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Casenotes: Constitutional Law - upon Proof of His Insanity by a Preponderance of the Evidence, Due Process Does Not Require Limiting the Confinement of an Insanity Acquittee to the Hypothetical Maximum Sentence He Could Have Received. Jones v. United States, 103 S. Ct. 3043 (1983)

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CONSTITUTIONAL LAW — UPON PROOF OF HIS INSANITY BY A PREPONDERANCE OF THE EVIDENCE, DUE PROCESS DOES NOT REQUIRE LIMITING THE CONFINEMENT OF AN INSANITY ACQUITTEE TO THE HYPOTHETICAL MAXIMUM SENTENCE HE COULD HAVE RECEIVED. *Jones v. United States,* 103 S. Ct. 3043 (1983).

Petitioner, an insanity acquittee, was confined indefinitely[1] to a public mental health hospital after pleading not guilty by reason of insanity to a charge of petit larceny.[2] After he was denied release pursuant to the statutory review procedure,[3] the acquittee appealed to the District of Columbia Court of Appeals, which ultimately affirmed his continued confinement.[4] The United States Supreme Court granted certiorari[5] and held that, upon proof of insanity by a preponderance of the evidence, an insanity acquittee may be confined to a mental institution until he regains his sanity and is no longer dangerous to himself or others.[6] The Court determined that due process did not require release or civil commitment when the acquittee had been hospitalized for the maximum length of the sentence he could have received had he been convicted.[7]

Commitment is a legally sanctioned admission to an institution for

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1. Defendant was confined pursuant to D.C. CODE ANN. § 24-301(d)(1) (1981), which provides that, if a defendant raises an insanity defense and is acquitted based on the defense, he shall be automatically committed until eligible for release.
2. D.C. CODE ANN. § 22-2202 (1981) (repealed 1982) defined petit larceny as a felonious taking and carrying away of property valued at less than $100.

   The maximum sentence was imprisonment for one year or a fine of $200 or both. *Id.* In 1982, a comprehensive theft and fraud statutory scheme replaced § 22-2202. *See* D.C. CODE ANN. §§ 22-3801 to -3821 (Supp. 1984). Under § 22-3812, theft in the first degree is the taking of property of another valued at $250 or more, with a maximum sentence of 10 years imprisonment and a $5,000 fine. Theft in the second degree is the taking of property of another valued at less than $250, carrying a maximum sentence of one year imprisonment and a $1,000 fine.
3. D.C. CODE ANN. § 24-301(d)(2)(A) (1981) provides for a hearing within 50 days of confinement to determine eligibility for release.
4. In its first opinion, Jones v. United States, 396 A.2d 183 (D.C. 1978), *rev'd,* 411 A.2d 624 (D.C. 1980), *rev'd,* 432 A.2d 364 (D.C. 1981), *aff'd,* 103 S. Ct. 3043 (1983), the District of Columbia Court of Appeals held that there was no constitutional requirement that the acquittee be released or civilly committed at the end of his hypothetical maximum sentence. On rehearing, Jones v. United States, 411 A.2d 624 (D.C. 1980), *rev'd,* 432 A.2d 364 (D.C. 1981), *aff'd,* 103 S. Ct. 3043 (1983), the court of appeals reversed, finding that because the crime committed was the basis of the automatic commitment, the procedure was punitive. Finally, in Jones v. United States, 432 A.2d 364 (D.C. 1981), *aff'd,* 103 S. Ct. 3043 (1983), the District of Columbia Court of Appeals found that § 24-301 was remedial and protective and not punitive. Furthermore, the Court determined that the maximum hypothetical prison sentence bore no relation to the time necessary to treat the acquittee. *Id.* at 376.
5. 454 U.S. 1141 (1982).
6. Jones v. United States, 103 S. Ct. 3043, 3052 (1983).
7. *Id.*

an indeterminate period[8] based on the constitutionally adequate finding of mental illness and dangerousness to self or others.[9] Because commitment is a deprivation of liberty, it must comport with the due process protections of the fifth and fourteenth amendments.[10] Due process demands that the nature and duration of confinement bear a reasonable relationship to the purpose of the commitment.[11] If the constitutionally adequate basis for the commitment no longer exists, the institutional confinement may not continue.[12]

When an individual is threatened with deprivation of physical liberty, due process necessitates a fair procedure.[13] Due process is a flexible concept, allowing the necessary procedural protections to vary depending on the circumstances of the particular case.[14] The procedures required in an action threatening deprivation of a liberty interest are determined by balancing three factors: 1) the individual interest threatened by the action, 2) the risk of erroneous deprivation, and 3) the governmental interest, including increased costs.[15] In an adversarial proceeding, the test is used to determine the government's standard of proof to warrant a deprivation of physical liberty.[16]

In a criminal proceeding, the defendant is presumed sane and has the initial burden to present evidence raising a doubt as to his sanity.[17] Once the doubt has been raised, some jurisdications require the prosecution to establish the defendant's criminal responsibility beyond a reasonable doubt.[18] The remaining jurisdictions, including Washington, D.C., require the defendant to prove his insanity by a preponderance of

8. Weihofen & Overholser, *Commitment of the Mentally Ill,* 24 TEX. L. REV. 307, 313-14 (1946).
9. DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH 8 (C. Frederick ed. 1978).
10. Addington v. Texas, 441 U.S. 418, 425 (1979); *see* U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V.
11. Jackson v. Indiana, 406 U.S. 715, 738 (1972); *see also* O'Connor v. Donaldson, 422 U.S. 563 (1975) (state must have constitutionally adequate purpose for commitment).
12. O'Connor v. Donaldson, 422 U.S. 563, 575 (1975).
13. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 534 (1983) [hereinafter cited as NOWAK].
14. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Some elements the Supreme Court has required in various situations are: notice, impartial decisionmaker, opportunity to be heard, opportunity to present evidence or witnesses, opportunity to confront adverse witnesses, right to counsel, and a decision based on the record with a statement of the reasons for the decision. NOWAK, *supra* note 13, at 555-56. Criminal defendants may also be entitled to compulsory process, discovery, public hearing, transcript, jury, and the government bearing the burden of proof as to guilt. *Id.*
15. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
16. NOWAK, *supra* note 13, at 561; *see, e.g.,* Addington v. Texas, 441 U.S. 425 (1979) (balancing test applied).
17. G. MORRIS, THE INSANITY DEFENSE: A BLUEPRINT FOR LEGISLATIVE REFORM 42 (1975) [hereinafter cited as MORRIS].
18. *Id.* at 42.

the evidence.[19]

The Washington, D.C. statutes considered in *Jones* provide for immediate commitment of an insanity acquittee,[20] followed by a hearing within fifty days to determine eligibility for release.[21] If further confinement is authorized, the committee may petition for release when he has recovered his sanity and is no longer dangerous to himself and others.[22]

In comparison, a civil commitment proceeding is instigated by a third party asserting that an individual is mentally ill and dangerous to himself or others.[23] The Washington, D.C. civil commitment scheme provides for a hearing before the Commission on Mental Health,[24] followed by a report of the Commission's findings to the Superior Court.[25] The potential committee is entitled to a jury trial[26] or court hearing with notice.[27] If committed, the individual may petition for release when no longer mentally ill or dangerous.[28]

In the District of Columbia, automatic criminal and civil commitment both require the same substantive findings: mental illness and dangerousness to self or others.[29] Also, both schemes provide for a judicial hearing with notice and assistance of counsel.[30] The two proceedings differ, however, as to the burden of proof required and who bears the burden of proof. In automatic criminal commitment, the acquittee has already proven his insanity by a preponderance of the evidence at his criminal trial.[31] In civil commitment, the government must prove the potential committee's mental illness. The Supreme Court in *Addington v. Texas*[32] held that due process requires proof of insanity by clear and convincing evidence in civil commitment proceedings.

In *Jones v. United States,* the Petitioner raised three contentions. First, he asserted that the criminal trial did not prove mental illness

19. *Id.*
20. D.C. CODE ANN. § 24-301(d)(1) (1981).
21. *Id.* § 24-301(d)(2)(A).
22. *Id.* §§ 24-301(e) and 21-546. The United States Court of Appeals for the District of Columbia Circuit has held that the periodic review provisions of the civil commitment scheme are impliedly included in the criminal commitment statutory scheme. Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968).
23. D.C. CODE ANN. § 21-541(a) (1981).
24. *Id.* § 21-542.
25. *Id.* § 21-544.
26. *Id.*
27. *Id.* § 21-545.
28. *Id.* § 21-546.
29. Violence is not a prerequisite to commitment based on dangerousness. *See* Overholser v. O'Beirne, 302 F.2d 852, 861 (D.C. Cir. 1961). The Supreme Court has defined dangerousness as the possibilty that continued liberty will imperil the preservation of the public peace. Lynch v. Overholser, 369 U.S. 705, 714 (1962).
30. D.C. CODE ANN. §§ 21-543 and 24-301(d)(2)(A) (1981).
31. *Id.* § 24-301(j).
32. 441 U.S. 418 (1979).

and dangerousness sufficiently to justify indefinite commitment.[33] The Court stated that the verdict of not guilty by reason of insanity established, beyond a reasonable doubt, that the acquittee committed the criminal act and that he committed the act because of his mental illness.[34] Although the insanity acquittee merely proved his mental illness at the time he committed the crime, the Court found it reasonable and constitutional to assume that the insanity continued and to require confinement until recovery.[35] Moreover, the Court reiterated its view that dangerousness is indicated by the finding, beyond a reasonable doubt, that the acquittee has committed a criminal act.[36] The *Jones* Court therefore concluded that a verdict of not guilty by reason of insanity was an adequate basis for commitment of the acquittee for treatment and protection of society.[37]

Second, the acquittee contended that his indefinite commitment was unconstitutional because his insanity was only proven by a preponderance of the evidence, rather than *Addington's* clear and convincing evidence requirement.[38] In considering the proof necessary for civil commitment, the *Addington* Court was concerned with the risk of erroneous commitment based on mere idiosyncratic behavior.[39] The *Jones* Court found that the risk of erroneous commitment was reduced when the defendant asserted and proved his own mental illness.[40] In addition, the finding that the defendant has committed a crime eliminated the concern that commitment may be based on idiosyncratic behavior.[41] The Court concluded that the concerns in *Addington,* which required a clear and convincing standard of proof for civil commitment, are not present in automatic criminal commitment.[42] The acquittee's proof of insanity by a preponderance of the evidence, therefore, comported with due process.[43]

Finally, the acquittee asserted that automatic commitment of insanity acquittees is punitive in nature.[44] Therefore, he contended that he should not be confined beyond the maximum period of incarcera-

33. Jones v. United States, 103 S. Ct. 3043, 3049 (1983).
34. *Id.*
35. *Id.*; *see* S. REP. No. 1170, 84th Cong., 1st Sess. 13 (1955) (reasonable to presume insanity continues justifying automatic confinement for treatment).
36. Jones v. United States, 103 S. Ct. 3043, 3049 (1983). Although the defendant committed a non-violent crime, the Court recognized that the commission of a crime in and of itself justified labelling the committee as dangerous. *Id.*; *see* Lynch v. Overholser, 369 U.S. 705, 714 (1962) (the Court equated danger with a threat to "the preservation of the peace").
37. Jones v. United States, 103 S. Ct. 3043, 3050 (1983).
38. *Id.* at 3051.
39. Addington v. Texas, 441 U.S. 418, 426-27 (1979).
40. Jones v. United States, 103 S. Ct. 3043, 3051 (1983).
41. *Id.* (criminal acts are outside range of normal behavior).
42. *Id.*
43. *Id.* & n.17 (the majority notes that a defendant asserting the insanity defense would not be benefitted by a requirement of a higher standard of proof).
44. *Id.* at 3051.

tion he could have received if convicted.[45] The Court began with the due process principle that the nature and duration of confinement must bear a reasonable relation to the purpose of the confinement.[46] Since the insanity acquittee was not convicted, he could not be punished based on the traditional purposes of incarceration: retribution, deterrence, rehabilitation, and incapacitation.[47] He could, however, be committed to treat his mental illness and to protect society.[48] Since it is impossible to predict the recovery period for any particular case, Congress properly left the duration of confinement indeterminate and provided for periodic review.[49] The *Jones* Court concluded that the purpose of automatic criminal commitment justified indeterminate confinement; therefore, due process did not require the release or civil commitment of the insantiy acquittee at the expiration of his hypothetical maximum sentence.[50]

In *Jones v. United States,* the Supreme Court approved the use of the preponderance of the evidence burden of proof standard in automatic criminal commitment.[51] The Court's refusal to require the higher standard of clear and convincing evidence applicable to civil commitment proceedings necessitates a comparison of *Jones* and *Addington.* In both cases, the Court balanced the government's interest in committing the mentally ill against the individual's liberty interest.[52] The government's interests were the provision of care and treatment of mentally ill citizens and the protection of the community from them.[53] The individual's interest was the reduction of the risk of erroneous commitment based on mere idiosyncratic behavior.[54]

The *Addington* Court recognized commitment as a deprivation of liberty and confirmed that the committee is guaranteed due process

45. *Id.*
46. *Id.* (citing the holding in Jackson v. Indiana, 406 U.S. 715, 738 (1972)).
47. *Id.* at 3052.
48. *Id.* at 3051.
49. *Id.* at 3052. In addition, there is no relationship between the severity of the crime and the period for recovery, as evidenced by the fact that any acquittee may be released after 50 days. *Id.* at 3052.
50. *Id.* The dissenting justices asserted that the case required a balancing of the governmental interest in treating the mentally ill and dangerous, the difficulty of proving mental illness, and the liberty interests of the acquittee. Jones v. United States, 103 S. Ct. 3043, 3054 (1983) (Brennan, J., dissenting). First, the dissent found that automatic criminal confinement could exceed the maximum hypothetical sentence only upon proof of additional facts. *Id.* at 3055. Second, the dissenting justices stated that past criminal behavior alone could not justify indefinite commitment; therefore, once the defendant had been confined for the maximum hypothetical sentence the government must fulfill the civil commitment burden of clear and convincing evidence. *Id.* Finally, the dissent found the liberty interests that compel release or civil commitment are risk of erroneous commitment, social stigma, and the intrusiveness of confinement in a mental institution. *Id.* at 3060.
51. 103 S. Ct. 3043 (1983).
52. Addington v. Texas, 441 U.S. 418, 425 (1979).
53. *Id.* at 426.
54. *Id.* at 426-27.

protection.[55] The Court held that commitment must be founded upon clear and convincing proof of insanity by the state.[56] A lesser standard would increase the risk of erroneous commitment.[57] The *Addington* Court indicated that only a legitimate, overriding state interest could justify increasing the risk of erroneous commitment by requiring the preponderance of the evidence standard.[58]

Jones presented the same possible indeterminate deprivation of liberty that the Court examined in *Addington.* The *Jones* Court, however, was willing to increase the risk of erroneous commitment. First, and most importantly, the Court considered the state's legitimate interest in protecting society from the acquittee's proven antisocial behavior and continuing mental illness. Second, the individual's liberty interest threatened by indefinite criminal commitment is less than in the case of civil commitment, since it is he who asserts the insanity defense whose liberty interest is at stake. He has imputed knowledge of the consequences of a successful insanity defense. The possibility of indefinite commitment is a valid safeguard against fraudulent insanity claims. Presumably, those with legitimate claims will assert them in pursuit of appropriate treatment for mental illness and not merely to escape incarceration.

The factors justifying differing treatment of *Jones* and *Addington* committees are best illustrated through analysis of the status of the two classes of committees at the time of commitment. In civil commitment, a judge or jury analyzes the behavior of the prospective committee to determine dangerousness. Because there are no firm delineations of "dangerousness," this consideration is extremely subjective, resulting in disparate determinations. Moreover, the judge or jury generally has no psychological training and must rely on medical and lay testimony. A highly subjective method of determination increases the risk of erroneous commitment and requires a higher standard of proof in order to reduce that risk.

Criminal acquittees, on the other hand, have been found guilty of a crime, but absolved of any responsibility due to their insanity at the time of the criminal act. The acquittee's behavior is a threat to the public peace and is therefore dangerous. This determination of dangerousness is objective in that all insanity acquittees are deemed dangerous and in need of treatment because they have been proven to have committed a crime beyond a reasonable doubt. The commitment of insanity acquittees is not punitive because it is based on the state's inherent power to protect the health, safety and morals of its citizens.[59]

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55. *Id.* at 425-26.
56. *Id.* at 433.
57. *Id.* at 426. The *Addington* Court also noted that the higher standard of proof informs the factfinder of the importance of the ultimate decision. *Id.* at 427.
58. *Id.* at 426.
59. Lochner v. New York, 198 U.S. 45, 45 (1905).

The power includes protecting its citizens from the mentally ill and dangerous and treating mentally ill citizens.

Moreover, unlike civil committees, the acquittee is asserting his own mental illness. No interest would be served by increasing the acquittee's standard of proof. The recent, overt, antisocial behavior of the acquittee, as well as his own assertions of mental illness, justify the lesser standard of proof for commitment of an insanity acquittee.

The Supreme Court in *Jones* approved of the preponderance of the evidence standard of proof for commitment of insanity acquittees. The Court rejected the argument that an acquittee must be released or civilly committed at the end of his hypothetical maximum sentence, since the purposes for commitment differ from those of incarceration. *Jones* is consistent with *Addington* because the dissimilar situations and interests of civil and criminal committees at the time of commitment justify the different commitment standards and procedures.

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