CRIMINAL PROCEDURE

STATE EX REL. COLLINS V. SUPERIOR COURT AND PATRICIA MITTENTHAL, REAL PARTY IN INTEREST: AUTOMATIC COMMITMENT OF INSANITY DEFENSE ACQUITTEE FOR A MINIMUM OF 230 DAYS IS UNCONSTITUTIONAL

On November 13, 1984 Patricia Ann Mittenthal, 45, shot her former lover's fiance three times.[1] Mittenthal was charged with attempted murder. The trial court returned a jury verdict of not responsible for criminal conduct by reason of insanity.[2] Since Mittenthal had committed a crime that involved physical injury to another,[3] Arizona Revised Statutes section 13-3994(D) required the court to confine her in a mental hospital for a minimum of 230 days.[4] However, the court refused to comply with section 13-3994(D) after concluding that the statute denied Mittenthal due process and was thus unconstitutional and unenforceable. The State appealed on special action to the Arizona Supreme Court. The central issue before the court was whether the mandatory confinement provision of section 13-3994(D) was constitutional.[5]

The court found that Arizona Revised Statutes section 13-3994(D) absolutely denies dangerous crime insanity defense acquittees (DCIDA)[6] the

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1. The Arizona Republic, at A25, col. 2, Tuesday November 4, 1986.

2. State ex rel. Collins v. Superior Court of Maricopa County, 150 Ariz. 295, 723 P.2d 644 (1986).

3. After acquittal of a defendant on grounds of insanity, the court is required, under ARIZ. REV. STAT. ANN. § 13-502(D) to make findings as to the nature of the acts the defendant committed. The subsection reads as follows:

> The court shall make findings as to the acts the defendant committed, as to whether such acts involved physical injury or a substantial risk of physical injury to another and as to the offense, if any, of which the defendant would have been convicted if he had been found responsible for criminal conduct.

The *Collins* court determined that Mittenthal had caused physical injury to another by shooting the victim. 150 Ariz. at 296, 723 P.2d at 645.

4. ARIZ. REV. STAT. ANN. § 13-3994(A) (1982) provides:

> A person who is found not responsible for criminal conduct pursuant to § 13-502 shall be committed to a secure mental health evaluation or treatment agency until the person is eligible for release pursuant to this section.

ARIZ. REV. STAT. ANN. § 13-3994(D) provides:

> If the court finds pursuant to § 13-502, subsection D, that the act or acts committed by the person involved physical injury or a substantial risk of physical injury to another, *the person is not eligible for conditional release pursuant to subsection D [sic, for C] of this section until at least two hundred thirty days have elapsed* from the date of the initial commitment made pursuant to subsection A of this section.

[emphasis added.]

5. *State ex rel. Collins*, 150 Ariz. at 296, 723 P.2d at 645.

6. For convenience purposes, a person falling within the scope of ARIZ. REV. STAT. ANN. § 13-3994(D) will hereinafter be referred to as a DCIDA: "dangerous crime insanity defense acquittee." This specifically includes those persons found, pursuant to § 13-502(D), to have committed an

opportunity to gain release, regardless of their mental health, before 230 days have passed.[7] As a result, the court held that the statute denies due process of law and is therefore unconstitutional.[8] The court reasoned that once a person acquitted by reason of insanity no longer suffers from any mental disorder, that person requires neither treatment nor confinement.[9] Consequently, the only state interest in confining such a person, according to the court, would be for punishment.[10] The court pointed out that punishment is not a legitimate state interest for confining insanity defense acquittees, as established by Arizona's long standing policy that persons acquitted by reason of insanity are not responsible for their illegal act and cannot be punished for it.[11]

THE INSANITY DEFENSE AND AUTOMATIC COMMITMENT

Exempting the insane from criminal liability has ancient origins, going back to the Old Testament Hebrews and the ancient Greek philosophers.[12] A modern basis for the insanity defense was established in 1843,[13] when

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act or acts involving "physical injury or a substantial risk of physical injury to another." *See supra* note 4.

7. 150 Ariz. at 299, 723 P.2d at 648.

8. *Id.*

9. *Id.* The only legitimate state interests in confining insanity defense acquittees noted by the court include: 1) treatment, 2) protection of the acquittee and the public from the acquittee's dangerousness, and 3) effective evaluation of the acquittee's present mental condition. *See infra* notes 35, 60, and 61 and accompanying text.

10. *State ex rel. Collins*, 150 Ariz. at 299, 723 P.2d at 648.

> When a person acquitted by reason of insanity no longer suffers from a mental disease or defect, he or she requires neither treatment nor confinement. The State thus has no interest in confining the individual other than for punishment, which is not a legitimate governmental interest for those found not guilty by reason of insanity.

Id.

11. *Id.* at 298, 723 P.2d at 647. *See infra* note 69. The court also cites Jones v. United States, 463 U.S. 354 (1983), for the proposition that punishment is an illegitimate government interest for confining insanity defense acquittees. *Jones* held that an insanity defense acquittee has not been convicted of a crime and therefore cannot be punished. *Id.* at 369.

12. S. BRAKEL, J. PARRY, & B. WEINER, THE MENTALLY DISABLED AND THE LAW 708-09 (3d ed. 1985).

13. M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843). The verdict in *M'Naghten's Case* resulted in a parliamentary inquiry which the judiciary responded to. This response became the official M'Naghten test:

> [T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

8 Eng. Rep. at 722.

The M'Naghten test has been used throughout the United States for more than one hundred years. In about one third of the states it remains the test for the insanity defense. In several states the M'Naghten test has been modified to include an "irresistible impulse" test. This modification broadens the M'Naghten test by recognizing that persons may appreciate the quality of their act and know that it is wrong, but do it anyway as a result of an overpowering compulsion that is the product of mental disability. Still other jurisdictions have rejected both the M'Naghten test and the "irresistible impulse" modification. The Durham rule, established in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), simply holds that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874-75. Finally, other jurisdictions have adopted the American Law Institute (ALI) test. Drafted by the ALI in the 1950's, this test

Daniel M'Naghten shot and killed the British Prime Minister's private secretary Edward Drummond.[14] The jury acquitted M'Naghten by reason of insanity.[15] Upon acquittal, the court committed M'Naghten to a mental hospital where he remained for twenty-two years before he died. During those twenty-two years M'Naghten never received a hearing to assess whether his illness continued or whether he was in need of confinement.[16]

Automatic commitment to a mental hospital remained the accepted disposition of insanity defense acquittees for over a century following *M'Naghten's Case*, both in England and America.[17] In England, indefinite automatic commitment remains to this day the accepted disposition of insanity defense acquittees.[18] In the United States, the Supreme Court restricted the application of an automatic commitment statute for the first time in *Lynch v. Overholser*.[19] Lynch tried to plead guilty to making checks with intent to defraud, but the trial court refused the plea, found him not guilty by reason of insanity, and committed him to a mental hospital.[20] The

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holds that "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01 (1962), *reprinted in* 10 U.L.A. 490-91 (1974). Jurisdictions that have an insanity defense have some form of one of the above four standards. *See generally* S. BRAKEL, J. PARRY, & B. WEINER, *supra* note 12.

Pursuant to ARIZ. REV. STAT. ANN. § 13.-502(A) the Arizona insanity defense standard is basically the M'Naghten test:

> A person is not responsible for criminal conduct by reason of insanity if at the time of such conduct the person was suffering from such a mental disease or defect as not to know the nature and quality of the act or, if such person did know, that such person did not know that what he was doing was wrong.

In its report on examining the insanity defense in Arizona, the Senate Judiciary Interim Subcommittee noted that most agree that the M'Naghten test is the most difficult for the plaintiff to meet of the four tests currently used. Final Report of the Senate Judiciary Interim Subcommittee on the Insanity Defense, 12 (December 28, 1982).

14. M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843). The facts of *M'Naghten's Case* are also set forth in W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 37, at 274-75 (1972); Morris, *Dealing Responsibly with the Criminally Irresponsible*, 1982 ARIZ. ST. L.J. 855, 855; and S. BRAKEL, J. PARRY, & B. WEINER, *supra* note 12, at 709 n.202.

15. M'Naghten's Case, 8 Eng. Rep. at 720.

16. Reported in Benham v. Edwards, 501 F. Supp. 1050, 1057 (N.D. Ga. 1980), *modified*, 678 F.2d 511 (5th Cir. 1982), *vacated sub nom.* Ledbetter v. Benham, 463 U.S 1222 (1983) (*vacated* in light of Jones v. United States, 463 U.S 354 (1983)).

17. *See* T. MAEDER, CRIME AND MADNESS 169 (1985);

> In 1800, . . . Britain rushed through legislation authorizing the immediate indefinite hospitalization of a defendant whose very acquittal was presumed to offer incontrovertible proof of his dangerous lunacy. Similar procedures were adopted in America, and for a century and a half afterward no one needed to worry about insanity acquittals of any kind, since NGRIs were left quietly to languish and die in psychiatric warehouses alongside their civilly committed brethren.

See also Note, *Commitment of Persons Acquitted by Reason of Insanity: The Example of the District of Columbia*, 74 COLUM. L. REV. 733, 736 (1974) ("Mandatory commitment was essentially the quid pro quo for being held blameless."); Ragsdale v. Overholser, 281 F.2d 943, 949 (D.C. Cir. 1960):

> It is hardly asking too much to require that a defendant who is absolved from punishment by society because of his mental condition at the time of the criminal act should accept some restraint on his liberty by confinement in a hospital for such period as is required to determine whether he has recovered and whether he will be dangerous if released.

18. *See* Mental Health Act, 1959, 7 & 8 Eliz. 2, ch. 72, § 60, and Criminal Procedure (Insanity) Act, 1964, ch. 84, § 5.

19. 369 U.S. 705 (1962).

20. *Id.* at 707-08.

Supreme Court construed the District of Columbia automatic commitment statute to apply only when the defendant raises the issue of insanity.[21] Since Lynch plead guilty, the Court held that the statutes did not apply to him.[22] The Court avoided the constitutional issues surrounding automatic commitment altogether.[23]

Although not yet addressing the constitutionality of automatic commitment head on, in a line of cases starting in 1966, the Court addressed equal protection and due process arguments pertaining to the commitment of mentally ill criminal offenders generally. In *Baxtrom v. Herold*,[24] the Court held that equal protection requires the same commitment procedures for civil commitment candidates as for mentally ill prisoners.[25] In *Specht v. Patterson*,[26] the Court ruled that due process requires that a sex offender who is subject to commitment in a mental hospital for an *indefinite* period must receive a hearing to assess present mental health and need for confinement.[27] Finally, in *Jackson v. Indiana*,[28] the Court articulated the general principle that due process requires a reasonable relation between confinement and the purpose for that confinement.[29] Although none of these cases dealt specifically with the automatic commitment of insanity defense acquittees, lower courts extended the due process and equal protection analysis of them to the context of automatic commitment of insanity defense acquittees.[30]

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21. *Id.* at 710.

22. *Id.* at 719.

23. *Id.* at 710-11.

24. 383 U.S. 107 (1966).

25. *Id.* at 110. It was argued by the State that it was reasonable to commit mentally ill prisoners under lower procedural safeguards since they had demonstrated their need for confinement by having criminal records. *Id.* at 114. The Court rejected this argument noting:

> Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all.*

Id. at 111 (emphasis in original). *See also* Humphrey v. Cady, 405 U.S. 504 (1972) (criminal conviction does not justify less procedural safeguards).

26. 386 U.S. 605 (1967).

27. *Id.* at 610. Specht was committed indefinitely by the trial court pursuant to the Colorado Sex Offenders Act. COLO. REV. STAT. § 39-19-1 to 10 (1963). *Id.* at 607. The Act authorized indefinite commitment of an individual convicted of certain sex offenses if he represented a threat of harm to the public, or if he was a habitual offender and mentally ill. Specht was not given notice, nor was he given a full hearing on his present mental health. The Court held that due process requires that such a defendant be given a hearing, and that at that hearing the defendant has the right to counsel, confrontation, cross-examination, presentation of evidence, and adequate findings of fact to insure a meaningful appeal. *Id.* at 610.

28. 406 U.S. 715 (1972).

29. *Id.* at 738. Specifically, the Court held that "[a]t 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." *Id.*

30. In 1968, relying on *Specht* and *Baxstrom*, the District of Columbia Circuit in Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968), struck down a statute which authorized the government to commit insanity defense acquittees without a hearing on present mental illness. Other courts, utilizing similar rationale, also found added protections for insanity defense acquittees: Allen v. Radack, 426 F. Supp. 1052 (D.S.D. 1977) (commitment must be based upon finding, at the time of commitment, of present mental illness); Locklear v. Hultine, 528 F. Supp. 982 (D. Kan. 1981) (state cannot place burden on acquittee to prove eligibility for release following automatic commitment); *In re* Moye, 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978) (*en banc*) (equal protection requires that the state carry the burden of proof once the underlying maximum sentence has expired); Wilson v. State, 259 Ind. 375, 287 N.E.2d 875 (1972) (equal protection requires that criminal commitment

Finally, in *Jones v. United States*[31] the Supreme Court directly addressed the constitutionality of the District of Columbia's automatic commitment statute.[32] Jones was charged with attempting to steal a coat from a department store, a misdemeanor which carried a maximum one year sentence.[33] He successfully asserted the insanity defense and was automatically committed to a mental hospital. Unable to prove his sanity, as required by statute to gain release,[34] Jones challenged the statute at the end of one year, the maximum prison term for his offense. Jones argued that he had a right to be released or alternatively to have civil commitment proceedings started against him at which the government would have the burden of proving his need for continued confinement.[35]

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and civil commitment candidates receive equal treatment regarding commitment and release); Williams v. Superintendent, 43 Md. App. 588, 406 A.2d 1302 (1979) (acquittees must be committed under same proof by clear and convincing evidence that civil committees are committed under), *vacated sub nom. due to legislative enactment*, Coard v. State, 288 Md. 523, 419 A.2d 383 (1980); People v. McQuillan, 392 Mich. 511, 221 N.W.2d 569 (1974) (en banc) (it is unconstitutional to commit acquittees for an indefinite period); State v. Fields, 77 N.J. 282, 390 A.2d 574 (1978) (release procedures must be the same for acquittees and civil committees); State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975) (following a temporary commitment for observation, the state must prove that the acquittee is dangerous and mentally ill in order to retain him); *In re* Torsney, 47 N.Y.2d 667, 394 N.E.2d 262, 420 N.Y.S.2d 192 (1979) (due process and equal protection require that the same substantive and procedural rights be accorded all commitment candidates, acquittees included); State v. Wilcox, 92 Wash.2d 610, 600 P.2d 561 (1979) (en banc) (due process requires that the state bear the burden of proof for commitment of acquittee); State *ex rel.* Kovach v. Schubert, 64 Wis.2d 612, 219 N.W.2d 341 (1974), *cert. denied*, 419 U.S. 1130 (1975) (automatic commitment of acquittees violates due process and equal protection). *See* Note, *Automatic and Indefinite Commitment of Insanity Acquittees: A Procedural Straitjacket*, 37 VAND. L. REV. 1233, 1242-44 (1984).

31. 463 U.S. 354 (1983).

32. The debate over the disposition of insanity defense acquittees has been especially prominent in the District of Columbia. The District of Columbia Circuit has developed a coherent body of caselaw typified by Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968), while Congress has responded by circumscribing the judicially developed scheme. *See* Note, *Commitment of Persons Acquitted by Reason of Insanity: The Example of the District of Columbia*, 74 COLUM. L. REV. 733 (1974). At the time of Jones v. United States, 463 U.S. 354 (1983), relevant sections of the District of Columbia automatic commitment statute read as follows: D.C. CODE ANN. § 24-301(d)(1)(1981):

> If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its commission, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e) of this section.

D.C. CODE ANN. § 24-301(d)(2)(A)(1981):

> A person confined pursuant to paragraph (1) of this subsection shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. . . .

33. D.C. CODE ANN. §§ 22-103, 22-2202 (1981).

34. D.C. CODE ANN. § 24-301(d)(2)(B)(1981):

> If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within 10 days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. *The person confined shall have the burden of proof.* If the court finds *by a preponderance of the evidence* that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

(emphasis added).

35. *Jones*, 463 U.S. at 363. The District of Columbia's civil commitment procedures provide that the government must prove by clear and convincing evidence that a person is in need of confinement in order to confine him involuntarily. D.C. CODE ANN. § 21-545(b)(1981). In addition, a person may demand a jury in the civil commitment proceeding against him. D.C. CODE ANN. § 21-544 (1981). And, once committed, the person may gain release at any time upon certification by the hospital that he has recovered. D.C. CODE ANN. §§ 21-546, 21-548 (1981 & Supp. 1986).

Before addressing Jones's argument that civil commitment proceedings were necessary for continued confinement, the Court addressed the constitutionality of automatic commitment itself.[36] The Court noted that it was not unreasonable for Congress[37] to determine that an insanity defense acquittal supports an inference of continuing mental illness and need for confinement.[38] The Court concluded that this inference is sufficient for automatic commitment, at least where the statutory scheme provides for a hearing within fifty days of commitment.[39]

The *Jones* Court held that a successful insanity defense provides sufficient foundation for commitment of an acquittee. Treatment of the individual and protection of the acquittee and society from the acquittee's potential dangerousness were cited by the Court as the purposes served by commitment.[40] As stated above, due process requires that the nature and duration of commitment have a reasonable relation to the purpose of confinement.[41] The *Jones* Court concluded that a hearing within 50 days of confinement is a sufficient safeguard against the possibility of an acquittee being confined while he is no longer in need of treatment and is no longer a threat to himself or society.[42]

The Court rejected Jones's argument that he had a right to release or to a civil commitment hearing at which the state would be required to prove his need for confinement in order to retain him.[43] The Court reasoned that there are important differences between insanity acquittees and civil committees.[44] This difference, according to the Court, is sufficient to justify the

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36. *Jones*, 463 U.S. at 364-68.

37. The United States Constitution, Article 1, section 8, gives Congress exclusive legislative authority over the District of Columbia.

38. Jones v. United States, 463 U.S. at 364. Specifically, the court noted that

> [a] verdict of not guilty by reason of insanity establishes two facts: (i) the defendant committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness. Congress has determined that these findings constitute an adequate basis for hospitalizing the acquittee as a dangerous and mentally ill person. . . . We cannot say that it was unreasonable and therefore unconstitutional for Congress to make this determination.

Id. at 363-64. As Professor Wexler has pointed out, it is interesting to note that "in discussing Jones' dangerousness, the Court attached no significance to the notoriously minor and nonviolent nature of the attempted shoplifting." Wexler, *Redefining the Insanity Problem*, 53 GEO. WASH. L. REV. 528, 534 (1985).

39. *Jones*, 463 U.S. at 366.

40. *Id.* at 368. In addition, some courts have recognized a third legitimate government interest in automatic confinement of insanity defense acquittees: confinement for purposes of making an effective diagnosis of the defendant's mental health. Application of Downing, 103 Idaho 689, 652 P.2d 193 (1982).

41. Jackson v. Indiana, 406 U.S 715, 738 (1972); *see supra* note 28 and accompanying text.

42. *Jones*, 463 U.S at 366.

43. *Id.* at 368.

44. *Id.* at 367-69. The defendant asserted that proof of his insanity was based on a preponderance of the evidence and that for indefinite commitment proof should be required by the clear and convincing standard of Addington v. Texas, 441 U.S. 418 (1979). The Court pointed out that the *Addington* standard was adopted to protect against erroneous commitment based on "abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable," or on mere idiosyncratic behavior. *Jones*, 463 U.S. at 367, citing *Addington*, 441 U.S. at 426-27. The *Jones* Court stated that the *Addington* concerns are not present in the class of insanity defense acquittees, thus justifying a lower standard of proof. Since the defendant had asserted the insanity defense, and proven that his conduct was the result of mental illness, there is little risk of error. Furthermore, the Court noted,

lower standards required to confine an insanity defense acquittee.[45]

ARIZONA'S AUTOMATIC COMMITMENT STATUTE

In spring of 1982, two controversial murder trials directed a great deal of attention to the insanity defense in Arizona. Steven Steinberg stabbed his wife to death with a kitchen knife while "sleepwalking," and William Gorzenski shot his wife and her lover when he found them together in his own bed.[46] Both men were acquitted by reason of insanity.[47] Psychiatrists testified at Steinberg's trial that Steinberg was no longer a threat to himself or society; Steinberg was released after the verdict.[48] Gorzenski was found to have suffered from deep depression along with suicidal feelings; he too was released after his acquittal.[49]

The *Steinberg* and *Gorzenski* cases were cited in legislative material in 1982 as marking the need for a thorough examination of the Arizona insanity defense statute.[50] In 1983, the Arizona Legislature adopted section

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proof that the defendant committed an act which was criminal eliminates the risk that commitment is based on mere idiosyncratic behavior. *Jones*, 463 U.S. at 367-68.

45. *Id.* at 368. This aspect of the court's holding, along with the presumption of continued mental illness and dangerousness, has met a certain amount of criticism. *See* Note, *Throwing Away the Key: Due Process Rights of Insanity Acquittees in* Jones v. United States, 34 AM. U.L. REV. 479 (1985) (punitive motives underlie many of the justifications that courts have offered for the lenient commitment and stringent release procedures for persons acquitted of criminal offenses by reason of insanity). *See also* Note, *Automatic and Indefinite Commitment of Insanity Acquittees: A Procedural Straitjacket*, 37 VAND. L. REV. 1233 (1984) (*Jones* should not control in jurisdictions in which the criminal defendant need create only a reasonable doubt of his insanity at the time of the offense to obtain acquittal).

It is also worth noting here that the *Jones* holding is somewhat strange in light of some of the realities of the insanity defense. T. MAEDER, *supra* note 17, at 168 (1985). Professor Maeder has noted that "[v]ery often the offender's illness so obviously precludes legal responsibility that he never even reaches a courtroom—charges are simply dismissed, either outright or in exchange for guarantees of voluntary or involuntary civil commitment." *Id.* at 168. Thus, persons equally insane and equally dangerous may end up in a mental hospital, but with radically different rights regarding commitment and release. For example, in Arizona, a civil committee is committed upon the state showing by clear and convincing evidence that the individual is in need of confinement, ARIZ. REV. STAT. ANN. § 36-540(A), and the committee may gain release at the expiration of the commitment period if the state fails to meet its burden to show a need for continued confinement. ARIZ. REV. STAT. ANN. § 36-542. Insanity defense acquittees, on the other hand, must prove by clear and convincing evidence that they were insane in order to be acquitted and automatically committed. ARIZ. REV. STAT. ANN. § 13-502(B), and in order to gain release they must prove by clear and convincing evidence that they are no longer in need of confinement. ARIZ. REV. STAT. ANN. § 13-3994(C). (*State ex rel. Collins* does not change this, as insanity defense acquittees may still be automatically committed pursuant to ARIZ. REV. STAT. ANN. § 13-3994(B). *See infra* note 52 and accompanying text.)

46. These cases are cited and briefly described in the Final Report of the Senate Judiciary Interim Subcommittee on the Insanity Defense, at 1-2 (December 28, 1982). The subcommittee was charged to examine the insanity defense in Arizona and make recommendations for change.

47. *Id.* at 1-2.

48. *Id.* at 1.

49. *Id.* at 2; State v. Gorzenski, No. 3682. Graham County Superior Court, March 12, 1982, acquittal.

50. Final Report of the Senate Judiciary Interim Subcommittee on the Insanity Defense, at 1-2 (December 28, 1982). The subcommittee report outlined options that could have been adopted in changing the insanity defense. Among the options for change included a suggestion that the burden of proof could be shifted from the prosecution having to prove sanity beyond a reasonable doubt to the defense having to establish insanity. *Id.* at 14. Under ARIZ. REV. STAT. ANN. § 13-502 (1978), once the defendant raised the issue of insanity, it became the government's burden to prove sanity beyond a reasonable doubt. State v. Moore, 111 Ariz. 496, 533 P.2d 663 (1975). The Senate sub-

13-3994.[51] The new scheme distinguished between non-violent insanity defense acquittees and insanity defense acquittees who committed crimes involving physical harm or risk of physical harm to another.[52] This new scheme required that, in the future, persons like Steinberg and Gorzenski who demonstrate dangerousness in their criminal act must spend a minimum of two hundred and thirty days in a mental hospital before they are eligible for release into the community.[53] The new scheme also provided that non-violent insanity defense acquittees have a right to a hearing within fifty days of commitment to determine need for continued confinement.[54]

The Arizona Supreme Court, in *State ex rel. Collins*, struck down section 13-3994(D) as unconstitutional. Presently, persons acquitted by reason of insanity may be automatically committed pursuant to section 13-3994(A), but they are all entitled to a hearing within fifty days of their commitment to determine the need for continued confinement.[55]

ANALYSIS OF *STATE EX REL. COLLINS V. SUPERIOR COURT*

In *State ex rel. Collins*, the Arizona Supreme Court focused on the *Jones* decision in striking down section 13-3994(D). The court noted that there is little risk of erroneous error in committing an insanity defense acquittee who has established his or her insanity at the time of the crime.[56] In addition, the court found that it is reasonable to believe that an insanity defense acquittal supports an inference of continued mental illness.[57] Finally, the court made special note of the need for some procedural safeguard, such as a hearing within fifty days of commitment, to insure against errone-

committee noted that the Supreme Court had held that a statute which places the burden on the defendant to establish insanity beyond a reasonable doubt does not deny due process. Leland v. Oregon, 343 U.S. 790 (1952). Also among the options outlined by the subcommittee was a suggestion that a new insanity defense statute could require automatic commitment. Final Report at 14. The only suggestion on length of time for such a commitment was that it "should be of sufficient duration to allow for a complete evaluation of the acquittee's mental disorder." *Id.* at 14-15.

51. Added by Laws 1983, Ch. 198, § 3. *See supra* note 4. The Arizona Legislature also amended ARIZ. REV. STAT. ANN. § 13.502(C), shifting the burden of proof to the defendant. Under § 13-502 a defendant must now prove by clear and convincing evidence that he was not responsible for his criminal conduct. Amended by Laws 1983, ch. 198, § 1; Laws 1984, Ch. 287, § 1.

52. *See* ARIZ. REV. STAT. ANN. § 13-3994(A) and § 13-3994(D) *supra* note 4, and § 13-3994(B), which provides in part: "A person committed pursuant to subsection A of this section is entitled to a hearing within fifty days of his confinement to determine whether he is entitled to release from confinement. . . ."

53. ARIZ. REV. STAT. ANN. § 13-3994(D), *see supra* note 4.

54. ARIZ. REV. STAT. ANN. § 13-3994(B). ARIZ. REV. STAT. ANN. § 13-3994(C) stipulates the burden of proof to be carried at the hearing and the appropriate disposition of the person seeking release:

> If a person seeking release from confinement pursuant to subsection A of this section proves by clear and convincing evidence that he is either no longer suffering from the mental disease or defect established pursuant to § 13-502 or no longer a danger to himself or others, the person shall be released. If a person seeking release from confinement pursuant to subsection A of this section proves by clear and convincing evidence that the factors specified in § 36-540.01, subsection A, paragraphs 1,2,3 and 4 apply to the person, the court may order the person's conditional release subject to the provisions of § 36-540.01, subsections B, C, E, F, G, H, I, K and L.

55. See *supra* notes 45 and 52 and accompanying text.

56. State *ex rel.* Collins v. Superior Court, 150 Ariz. 295, 296, 723 P.2d 644, 645 (1986).

57. *Id.* at 296, 723 P.2d at 645.

ous deprivation of the acquittee's liberty.[58]

In determining whether section 13-3994(D) provided sufficient procedural safeguards, the court reviewed the automatic commitment statutes of Colorado[59] and California.[60] The State submitted these statutes to support Arizona's strict post acquittal commitment provision.[61] However, the court noted that the Colorado and California statutes provide a great deal more procedural safeguards than Arizona Revised Statutes section 13-3994(D).[62] The opinion went on to state that the absolute waiting period of 230 days required by section 13-3994(D) constitutes a severe limit on liberty.[63] The court then turned to the question of whether there was any legitimate government interest that would justify such a limitation on individual liberty.[64]

The court recognized the legitimate government interests of treatment of the acquittee; protection of the acquittee and protection of society from the acquitee's potential dangerousness;[65] and proper evaluation of the acquittee's mental health, which is best achieved while the acquittee is confined.[66] The court found none of these interests sufficient to justify the 230 day confinement required by section 13-3994(D).[67] The only possible reason for having such a long unconditional confinement period, concluded the court, is to punish the acquittee of the crime that she committed.[68] The

58. *Id.* at 298, 723 P.2d at 647.

59. Colorado's automatic commitment statute provides three different safeguards against unjustified confinement: 1) COLO. REV. STAT. § 16-8-115(1) requires the court to conduct a release hearing upon motion of the defendant made after one hundred eighty days following the date of the commitment order; 2) § 16-8-115(2) permits the court to order a release hearing at any time on its own motion, "which it deems necessary to a proper consideration and determination of the question of eligibility for release."; and 3) § 16-8-116(1),(2),(3) permits an expedited release on the initiation of the hospital authority when the hospital believes the defendant no longer requires hospitalization.

60. The CALIFORNIA PENAL CODE § 1026 provides in part:

> If the verdict or finding be that the defendant was insane at the time the offense was committed, the court, unless it shall appear to the court that the sanity of the defendant has been recovered fully, shall direct that the defendant be confined in a state hospital for the care and treatment of the mentally disordered . . . or the court may order the defendant placed on outpatient status. . . .

Prior to committing an insanity defense acquittee, under CAL. PENAL CODE § 1026 (West 1983), the court must order an evaluation of the defendant's present mental health. So, California's commitment statute is in fact not automatic. CAL. PENAL CODE § 1026(a) (West 1983) also provides that a person may receive a release hearing upon application after 90 days of confinement.

61. *Collins*, 150 Ariz. at 297, 723 P.2d at 646. "The State cites Colorado and California as examples of states whose lengthy and strict post-acquittal commitment provisions have withstood constitutional challenge." *Id.*

62. *Id.* at 298, 723 P.2d at 647. The court stated:

> Inasmuch as A.R.S. § 13-3994(D) provides for neither possible early release on the initiative of the court or the hospital nor precommitment examination to determine the existence or extent of mental disease after acquittal, it does not provide as much due process protection as the Colorado or California automatic commitment statutes.

Id.

63. *Id.*

64. *Id.*

65. *Id.* at 296-97, 723 P.2d at 645-46 (*citing* Jones v. United States, 463 U.S. 354 (1983)).

66. *Id.* at 297, 723 P.2d at 646 (*quoting* Application of Downing, 103 Idaho 689, 652 P.2d 193 (1982): "It is generally held that a person acquitted of a crime by reason of insanity may be held without right to petition for release *until a reasonable time has elapsed* for the detaining authorities *to evaluate the committed person's mental condition.*" 103 Idaho at 697, 652 P.2d at 201 (emphasis added)).

67. *Id.* at 298, 723 P.2d at 647. The court held that where the government does have a legitimate interest in confining an individual, confinement may be "indefinite but not unconditional." *Id.*

68. *Id.* at 299, 723 P.2d at 648.

court stated that punishment, however, is not a legitimate state interest for confining an insanity defense acquittee.[69]

Unconditional confinement, the court implied, is inconsistent with the notion that the commitment must bear a reasonable relation to the purpose for which the person was committed.[70] With an unconditional commitment there is no way a person can gain release, even after the reason for which she is confined no longer exists. An automatic commitment statute, according to the court, must contain release provisions sensitive to a patient's recovery of sanity.[71] Otherwise, the risk of erroneous error becomes inevitable.[72]

The court determined that when an insanity defense acquittee no longer suffers from mental illness that person is entitled to release.[73] The court also noted that a hearing within fifty days of confinement under section 13-3994(B) is responsive to an acquittee's improved mental health.[74] The court concluded that section 13-3994(D) absolutely denies DCIDA the opportunity to gain release before 230 days have passed, and as such, it denies those persons due process.[75]

THE FUTURE OF THE INSANITY DEFENSE AND THE DISPOSITION OF INSANITY DEFENSE ACQUITTEES IN ARIZONA

In the aftermath of the John Hinkley case[76] there has been a great deal of concern expressed over the insanity defense and the disposition of insanity defense acquittees.[77] There is an obvious tension between an insanity defense acquittee's liberty interest and society's interest in protecting itself

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69. *Id.* at 298, 723 P.2d at 647. The court specifically stated that:

> Despite the pull of popular sentiment towards retribution against mentally ill individuals who commit criminal, otherwise punishable acts, the long standing policy of this state has been that persons who are insane are not responsible for criminal conduct and are therefore not subject to punishment.

Id.

70. *Id.* at 298, 723 P.2d at 647 (citing Jackson v. Indiana, 406 U.S. 715, 738 (1972); and O'Connor v. Donaldson, 422 U.S. 563, 575 (1975)). The Supreme Court of Arizona stated further that confinement may not constitutionally continue once the basis for confinement no longer exists. *Id.*

71. State *ex rel.* Collins v. Superior Court, 150 Ariz. 295, 298, 723 P.2d 644, 647.

72. *Id.*

73. *Id.* at 299, 723 P.2d at 648.

74. *Id.* at 298, 723 P.2d at 647.

75. *Id.* at 299, 723 P.2d at 648. Specifically, the court states that ARIZ. REV. STAT. ANN. § 13-3994(D) "absolutely denies persons acquitted by reason of insanity the possibility of a release hearing to determine recovered sanity before 230 days have passed . . . it denies these persons due process of law and . . . it is therefore unconstitutional." *Id.*

76. In 1981, John Hinkley attempted to assassinate President Ronald Reagan by shooting him. A jury returned a verdict of not guilty by reason of insanity. United States v. Hinkley, 525 F. Supp. 1342 (D.D.C. 1981).

77. The American Psychiatric Association (APA), the National Commission on the Insanity Defense, and the American Medical Association (AMA) all released position papers on the subject soon after the Hinkley case. *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681 (1983); NATIONAL MENTAL HEALTH ASSOCIATION, MYTHS AND REALITIES: A REPORT OF THE NATIONAL COMMISSION ON THE INSANITY DEFENSE (1983); AMERICAN MEDICAL ASSOCIATION BOARD OF TRUSTEES, THE INSANITY DEFENSE IN CRIMINAL TRIALS AND LIMITATION OF PSYCHIATRIC TESTIMONY (1983) (unpublished report on file at the GEO. WASH. L. REV.). *See generally* Wexler, *supra* note 38, at 528.

from dangerous mentally ill persons.[78] Debate over this tension surfaced after the first challenges to the constitutionality of automatic commitment and have continued to the present.[79] Some states have responded to this debate by abolishing the insanity defense.[80] Still others have introduced a "guilty but mentally ill" verdict.[81] Of those states that have retained some form of the insanity defense,[82] statutory frameworks for the disposition of insanity defense acquittees fall under four basic types: 1) the insanity defense acquittee is treated as anyone acquitted of a crime and released;[83] 2) the acquittee is automatically committed for a period to allow evaluation to determine need for continued hospitalization;[84] 3) the acquittee is automatically committed for an indefinite period;[85] or 4) a hearing is conducted immediately after the verdict of not guilty by reason of insanity and commitment follows only if the acquittee is found in need of confinement.[86]

Prior to the 1983 addition to the Arizona insanity defense statute, Arizona utilized a disposition scheme of the fourth type above.[87] Currently in Arizona, the State may automatically commit insanity defense acquittees provided there is a hearing within fifty days of commitment.[88] Although the court did not indicate in *State ex rel. Collins* exactly what procedural safeguard would be sufficient to make section 13-3994(D) constitutional, it did note that subsection (B) provides sufficient safeguards by incorporating the very safeguard that was upheld in *Jones* as sufficient.[89]

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78. *See* Note, *Rules for an Exceptional Class: The Commitment and Release of Persons Acquitted of Violent Offenses by Reason of Insanity*, 57 N.Y.U. L. REV. 281, 281-82 (1982).

79. *See* Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968) (must give insanity acquittees judicial hearing with substantially similar procedures as those in civil commitment proceedings). There was ensuing debate in Congress over the danger of creating a "revolving door" which would allow persons to avoid both conviction and commitment. H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 74, at 74 (1970). *See also supra* note 45.

80. Idaho, Montana, and Utah have all abolished the insanity defense. IDAHO CODE § 18-207 (1974 & Supp. 1984); MONT. CODE ANN. § 46-14-201 (1981); UTAH CODE ANN. § 76-2-405 (1978 & Supp. 1983).

81. There are two forms of the guilty but mentally ill verdict (GBMI) in use today. Michigan provides the model for the first type. After an insanity defense has been presented in Michigan, there are four possible verdicts: 1) not guilty, 2) guilty, 3) not guilty by reason of insanity, or 4) guilty but mentally ill. To establish a GBMI verdict, it must be shown that the defendant 1) is guilty of the offense charged, 2) was mentally ill when he committed the offense, but 3) was not legally insane at the time he committed the offense. *See* MICH. STAT. ANN. § 28.1059 (Supp. 1983-84). The GBMI verdict, under this scheme, simply provides another option. With this additional option it is believed that fewer insanity defense acquittals will result. Montana provides the only example of the second type of GBMI verdict. In Montana there are only three possible verdicts 1) guilty, 2) not guilty, or 3) guilty and suffering from a mental disease or defect. MONT. CODE ANN. §§ 46-14-201, 46-14-210 (1981). About thirteen states have adopted a version of the GBMI verdict. *See generally* S. BRAKEL, J. PARRY, & B. WEINER, *supra* note 12, at 17.

82. *See supra* note 13.

83. S. BRAKEL, J. PARRY, & B. WEINER, *supra* note 12, at 725-26.

84. *Id.*

85. *Id.*

86. *Id.*

87. Pursuant to ARIZ. R. CRIM. P. 25, when a defendant was found not guilty by reason of insanity, the court was required to order the prosecution to initiate civil commitment proceedings against the defendant.

88. The holding in the present case did not affect ARIZ. REV. STAT. ANN. § 13-3994(A), as accompanied by § 13-3994(B), which provides for a hearing within fifty days of commitment. State *ex rel.* Collins v. Superior Court, 150 Ariz. 295, 298-99, 723 P.2d 644, 647-48 (1986).

89. ARIZ. REV. STAT. ANN. 13-3994(B) provides for a hearing within 50 days of the commitment. *See supra* note 88.

It is clear, however, by the statutory scheme of Arizona Revised Statutes section 13-3994 that the legislature wanted to distinguish between insanity defense acquittees who are acquitted of crimes involving physical harm or risk of physical harm and those acquitted of other crimes.[90] Subsection (D) was specifically drafted to make it more difficult for dangerous crime insanity defense acquittees to gain early release. If the Arizona Legislature wants to maintain a two-tiered approach to the commitment of insanity defense acquittees,[91] with the *Jones* dispositional framework for nonviolent acquittees, the question becomes whether a dispositional framework can be designed that is more restrictive than *Jones*, yet can still pass constitutional muster.[92]

The Supreme Court did not indicate whether *Jones* sets a minimum level of procedural safeguards under the Federal Constitution or whether a commitment scheme that provides less procedural safeguards than *Jones* may be constitutional.[93] It is uncertain how the Arizona Supreme Court would react if the Arizona Legislature attempts to construct a two-tiered scheme that provides less procedural safeguards than *Jones* for DCIDAs but more procedural safeguards than were provided by Arizona Revised Statutes section 13-3994(D).

The options open to the Arizona Legislature for making it more difficult for DCIDAs to gain early release are somewhat limited. Under existing law, the burden of proof is already on the DCIDA, and the standard of proof is already at the high level of clear and convincing evidence. Thus, it seems the only avenue for making it more difficult for DCIDAs to gain early release is to allow a longer waiting period before the DCIDA has a right to a hearing to determine releasability. But, as the length of the waiting period exceeds fifty days, the likelihood increases that courts will find the statute unconstitutional, especially where other safeguards, as in Arizona, are at a minimum. Short of providing the DCIDA a right to a hearing after fifty days, the Arizona Legislature could modify Colorado's approach[94] and allow courts to order a release hearing or hospital authorities to initiate release procedures after fifty days of confinement. With these added safeguards there would be less constitutional challenge to withholding the right to a release hearing beyond fifty days. At the same time, it would presumably be more difficult

90. It appears the Arizona Legislature modeled the commitment scheme after the American Bar Association's standard 7-7.3(a) which suggests a special commitment procedure for "those acquittees who were acquitted by reason of mental nonresponsibility [insanity] of felonies involving acts causing, threatening, or creating a substantial risk of death or serious bodily harm." ABA, MENTAL HEALTH STANDARDS, 7.7.3(a) (1984).

91. *See* Wexler, *supra* note 38, who refers to the scheme whereby non-violent crime insanity defense aquittees are given more procedural safeguards than violent crime insanity defense acquittees as a two-tiered dispositional scheme. Wexler reviews the ABA MENTAL HEALTH STANDARDS, and endorses the possibility of framing special commitment procedures for violent crime insanity defense acquittees, particularly homicides involving nondomestic violence, as these crimes create the greatest threat to public safety.

92. *See* Wexler, *supra* note 38, at 549-61, for an insightful analysis of possible alternatives. *But see supra* note 45.

93. The Court merely stated that a hearing within 50 days of commitment to determine continued mental illness and need for confinement is sufficient protection against erroneous deprivation of liberty. *See generally* Jones v. United States, 463 U.S. 354 (1983).

94. *See supra* note 59.

for DCIDAs to gain early release. Whether courts would find such a scheme constitutional is an open question.

CONCLUSION

In *State ex rel. Collins*, the Arizona Supreme Court, in dictum, said confinement for fifty days without a hearing is constitutionally permissible.[95] The court held that two hundred and thirty days is too long.[96] The United States Supreme Court in *Jones* did not indicate whether a hearing within fifty days was a minimum procedural safeguard, or whether something less would suffice.[97] Given the current precedent, it is unclear how the court would receive a statute providing less safeguards against erroneous deprivation of liberty than what was held sufficient in *Jones*.

In *State ex rel. Collins*, the Arizona Supreme Court reinforced Arizona's strong public policy of not holding insane persons responsible for their criminal actions and thus not subjecting them to punishment.[98] It is now up to the Arizona Legislature to work out a policy toward the insanity defense and the disposition of DCIDAs that addresses the strong public interest in protecting society from potentially dangerous persons, while at the same time providing DCIDAs sufficient procedural safeguards to avoid implementing a policy of punishment.[99]

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95. State *ex rel.* Collins v. Superior Court, 150 Ariz. 295, 298-99, 723 P.2d 644, 647-48 (1986).
96. *Id.* at 299, 723 P.2d at 648.
97. *See supra* note 93 and accompanying text.
98. *Collins*, 150 Ariz. at 298, 723 P.2d at 647.
99. Some may argue that this cannot be done short of requiring that insanity defense acquittees be committed under the same procedures as civil committees. *See supra* note 45. However, the United States Supreme Court has held that there are relevant differences between insanity defense acquittees and civil committees justifying different treatment. Jones v. United States, 463 U.S. 354 (1983). *See also supra* note 44. The question remains open as to differing treatment between DCIDAs and other insanity defense acquittees, and as to the absolute minimum procedural safeguards required to commit DCIDAs.