

Not Competent, Not Restorable, and Not Committable

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I comment on the problem discussed by Simpson of criminal defendants who are found not competent, not restorable, and subject to involuntary civil commitment. He presents the 2010 case of Donn Thomas Spinoso in Oregon as an exemplar of serial nonrestorability. The facts of the Spinoso case are illustrative of a prosecutor who is frustrated by not being able to bring a criminal prosecution against a person who is not competent to stand trial and a state hospital that is proposing discharge of the person because he can no longer be civilly committed. I review and apply the longstanding constitutional principles of *Jackson v. Indiana* to the *Spinoso* case.

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Simpson¹ explores the problem related to the disposition of persons found not competent to stand trial and not restorable to competency. He explores the rare circumstances in California where a person may not be competent to stand trial, not restorable, and therefore not subject to criminal prosecution on the charges and not subject to civil commitment. I am not well placed to comment about the details and legal effect of conservatorship or commitment law in California, but I will explore the broad concepts addressed in Simpson's thoughtful article.

He opens with the case of Donn Spinoso in Oregon and concludes that: "The Spinoso case is a compelling reminder of the dilemma posed by permanently incompetent defendants who are alleged to have committed serious crimes in the era after the landmark U.S. Supreme Court decision in *Jackson v. Indiana*."¹ Simpson's conclusion is correct, because the standard for incompetency to stand trial is different from the standard for commitment: danger to self or others or, in many states, gravely disabled. One explanation is that the commitment system is working as it should, as a treatment system and not a punishment system.

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The facts of the *Spinoso* case are important.² Mr. Spinoso, age 56 at the time, was arrested a few days after his ex-wife's death and charged with murdering her on May 10, 1997. In November 1997, while in jail awaiting trial on capital murder charges, he underwent a competency evaluation and was found not competent, but restorable. He had first received a diagnosis of schizophrenia in 1972, while in his 20s. He was committed to the Oregon State Hospital in Salem for competency restoration for three years, the maximum restoration period, and was eventually found not competent and not restorable at a hearing on November 17, 2000. The judge adhered to the law, dismissed the charges without prejudice, and ordered the Oregon State Hospital to initiate civil commitment proceedings against Mr. Spinoso. In November 2000, Mr. Spinoso was civilly committed to the hospital, where he stayed until June 2009, when he was moved to a facility in Portland for transition to discharge. Hospital officials gave notice to the prosecutor that they planned to discharge Mr. Spinoso in October 2010. On October 1, the day of Mr. Spinoso's discharge, the district attorney recharged him and held him in a correctional facility on high bond. On December 15, 2010, he was again found not competent to stand trial and returned to Oregon State Hospital for competency restoration. On March 11, 2011 a psychologist at Oregon State Hospital found Mr. Spinoso not competent and not restorable.

The prosecutor, on dubious legal grounds, held Mr. Spinosa in the Washington County Jail for eight months after he was found not competent and not restorable. He was held in solitary confinement and was not provided with adequate mental health care. It is unclear why Oregon State Hospital was not instructed to commence civil commitment proceedings again. Instead, on October 20, 2011, the judge ordered Mr. Spinosa to Oregon State Hospital on a “magistrate’s hold,” apparently without statutory authority. The Oregon protection and advocacy organization, Disability Rights Oregon, objected and argued that the only legal authority to hold Mr. Spinosa at the Oregon State Hospital was through civil commitment. Mr. Spinosa was civilly committed in November 2011.

One can certainly acknowledge the frustration of the district attorney in not being able to prosecute a person he characterized as “factually guilty” and then have the Oregon State Hospital give notice of discharge, albeit 12 years later. Another perspective is that the system worked perfectly well and as it should, up to the point that the judge, upon request of both the prosecutor and defense attorney, failed to order Mr. Spinosa to the state hospital to await another civil commitment hearing. From a civil rights perspective, there are many problems with how the district attorney handled the refiling of charges in October 2010. Refiling charges for capital murder upon learning of discharge from involuntary civil commitment is not inappropriate. Although the standard for determining competency to stand trial is completely different from that required to hospitalize involuntarily a person with mental illness, it is not unreasonable for the district attorney to conclude that Mr. Spinosa may have been treated sufficiently to become competent to stand trial and therefore refile the charges. However, much of what was done after the district attorney refiled murder charges is problematic. Once Mr. Spinosa was found not competent and not restorable, the judge, prosecutor, and defense attorney should have followed the law and ensured that he was referred back to the state hospital for civil commitment.

First, it appears that the district attorney refused to accept the constitutional principle from *Dusky v. United States*, 360 U.S. 402 (1960), that it is a violation of due process to try, convict, or sentence a person who is not competent to stand trial. Mr. Spinosa had a long history of mental health treatment

for schizophrenia, had symptoms of delusions and hallucinations, clearly had a mental illness, and was not competent to stand trial (Ref. 2, p 6). Experienced and knowledgeable judges, attorneys, and psychiatrists understand that the symptoms of mental illness and the *mens rea* for a crime compete on a spectrum. Thus, the more intense the symptoms of mental illness such as delusions, hallucinations, and paranoia, the less likely the mental health professional is to find the legal criminal intent to commit the act. The district attorney was absolutely convinced of Mr. Spinosa’s factual guilt in the murder. Because it was unconstitutional to put Mr. Spinosa on trial, the district attorney apparently sought to use the involuntary civil commitment process to incarcerate and punish. When the Oregon State Hospital determined that Mr. Spinosa no longer met the standards for civil commitment, a judge was persuaded of the necessity for commitment to the state hospital based on reasoning that lacked statutory and case law authority. Moreover, Mr. Spinosa was denied a constitutionally required judicial due process hearing to determine whether he met the commitment standard. Once Mr. Spinosa was found not competent and not restorable, he should have been referred for involuntary civil commitment and given a full judicial due process hearing.

Second, *Jackson v. Indiana* held that the Fourteenth Amendment due process clause requires that:

... a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant [3].

This chain of events is exactly what happened from 1997 to 2000, when Mr. Spinosa was committed involuntarily. When he was found not competent and not restorable on March 11, 2011, instead of having his charges dismissed without prejudice and referring him for involuntary civil commitment, he was transferred from Oregon State Hospital back to the Washington County Jail. For eight months, he was in solitary confinement and denied appropriate mental health treatment. He also did not take psychiatric medication and was not eating regularly (Ref. 5, p 5). In essence, the district attorney was seeking an indefinite commitment, solely because

Mr. Spinosa was not competent to stand trial, directly in violation of the core constitutional principle of *Jackson v. Indiana*.³

In the end, on November 5, 2011, Mr. Spinosa was illegally sent from jail to Oregon State Hospital for an indefinite commitment. Hospital officials, understanding their own independent need for a constitutional and legal basis to hold Mr. Spinosa, filed for civil commitment later in November, which was granted in due course (Ref. 2, p 7).

Simpson concludes with several observations about both the California and Oregon commitment statutes for persons found not competent to stand trial and not restorable.

Although an incompetent defendant charged with a crime of serious violence has not been proven through the mechanism of a trial to have perpetrated a violent act, as a matter of probability, it could be argued that the defendant is more likely to commit violence in the future than someone who has never been charged with a violent crime, all other things being equal [Ref. 1, p].

He does not cite any authority for that proposition. It was squarely rejected on constitutional grounds in *Jackson v. Indiana* and *Baxstrom v. Herold*. In *Baxstrom*, a person who had been convicted of a crime was committed without the same due process applied in other cases of civil commitment in that state, a jury trial. The Supreme Court held that “there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.”⁴ In 1972, the Court followed *Baxstrom* with *Jackson v. Indiana* and stated:

If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice The *Baxstrom* holding has been extended to commitment following an insanity acquittal . . . and to commitment in lieu of sentence following conviction of a sex offender [Ref. 5].

An assumption of dangerousness and denial of a judicial due process hearing in a state statute for commitment based on either a prior conviction or “mere filing of criminal charges” violates equal protection under the law and is unconstitutional.

Simpson goes on to conclude that:

[f]aced with the extremely difficult choice of releasing a person accused of murder or other violent felonies or keeping him confined in the face of an inability to prosecute him, a legal device such as the Murphy conservatorship could be considered the lesser of two evils (i.e., hospitalizing someone who might not be dangerous versus releasing someone who might be dangerous [Ref. 1, p].

Prosecutors are not faced with the choice of releasing a person charged with murder or confining him by civil commitment. It is not a choice: it is the law as required by the Constitution. Whether a person is competent to stand trial is not up to the prosecutor to decide. The court determines competency to stand trial as a matter of law after a full due process judicial hearing. If the court finds that the person is not competent and not restorable, most states provide for a process of involuntary civil commitment after a finding of mental illness and dangerousness in a full judicial due process hearing. The standards for persons not competent and not restorable cannot result in indefinite commitment based on that fact alone. The standard for commitment for nonrestorable defendants must not be more lenient and the standard for discharge from commitment more stringent than those for civil patients who have not been charged with crimes.⁶

Consequently, we hold that by subjecting Jackson to a more lenient commitment standard and to a more stringent standard of release than those generally applicable to all others not charged with offenses, and by thus condemning him in effect to permanent institutionalization without the showing required for commitment or the opportunity for release . . . Indiana deprived petitioner of equal protection of the laws under the Fourteenth Amendment [Ref. 6].

Simpson is correct when he states that the Murphy conservatorship/commitment is one way to follow the law. The California Supreme Court held that with the added requirement of a finding of present dangerousness for the Murphy conservatorship, the statutory commitment of those who are not competent to stand trial and are not restorable is substantially similar in both substance and procedure to other involuntary civil commitments. The choice is not between the release of a murderer or illegal extrajudicial confinement by a prosecutor. The choice is between following the law and the Constitution or violating it. If a person is not competent and not restorable, the court need only follow the law and the state’s procedure for involuntary civil commitment.

The more important question is not whether the small number of persons charged with a serious felony and found not competent to stand trial and not restorable should be involuntarily civilly committed. The real concern is the abuse of process in cases like *Jackson v. Indiana* where a person charged with misdemeanor purse-snatching of nine dollars is dragged through months or years of competency evaluation and treatment and committed indefinitely instead of being diverted from the criminal system and provided appropri-

ate supports and services in the community. Moreover, many states have competency restoration procedures that extend beyond that which is reasonable and some still allow for commitment based on nonrestorability in direct violation of *Jackson v. Indiana*.⁷⁻⁸

References

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