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Criminal Procedure--Automatic Commitment of Defendants Found Not Guilty by Reason of Insanity

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CRIMINAL PROCEDURE–AUTOMATIC COMMITMENT OF DEFENDANTS FOUND NOT GUILTY BY REASON OF INSANITY

State v. Kee[1]

Joseph Kee was charged with robbery in the first degree. After a psychiatric examination, Kee entered a plea of not guilty by reason of mental disease or defect excluding responsibility.[2] The circuit court considered the report of the mental examination, accepted Kee's plea, and committed Kee pursuant to section 552.040 (1) of the Revised Statutes of Missouri.[3] Following the procedures set out in section 552.040 (4), Kee filed an application for release from custody. Kee alleged that he no longer suffered from a mental disease or defect rendering him dangerous and that his original commitment violated the due process and equal protection clauses of the fourteenth amendment of the United States Constitution. At a hearing, the circuit court found that Kee still suffered from paranoid schizophrenia and held section 552.040 constitutional. The Missouri Supreme Court upheld the lower court.

In Missouri if the defendant is acquitted on the basis of mental disease or defect excluding responsibility, the verdict must so state.[4] Such a finding triggers section 552.040, which demands that the defendant be committed to the Director of Mental Diseases. This criminal commitment differs procedurally from civil commitment.[5] The civil commitment statute[6] requires that the potential patient be notified of the attempted commitment, that he be given a hearing concerning his present mental condition in probate court, that he be allowed to testify and cross-examine witnesses, that he be examined by a physician within 20 days of the application and that the physician testify at the hearing, that he be provided with an attorney and attorney's fees if he cannot afford them, and that he have a right to appeal the probate court's decision to circuit court. The allegedly mentally ill person may demand a jury trial at circuit court. The burden is on the applicant[7] to prove that the potential patient is mentally ill,[8] is

1. 510 S.W.2d 477 (Mo. En Banc 1974).
2. Pursuant to section 552.030, RSMo 1969.
3. Section 552.040 (1), RSMo 1969, provides:
When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the court shall order such person to be committed to the director of mental diseases for custody, care and treatment in a state mental hospital.
4. § 552.030 (8), RSMo 1969.
5. *See* Comment, *Equal Protection and Due Process For the Criminally Insane in Missouri,* 43 U.M.K.C.L. REV. 179, 184-87 (1974).
6. § 202.807, RSMo 1973 Supp.
7. State *ex rel.* Wilkerson v. Skinker, 344 Mo. 359, 365, 126 S.W.2d 1156, 1159 (1939).
8. Section 202.010 (12), RSMo 1969, defines "mental illness" as:
. . . a state of impaired mental function and includes alcoholism or other drug abuse to such an extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, and without re-

in need of custody, care, or treatment in a mental facility, and lacks sufficient insight or capacity to make decisions with respect to his own hospitalization.[9] Civilly committed patients may at any time petition for reconsideration of the commitment order[10] or may be discharged when the head of the hospital believes that it is justified.[11]

Under criminal commitment proceedings there is no determination of mental illness *at the time of commitment.* The finding that the defendant was suffering from a mental disease or defect excluding responsibility at the time of the crime is enough for commitment.[12] Also, there is no requirement calling for a post-commitment hearing. The only way the defendant can be released is if he, or the hospital superintendent, initiates a hearing at which the defendant has the burden of convincing the court[13] that he no longer has a mental defect rendering him dangerous.[14] Furthermore, there are no provisions for jury trial, right to examine witnesses, right to an attorney, or required examination or testimony by a physician.

Kee contended that the Missouri commitment statutes imposed an unreasonable and arbitrary distinction between civil and criminal commitment in violation of equal protection. In addition, Kee argued that failure to provide a pre-commitment hearing about his mental condition at the time of commitment deprived him of due process.[15]

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gard to whether or not such person has been adjudicated legally incompetent.

In O'Connor v. Donaldson, 95 S. Ct. 2486 (1975), the Supreme Court stated that there is no constitutional basis for confining a mentally ill person involuntarily if he is not dangerous and can live safely in freedom. This makes the Missouri statute of questionable constitutionality. *See* Bazelon, *Institutionalization, Deinstitutionalization, and the Adversary Process,* 75 COLUM. L. REV. 897 (1975).

9. § 202.807 (5), RSMo 1969.

10. § 202.837, RSMo 1969. This section also states that the hearing shall be conducted in accordance with section 202.807; *see* Murphy v. Murphy, 358 S.W.2d 778, 781-82 (Mo. 1962).

11. § 202.827, RSMo 1969.

12. Section 552.010, RSMo 1969, states:

> The terms "mental disease or defect" include congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms "mental disease or defect" do not include alcoholism without psychosis or drug abuse without psychosis or an abnormality manifested only by criminal sexual psychopathy. . . .

Section 552.030 (1), RSMo 1969, provides:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he did not know or appreciate the nature, quality or wrongfulness of his conduct or was incapable of conforming his conduct to the requirements of law.

13. State v. Montague, 510 S.W.2d 776, 778 (Mo. App., D. St. L. 1974).

14. § 552.040 (1), RSMo 1969.

15. 510 S.W.2d at 480. MODEL PENAL CODE § 4.08, Comment (Tent. Draft No. 4, 1955), points out that automatic commitment may ultimately benefit the defendant because it may make the insanity defense more plausible to the jury and the public.

The landmark case on the commitment issue, *Baxstrom v. Herold*,[16] was decided by the United States Supreme Court in 1966. *Baxstrom* involved a New York statute which allowed civil commitment of prisoners nearing the end of their sentences under a procedure different from that afforded to others civilly committed. The Court struck down the statute as a violation of equal protection. It stated that although classification of the mentally ill as either insane or dangerously insane may be a reasonable distinction for determining the type of custodial or medical care to be given, it has no relevance whatever in the context of the procedures employed to show whether a person is mentally ill at all.[17] *Baxstrom* has subsequently been interpreted to mean that dangerousness, as exhibited by prior criminal conduct, cannot justify denial of procedural safeguards for the determination of mental competence.[18]

Following *Baxstrom*, the United States Court of Appeals for the District of Columbia, in *Bolton v. Harris*,[19] held that anyone found not guilty by reason of instanity must be given a pre-commitment judicial hearing with procedures "substantially similar" to those in civil commitment proceedings.[20] The court emphasized, however, that "relevant differences" between the criminally and civilly committed patients would give rise to some differences in procedure. For example, one found not guilty by reason of insanity may be automatically committed for an adequate period of observation to determine his present mental condition.[21]

There are also due process considerations involved in mandatory commitment. As Judge Seiler pointed out in his dissenting opinion in *Kee*, we do not confine people without proving a case against them and then make them prove that they should be released.[22] It is a basic due process requirement that one is entitled to a hearing prior to deprivation of liberty.[23]

Although the United States Supreme Court has not spoken directly on the due process considerations in insanity acquittal cases, *Specht v.*

16. 383 U.S. 107 (1966). Prior to *Baxstrom*, in Lynch v. Oversholser, 369 U.S. 705 (1962), the Court construed a District of Columbia statute requiring commitment of one found not guilty by reason of insanity as inapplicable where the trial court raised the defense *sua sponte*. The Court stated that those who affirmatively rely on the defense are in a different position and that Congress might have thought that such acquittees should be committed automatically to discourage false pleas of insanity and to require them to show that they have recovered. However, the Court would go no further than to say that "such differentiating considerations are pertinent to ascertaining the intended reach of the statutory provision." *Id.* at 715.

17. 383 U.S. at 111.

18. Cameron v. Mullen, 387 F.2d 193, 201 (D.C. Cir. 1967); *see* People v. Lally, 19 N.Y.2d 27, 277 N.Y.S.2d 654, 224 N.E.2d 87 (1966).

19. 395 F.2d 642 (D.C. Cir. 1968).

20. *Id.* at 649. The court noted that it makes no difference for commitment purposes whether the plea of insanity is raised by the defendant, the prosecutor, or the court. *But see* note 16 *supra*.

21. *Id.* at 651.

22. 510 S.W.2d at 484.

23. Morrissey v. Brewer, 408 U.S. 471 (1972).

Patterson[24] provides some guidelines in an analogous situation. In *Specht* the defendant was convicted of indecent liberties under one statute, but sentenced under the Colorado Sex Offenders Act to an indeterminate term. The judge was allowed to sentence under that act if, based on a psychiatric examination, he found the defendant to be a habitual sex offender and mentally ill. The Supreme Court found that the act embodied a separate criminal proceeding which may be invoked after conviction of one of the specified crimes and that in such a proceeding, the full panoply of procedural safeguards was necessary to satisfy due process.

The *Specht* decision provides a foundation for ascertaining the due process requirements in mandatory commitment procedures. Both situations involve institutionalization on the basis of prior criminal conduct without inquiry into the separate set of facts which show the necessity of immediate commitment.[25] The *Specht* rationale would indicate that a trial court conviction for the substantive offense cannot be used as a basis for hospitalizing the defendant as an insane person without affording him adequate procedural safeguards.

Kee relied on *Baxstrom, Bolton,* and *Specht* in alleging that section 552.040 was unconstitutional. The Missouri Supreme Court distinguished *Baxstrom* as being concerned with two different methods of civil commitment, whereas *Kee* involved criminal versus civil commentment.[26] *Bolton* was distinguished on two bases. First, in *Bolton* the state had the burden of proving that the defendant was sane at the time the crime was committed and thus Bolton was committed even though there may have been only a reasonable doubt as to his sanity at the time he committed the crime; in Missouri, however, the defendant must prove affirmatively that he was insane by a preponderance of the evidence, thus making more reasonable a presumption that the insanity continues at the time of acquittal.[27] Second, the statute in *Bolton* did not provide for a release hearing, whereas insanity acquittees in Missouri may initiate a hearing immediately upon commitment.[28] *Specht* was dismissed as not involving a situation where the defendant relied on an insanity defense.

The *Kee* court did not sufficiently confront the issues and problems arising in these cases. Distinguishing *Baxstrom* as involving two different methods of civil commitment unlike *Kee,* which involved both criminal and civil commitment, is essentially labelling the procedures and saying that dif-

24. 386 U.S. 605 (1967).

25. *See* Note, *Constitutional Law—Equal Protection and Due Process—Automatic Commitment of a Defendant Found Not Guilty By Reason of Insanity,* 1974 WIS. L. REV. 1203, 1212.

26. 510 S.W.2d at 481.

27. Although section 552.030 (1), RSMo 1969, does not use the term "insane," the writer uses this term to describe the legal conclusion which that section requires to be reached in order to find that a person is not responsible for his criminal conduct. That term is not used to describe the conclusion that one is mentally ill under section 202.807, RSMo 1969.

28. 510 S.W.2d at 482-83.

ferent labels preclude comparison.[29] It is unfortunate that the court distinguished *Bolton*. The focus of that opinion was giving insanity acquittees a hearing into present mental condition, in spite of the degree of certainty as to past insanity. *Specht* was barely mentioned other than a statement of its facts.

The court in *Kee* quoted extensively from a Wisconsin case, *State ex rel. Schopf v. Schubert*,[30] which was subsequently overruled shortly after the *Kee* decision.[31] In overruling *Schopf*, the Wisconsin Supreme Court decided that automatic commitment denied due process and equal protection. It ordered that following an acquittal by reason of insanity the jury should decide whether the defendant is presently mentally ill and in need of treatment—the same finding required under the civil commitment statute. The jury must be provided with proof based on examination of the defendant's mental condition at the time of acquittal.[32]

Using the due process and equal protection principles expounded by the preceding cases, mandatory commitment without certain procedural safeguards is constitutionally suspect. Involuntary commitment in a mental institution is a deprivation of liberty which the state cannot accomplish without due process of law.[33] The extent of the required procedural protections depends on a judicious weighing of the individual's interest in maintaining his liberty against the state's interest in depriving him of it.[34] Although the state's interest in protecting its citizens from one who has been found to have been insane in the recent past may outweigh the individual's interest in freedom so as to justify temporary commitment, it does not justify permanent commitment without providing adequate procedural safeguards.

In upholding statutes affording insanity acquitees fewer procedural safeguards than others, many courts have relied on the presumption of

29. *See* Note, *The Rights of the Person Acquitted by Reason of Insanity: Equal Protection and Due Process*, 24 ME. L. REV. 135, 138-39 (1972).

30. 45 Wis. 2d 644, 173 N.W.2d 673 (1970).

31. State *ex rel.* Kovach v. Schubert, 64 Wis. 2d 612, 622, 219 N.W.2d 341, 346 (1974).

32. *Id.* at 622-23, 219 N.W.2d at 346. The court found that approval of *Bolton* could be inferred from a reference to that case in Jackson v. Indiana, 406 U.S. 715 (1972): "The *Baxstrom* principle has also been extended to commitment following an insanity acquittal." *Id.* at 724 (citing *Bolton*). The *Jackson* Court said: "*Baxstrom* held that the State cannot withhold from a few the procedural protections or the substantive requirements for commitment that are available to all others." *Id.* at 727. Both references are dicta. The court in *Kovach* also discussed Humphrey v. Cady, 405 U.S. 504 (1972), where the Supreme Court considered the Wisconsin Sex Crimes Act commitment procedure which, unlike the civil commitment statute, did not provide for a jury determination of the need for commitment. The Court found that although initial commitment under the Sex Crimes Act was arguably a justifiable alternative to sentencing, commitment beyond the normal prison term would require civil commitment because the two methods of confinement appeared to require the same kind of determination.

33. Specht v. Patterson, 386 U.S. 605, 608 (1967).

34. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

continuing insanity.[35] Although presuming that the defendant who was found to have been insane at the time he committed the crime is still insane at the time of commitment may be reasonable in many instances, it is not always valid. Even showing by a preponderance of the evidence that the defendant was insane when the crime was committed should not be conclusive of his insanity at the time of commitment. He may have recovered in the interval between the commission of the crime and commitment. The fact that the defendant was found mentally capable of standing trial, even though generally based on a lower standard of proof than the insanity defense,[36] may, nevertheless, indicate that he has improved.

Baxstrom and its progeny reject the idea that past criminal conduct gives rise to a presumption of continuing insanity. In *Specht* there was a reasonable presumption that a person convicted of indecent liberties constituted a threat of harm to the public, yet the Supreme Court required a pre-commitment hearing.

The fourteenth amendment does not require that things different in fact be treated in law as though they were the same.[37] But it does require that those who are similarly situated be similarly treated. Equal protection demands that legislative classification be reasonable in light of the purpose of the law.[38] The *Kee* court pointed out that the purposes of compulsory commitment are protecting society from the defendant and providing him with medical treatment.[39] These purposes seem to be similar to those of civil commitment. The issue is whether there are sufficient differences between the two groups to warrant substantially different commitment procedures. There is a difference in that one has been found to have committed a crime while the other is only potentially dangerous. However, *Baxstrom* said that prior criminal conduct cannot serve as a basis of classification for commitment purposes. It is arguable that *Baxstrom* is different because there was no connection between the individual's mental condition and his criminal act. However, *Bolton* involved a situation where there was such a link, and the court found substantially different procedures to be unreasonable. Many states have followed *Bolton's* extension of *Baxstrom* by

35. In *Kee* the court said: "When this kind of conduct is engaged in as a consequence of mental defect, it is reasonable to believe that it may be repeated until the defendant is cured." 510 S.W.2d at 480. *See* Comment, *Commitment Following Acquittal By Reason of Insanity and the Equal Protection of the Laws,* 116 U. PA. L. REV. 924, 935-36 (1968).

36. Under section 552.020 (1), RSMo 1969, a defendant is capable of standing trial if he understands the charges against him and can assist in his own defense. *See* Drope v. Missouri, 95 S. Ct. 396 (1975).

37. Tigner v. Texas, 310 U.S. 141, 147 (1940); *see* Tussman & ten Broek, *The Equal Protection of the Laws,* 37 CAL. L. REV. 341, 344 (1939).

38. Although the fundamental interest of liberty would seem to require the strict scrutiny test, the United States Supreme Court has consistently used the rational basis test in examining mental health laws. *See* Baxstrom v. Herold, 383 U.S. 106, 111 (1966).

39. 510 S.W.2d at 484. The state's interest in discouraging false pleas of insanity has been cited as another rationale for mandatory commitment, but this problem can be best dealt with using the less onerous burden of a pretrial examination or by imposing a greater burden for obtaining an insanity acquittal.

holding that insanity acquittees must be afforded the same procedural safeguards as civilly committed persons.[40]

It is difficult to see how the goals of caring for incompetent persons and protecting society would be impeded by granting uniform procedural safeguards to the civilly committed and to insanity acquittees, except, as *Bolton* recognizes, where there are "relevant differences."

Such terms as "substantial similarity" and "relevant differences" provide a degree of flexibility in dealing with insanity acquittees. Thus, the state's interest in protecting society is sufficient to justify temporary detention in order to determine present mental condition. However, in order to justify permanent institutionalization, a prompt post-detention hearing should be required. *Specht* requires reasonable notice, right to counsel, right to confront and cross-examine witnesses, and right to a meaningful record for review.[41] *Bolton* requires a right to jury trial and any other procedures necessary to give insanity acquittees protection "substantially similar" to that afforded the civilly committed. Some jurisdictions require that the patient have the burden of proving that he is no longer insane. But this is based largely on the discredited presumption of continuing insanity.[42] The better view is to place the burden on the state to prove the acquittee's insanity as in civil commitment.[43]

As the foregoing suggests, section 552.040 of the Revised Statutes of Missouri is procedurally deficient. The insanity acquittee may initiate a hearing immediately upon commitment. Although this provision arguably satisfies the "substantially similar" test, it does not satisfy due process. There should be a mandatory hearing within a reasonable time after commitment. The nature of the hearing provided under section 552.040 is not discussed in the statute and was not considered in *Kee*. At a minimum, the post-commitment hearing should provide the *Specht* procedures. In addition, safeguards afforded civilly committed persons should be provided. As Judge Seiler said in his dissenting opinion, the hearing must be an opportunity for a genuine test of whether the defendant should be permanently committed.[44]

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40. *See* State v. Clemons, 110 Ariz. 79, 515 P.2d 324 (1973); Wilson v. State, 287 N.E.2d 875 (Ind. 1972); People v. McQuillan, 395 Mich. 511, 221 N.W.2d 569 (1974); State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975); People v. McNally, 371 N.Y.S.2d 538 (1975); Holderbaum v. Watkins, 71 Ohio. Op. 2d 333, 42 Ohio St. 2d 372, 328 N.E.2d 814 (1975); Commonwealth *ex rel.* DiEmilio v. Shovlin, 449 Pa. 177, 295 A.2d 320 (1972).

41. 386 U.S. at 610.

42. *See, e.g., In re* Franklin, 7 Cal. 3d 126, 141, 101 Cal. Rptr. 553, 562, 496 P.2d 465, 474 (1972).

43. The United States Court of Appeals for the District of Columbia held that while the District has the burden of proof, a lower standard of proof could be used to commit insanity acquittees than civilly committed patients. United States v. Brown, 478 F.2d 606, 611 (D.C. Cir. 1973). There was a vigorous dissent by Judge J. Skelly Wright.

44. 510 S.W.2d at 485.