substantial injustice in keeping an unconvicted person in federal custody to await trial where it is plainly evident his mental condition will not permit trial within a reasonable period of time." *Id.* at 824.

18. 406 U.S. at 738.

being served, there is no excuse for further commitment. Thus, the *Jackson* Court held that a defendant, committed solely on account of his incompetency to stand trial, cannot be held longer than reasonably necessary to determine whether there is a substantial probability he will attain competency within the foreseeable future. If it is determined that he will not, the state must either institute civil commitment proceedings or release the defendant.[19]

Three years after *Jackson,* in *O'Connor v. Donaldson,*[20] the Supreme Court established minimal civil commitment standards. The plaintiff, Kenneth Donaldson, had been committed to the Florida State Hospital in Chattahoochee in January 1957.[21] During a 15-year confinement, Donaldson repeatedly requested release. Evidence showed that he was not dangerous to himself or others, and that he would have received care from responsible persons outside the institution if released.[22] In 1971, Donaldson brought a civil rights action alleging that Dr. J. B. O'Connor, superintendent of the hospital, and other staff members, had "intentionally and maliciously deprived him of his constitutional right to liberty."[23] The district court upheld Donaldson's claim, and he was awarded compensatory and punitive damages. The Fifth Circuit Court of Appeals affirmed.[24] On appeal, the United States Supreme Court agreed that Donaldson had been deprived of his constitutional right to liberty.[25] The Court found no justification for committing a person who was not dangerous and who could live safely outside the institution.[26] The Court also reiterated the *Jackson*

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19. *Id. Jackson* did not establish time limits for commitment, but the court did note that in a case such as Jackson's, 3½ years exceeded a "reasonable period" of commitment. *Id.*

20. 422 U.S. 563 (1975).

21. *Id.* at 564.

22. *Id.* at 567–68.

23. *Id.* at 565.

24. Donaldson v. O'Connor, 493 F.2d 507, 510 (5th Cir. 1974). Donaldson's suit was originally filed as a class action on behalf of himself and his fellow patients. He asked for damages and habeas corpus ordering the release of himself and all members of his class. Donaldson was released, but the court dismissed the suit as a class action. In an amended complaint, Donaldson again asked for damages and for declaratory and injunctive relief which would require the hospital to provide adequate psychiatric treatment. This request was later dropped. *Id.* at 512–13.

25. O'Connor v. Donaldson, 422 U.S. 563, 576 (1975). The Court remanded the case to the Fifth Circuit on the question of damages, ordering the court to consider whether the trial court's instructions on O'Connor's liability were adequate. The lower court judge had failed to instruct the jury on the effect of O'Connor's claimed reliance on state law as authorization for Donaldson's continued confinement. *Id.* at 577.

26. *Id.* at 575. In the words of the Court: "[T]he mere presence of mental illness does not disqualify a person from preferring his home . . . . Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a

requirement: not only must the state's original commitment be based upon constitutionally adequate grounds, but it cannot continue after those grounds no longer exist.[27]

Through its decisions in *Jackson* and *Donaldson*, the Supreme Court established the conditions under which a state may confine a person incompetent to stand trial. It may initially confine an incompetent accused only long enough to determine whether he will attain the capacity to stand trial within the foreseeable future.[28] If it is determined the defendant is permanently incompetent, the state must either civilly commit or release him.[29] To civilly commit the defendant, the state must show that he is either dangerous or unable to care for himself adequately.[30] In short, the state is specifically precluded from determining that an accused is dangerous solely on the basis of the pending criminal charge.[31]

III. A CRITIQUE OF THE FLORIDA RULE

As previously noted, Florida's rule for the commitment of incompetents was revised in 1973 to comply with the *Jackson* decision; specifically, sections (a)(3) and (a)(5)[32] were added to the Florida Rules of Criminal Procedure 3.210.[33] Unfortunately, the language of the rule is confusing and inconsistent. First, adequate standards for declaring a person incompetent are not clearly established. The word "insanity," used to describe incompetency to stand trial, is also used to describe the legal defense to a criminal act.[34] The blurring of this

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necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends." *Id.*

27. *Id.* at 574–75. The Fifth Circuit had also asserted that the fourteenth amendment guarantees an involuntarily, civilly committed mental patient the right to treatment. 493 F.2d at 510. The court based its decision on a *quid pro quo* theory: if the state is allowed to involuntarily confine a person because of his mental illness, it is then required to provide the patient with treatment which will assist him in improving his condition. *Id.* at 522. The Supreme Court, however, held that the right-to-treatment issue was not presented by this case. O'Connor v. Donaldson, 422 U.S. 563, 573 (1975). For a comprehensive discussion of the right-to-treatment issue *see* Saphire, *The Civilly-Committed Public Mental Patient and the Right to Aftercare*, 4 FLA. ST. U.L. REV. 232 (1976).

28. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

29. *Id.*

30. O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).

31. 406 U.S. at 728.

32. The text of these sections is set forth at note 1 *supra*.

33. *See* note 8 and accompanying text *supra*.

34. FLA. R. CRIM. P. 3.210(a) concerns incompetency to stand trial; FLA. R. CRIM. P. 3.210(b) concerns insanity as a defense. Both sections of the rule use the term "insanity." But the term has a very different meaning for purposes of each section. Indeed, one may well have possessed his mental faculties at the time he allegedly committed an offense, but nevertheless be incompetent to stand trial; *i.e.*, "insane" for purposes of postponing

distinction has resulted in confusion and misapplication of the standards by both judges and psychiatrists.

In addition, the rule fails to define adequately the procedures to be followed once a finding of incompetency is made. Under *Jackson*, the initial commitment is constitutional *only* if its purpose is to determine whether a defendant will ever regain competency. In Florida, however, if the defendant is found incompetent, the rule requires that the court commit him to the Division of Mental Health pursuant to the *civil* commitment statute.[35] The rule does not explicitly state whether commitment of an accused who does not meet civil commitment criteria is authorized, but the *hospital* is given a mandatory responsibility for the accused after he is committed to the division.[36] Thus the rule appears to contain a presumption that any defendant found incompetent is dangerous or unable to care for himself. Such a presumption is expressly prohibited by *Jackson*.

Jackson emphatically provides that if it is apparent during a defendant's hospitalization that he is permanently incompetent, he must be released or civilly committed. Florida's rule, *drafted to comply with this decision*, requires that he be civilly committed *and* adjudged "not guilty by reason of insanity."[37] A person so adjudged is automatically recommitted to the institution under Florida Rule of Criminal Procedure 3.460 and may not be released without the committing court's consent.[38] Thus the incompetent under Florida's procedure is subject

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trial. The concept of "insanity" as a defense is defined in Florida by the M'Naghten test which basically asks whether the defendant "knew right from wrong" when he committed the act of which he is accused. Campbell v. State, 227 So. 2d 873, 877 (Fla. 1969), *cert. denied*, 400 U.S. 801 (1970); Davis v. State, 32 So. 822, 826–27 (Fla. 1902).

The term "mental illness" is now used in Florida's civil commitment provisions, the term "insanity" having been deleted completely. FLA. STAT. § 394.467 (1975). For an extensive treatment of the subject *see* Note, *Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

35. FLA. R. CRIM. P. 3.210(a)(3).

36. *Id.* The rule requires "hospitalization," examination, and a written report to the court on the defendant's condition. No alternative to hospitalization is stated.

37. FLA. R. CRIM. P. 3.210(a)(5). The text of the rule is set forth at note 1 *supra*.

38. FLA. R. CRIM. P. 3.460 generally applies to those who have been tried by a jury and have raised insanity at the time of the alleged crime as a defense:

> RULE 3.460. ACQUITTAL FOR CAUSE OF INSANITY
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> When a person tried for an offense shall be acquitted by the jury for the cause of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause. If the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the people, the court shall order him to be committed to jail or otherwise to be cared for as an insane person and such person shall be held in custody *until released by order of the committing court*, or may give him into the care of his friends, on their giving satisfactory security for the proper care and protection of such person;

to indefinite commitment with release conditioned upon the committing court's discretion. Note that rule 3.210 requires this result and at the same time requires *civil* commitment.[39] Obviously, the rule is inconsistent if applied to one not civilly commitable, suggesting again the prohibited presumption that an incompetent defendant is also dangerous or unable to care for himself.

In contrast to the required indefinite commitment for an incompetent accused, an involuntarily civilly committed patient not charged with a crime is under no such constraint. He may be committed under Florida's Baker Act[40] only if it is shown that he is mentally ill *and* dangerous to himself or others, *or* is in need of treatment and does not have sufficient capacity to seek it on his own.[41] Furthermore, such a patient must be released within 6 months after hospitalization unless it is determined at a hearing that the civil commitment criteria still prevail;[42] even then, further hospitalization is permitted for only specified periods of time. Additionally, the hospital administrator may at any time release the patient if it is determined the civil commitment criteria no longer exist.[43]

It is clear the commitment scheme authorized by rules 3.210 and 3.460, contrary to the Supreme Court's mandate in *Jackson*, differs from the civil commitment procedure under the Baker Act in two important respects: (1) an incompetent may be indefinitely committed, and (2) he cannot be released without the committing court's consent. While no Florida court has considered the Florida commitment scheme from a constitutional standpoint, the attorney general of Florida has issued an opinion in which this procedure was approved.[44] The opinion based its defense of the scheme upon an assumption that the requirements of *Jackson* are met as long as the *commitment* of the incompetent complies with civil commitment standards,[45] even though release standards are more stringent.

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otherwise he shall be discharged.

(Emphasis added).

39. Rule 3.210 does not explicitly require that an incompetent be subjected to the requirement of rule 3.460 that release be conditioned on the committing court's consent. It would be difficult to construe the statute otherwise, however, especially in light of the Attorney General's opinion that 3.460 must apply. *See* 1975 FLA. ATT'Y GEN. OP. 075-228; notes 44-49 and accompanying text *infra*.

40. FLA. STAT. ch. 394 (1975), commonly called the Baker Act, is Florida's civil commitment statute.

41. Criteria for civil commitment are set forth in FLA. STAT. § 394.467 (1975).

42. FLA. STAT. § 394.467(2) (1975).

43. FLA. STAT. § 394.469(1) (1975).

44. 1975 FLA. ATT'Y GEN. OP. 075-228.

45. It appears, though, that the commitment procedure does not in fact comply with

The attorney general found a rational basis for more stringent release standards in the state's need for "safe-keeping" of the defendant until trial. This argument is fallacious on its face since the defendant, adjudicated not guilty by reason of insanity,[46] has no criminal charges pending. However, the pendency of criminal proceedings is irrelevant since *Jackson* specifically held that a "more stringent standard of release than those generally applicable to all others not charged with offenses . . ." violates the accused incompetent's right to equal protection.[47] Similarly, this procedure violates due process which requires, under *Jackson*, that the nature and duration of commitment be reasonably related to its purpose. Obviously, if the purpose of commitment, the restoration of competency, is impossible or unlikely to be achieved, further commitment cannot be defended unless these civil commitment criteria are present.

The attorney general further defends the combined effect of rules 3.210 and 3.460 on the ground that any other interpretation would lead to "absurd results and conclusions."[48] The "absurd" result of Florida's recognition of the constitutional rights of incompetent defendants would create the "anomaly" of the court's retaining a hold by rule 3.460 over those acquitted by a jury on the ground of insanity while abdicating its hold on those who have never been tried. The attorney general's opinion argues that there is a greater justification for detention of one against whom a charge is still pending than for one acquitted because of insanity.[49] *Jackson* demands a contrary conclusion. The court expressly stated that pending criminal charges can provide *no* justification for differing treatment.[50] It should be noted that the attorney general's argument presupposes the validity of rule 3.460. Although the rule was upheld by the Florida Supreme Court in 1974,[51] the weight of decisions in other jurisdictions considering similar questions indicates the result is a minority one.[52]

Jackson since the accused can be committed solely on the basis of his incapacity to stand trial. *See* note 36 and accompanying text *supra*.

46. The practice of judging a defendant not guilty by reason of insanity when he has never had the opportunity to present his case to a jury may also be suspect on equal protection grounds. The defendant's constitutional right to a presumption of innocence until proven guilty is lost if the court can merely "adjudge" him not guilty by reason of insanity. The "adjudged" defendant is stigmatized, since the classification carries with it a presumption that the defendant committed the crime even though he has a valid insanity defense.

47. Jackson v. Indiana, 406 U.S. 715, 730 (1972).

48. 1975 FLA. ATT'Y GEN. OP. 075-228, at 6.

49. *Id.* at 7.

50. *See* note 16 *supra*.

51. Powell v. Genung, 306 So. 2d 113 (Fla. 1974).

52. Statutes similar to rule 3.460 have been struck down in other jurisdictions under

IV. SUGGESTIONS FOR REFORM

A significant alteration of Florida's incompetency to stand trial rule is sorely needed. At a minimum, revision of the rule should: (1) state clearly the standard of incompetency which will warrant a postponement of trial; and (2) state the standards under which incompetent defendants may be committed with full regard given to their constitutional rights.

The first goal would be achieved by the elimination of the term "insanity" from the rule and the substitution of a clear definition of incompetency to stand trial. This definition should be in terms of "competency" and should make clear that competency has no relation to the defendant's state of mind at the time of the alleged criminal conduct.[53]

Second, and most important, the constitutional criteria of *Jackson* and *O'Connor* should be met. Compliance with these criteria will almost certainly require a specific maximum time limit during which determinations of competency to stand trial must be made. If it is clearly likely the defendant will never be able to stand trial, or is not improving, he should be released or civilly committed. If, at the end of this commitment time he is not yet competent but is improving, there should be permitted a further specific time period for recovery. If the defendant does not recover within this time and does not meet civil commitment standards, he should be released. In Jackson's case, the Court indicated that 3½ years was more than enough time to make this determination;[54] and a District of Columbia report has shown that in most cases, 2 years is sufficient time. A defendant "confined as incompetent for 2 years is likely to remain so for a substantial additional period."[55] The rule should certainly state that in no event may the

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standards set forth by the United States Supreme Court in Baxstrom v. Herold, 383 U.S. 107 (1966), discussed at note 16 *supra*. In People v. Lally, 224 N.E.2d 87 (N.Y. 1966), the New York Court of Appeals extended the effect of *Baxstrom* in New York, applying *Baxstrom's* standards to commitment following acquittal by reason of insanity. *Accord*, Cameron v. Mullen, 387 F.2d 193 (D.C. Cir. 1967), extending the principle to release as well as commitment standards. These decisions rest on the theory that no valid presumption of present dangerousness can arise solely from past criminal acts. For a thorough discussion of this subject *see* Comment, *Automatic Commitment of a Defendant Found Not Guilty By Reason of Insanity*, 1974 WIS. L. REV. 1203.

53. An amended rule might provide:

> A person may not be tried or punished while mentally incompetent. For purposes of this rule a defendant is mentally incompetent to stand trial if he is presently unable, as a result of mental disorder, to understand the charge and proceedings against him and to assist counsel in a rational manner in his defense.

54. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

55. Judicial Conference of the D.C. Circuit, Report of the Committee on Problems Connected with District of Columbia Mental Examination of the Accused in Criminal

total time spent in a mental institution exceed the maximum penalty for the alleged criminal offense.[56]

Florida should also allow an incompetent defendant to assert, through his attorney, any legal objections to prosecution which can be determined before trial and without defendant's participation. Certainly a defendant should be permitted to challenge the charges on the grounds that the prosecution is barred by law, or that the indictment or information is defective in form.[57] Some states, either by statute or through judicial interpretation, provide for a hearing on the defense to the charges.[58]

Jackson implies that in order for a state to commit an accused solely because of his incapacity to be tried, it must guarantee the defendant will receive treatment towards restoration of competency.[59] After *Jackson* and *O'Connor*, the sole justification for committing an accused, unless the civil commitment criteria are found to apply, is to aid him in regaining his ability to be tried. He can no longer be locked up in the "public interest" unless he is shown to be dangerous on a basis other than pending criminal charges. The hospital should be required at stated intervals to report to the court on the defendant's condition;

Cases Before Trial 132, 138–39 (1965), *cited in* Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 472 (1967).

56. A good example of a time-limited scheme for commitment of incompetents is found in CAL. PEN. CODE § 1370 (Supp. 1976). This provision requires that within 90 days of commitment, the superintendent of the state hospital to which the defendant is committed must report to the court on defendant's progress. Thereafter, a report must be filed every 6 months. If at any time within 18 months after commitment it is determined that the defendant is not likely to regain competency, he is released. After the defendant has been in commitment for 18 months, a new hearing is held by the court. Only if the defendant shows signs of improvement and it is determined that he will probably become competent within 18 more months will commitment continue. The maximum total time a defendant may continue in commitment under the incompetency statute is 3 years.

A discussion of California's approach to the problem is found in Parker, *California's New Scheme for the Commitment of Individuals Found Incompetent to Stand Trial*, 6 PAC. L.J. 484 (1975).

57. *See* Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832 (1960). *See also* Gobert, *Competency to Stand Trial: A Pre- and Post-Jackson Analysis*, 40 TENN. L. REV. 659 (1973). Both articles discuss this issue extensively. *See also* Comment, *Florida's Incompetency to Stand Trial Rule: Justice in a Straightjacket*, 27 U. FLA. L. REV. 248, 253 (1974).

58. *See, e.g.*, MASS. GEN. LAWS chs. 123, 137 (Supp. 1975) and CAL. PEN. CODE § 1368.1(a) (Supp. 1976). *See also Ex parte* Kent, 490 S.W.2d 649, 653 (Mo. 1973), *discussed in* Comment, *Criminal Procedure—Mental Illness and Commitment*, 39 MO. L. REV. 602, 605–06 (1974). The Model Penal Code would allow the defense attorney to assert objections to prosecution which can be fairly determined "prior to trial and without the personal participation of the defendant." MODEL PENAL CODE § 4.06.

59. 406 U.S. at 738. "[E]ven if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal."

if it is evident the defendant is not improving and is receiving no treatment, he should be released.[60]

Incorporating these provisions into Florida's rule would serve several important functions. First, it would assure that defendants will not be institutionalized when they may not in fact be prosecuted, either because prosecution is barred by law or because the charging instrument is faulty. Second, this scheme would place the initiative for determining a defendant's recovery on the courts. The incompetency to stand trial issue is ultimately a legal, as well as a medical one. It should be a bilateral decision: while medical testimony is essential, the court knows best what is required of a defendant during a trial and to what extent the defendant must assist counsel in preparing a defense.[61] Under the present rule, after initial commitment the court abdicates its responsibility in the decision to the hospital staff. Since the initiative in determining recovery is on the hospital, it is not unlikely that given the overcrowded state of most mental hospitals, the defendant may become "lost" in the institution.[62] The requirement for periodic court review would insure that the commitment of an accused is serving the function of preparing a defendant to stand trial. Finally, a maximum time limit for commitment would insure that the hopelessly incompetent individual could not effectively be sentenced to an indefinite or life commitment simply because he is unable to be tried. These suggestions appear to be the minimum necessary to insure protection of the individual's constitutional rights as enunciated by *Jackson* and *O'Connor*.

In addition, several options should be available to the court by which a defendant may be placed in a situation conducive to recovery. For example, the court should be empowered to order a defendant returned to his own environment and treated on an out-patient basis at a local community facility, if it finds that this would be more beneficial than commitment.[63] Furthermore, the defendant should have the same opportunity for release pending trial as any other accused.

Florida's present incompetency-to-stand-trial rule reflects society's inconsistent attitudes toward the mentally ill offender: the desire to protect the accused is countered by the desire to protect society from a

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60. The Supreme Judicial Court of Massachusetts has enunciated a constitutional right to treatment for the incompetent defendant committed to a mental institution. Nason v. Superintendent of Bridgewater State Hosp., 233 N.E.2d 908 (Mass. 1968).

61. Comment, *supra* note 57, at 253.

62. *See* note 6 and accompanying text *supra*. *See also* Note, *The Rights of the Mentally Ill During Incarceration: The Developing Law*, 25 U. FLA. L. REV. 494, 495 (1973).

63. *Id. See also* Foote, Gobert, *supra* note 57. FLA. STAT. § 394.463 (1975) contemplates access to local community facilities.

person thought to be guilty of a crime. But in *Jackson* and *O'Connor*, the Supreme Court ruled that an individual's constitutional rights are too important to be subordinated to public opinion. Commitment under the present rule is no more than an alternative form of conviction. Such a commitment scheme does violence to the constitutional safeguards designed to preserve the individual's rights; Florida's present rule must be changed to insure that these basic constitutional guarantees are honored.

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