Disposition of Insanity Defense Cases in Oregon

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Introduction

The defense of insanity has been a source of debate since its inception. In theory, this defense is a natural result of the requirement basic to the criminal law that, to find guilt, there must be a guilty mind.[1] In practice, implementation of this concept through the insanity defense has led to many complex problems. The result is a continuing controversy within and between the legal and medical professions, and in the community as well, over whether the defense should be abolished and whether the machinery that is set in motion when it prevails can be made more acceptable.

Before and during trial, complications of the insanity defense relate chiefly to the procedural issues of presumptions of sanity or insanity, burdens of proof, choice of a particular test and debate over use of the bifurcated trial as an equitable model. When the defense prevails, a whole set of new problems is presented in connection with disposition. Most of the challenges to the efficacy of the insanity defense have come from experiences with this phase of the proceedings.

Consideration of what happens after a finding of not guilty by reason of insanity (n.g.i.), requires analysis of constitutional rights, both procedural and substantive, as well as consideration of the needs of the community. Because the defense has been raised in all crimes, including serious crimes of violence, there is concern over whether the defense may have been abused to avoid prolonged incarceration. There is, as yet, no satisfactory definition of the status of a growing population of those persons who have been found n.g.i. and are in hospitals or on a conditional release in the community. To satisfy constitutional restraints, some outer limits on the relationship of these people to mental health treatment systems must be clarified.

Two separate and somewhat conflicting social realities have highlighted the problem of disposition of defendants found n.g.i. One is the increasing emphasis on procedural due process rights of individuals in civil commitment proceedings. Comparing the process given this group to the closely analogous n.g.i. population is forcing states to review their procedures for

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disposing of n.g.i. cases.[2] Also forcing the issue is the "Widespread concern that the insanity defense does not protect the public."[3] Communities are reconsidering questions of whether to offer treatment or punishment, or to avoid the issue of deciding between the two by providing a little of both. Approaches to the solution of this problem have run along a spectrum from total elimination of the defense;[4] to utilization of evidence of state of mind only to go to the seriousness of the crime for which a defendant can be convicted;[5] to acceptance of a plea of guilty but mentally ill, keeping disposition within the framework of the correctional system;[6] to maintaining the defense as it has been traditionally conducted, while clarifying and bolstering the disposition phase procedures, so that individual rights and community needs are protected.

Oregon has chosen this last approach in promulgating Oregon Laws 1977, Chapter 380 S8, codified as ORS 161.385. This legislation creates a Psychiatric Security Review Board in whose hands is placed the files of most Oregon defendants who have been found not responsible due to mental illness. This paper will examine these provisions which attempt to solve the problem of disposition of n.g.i. cases in a way that is unique among the states. It will review the earlier provisions for the disposition of n.g.i. cases and discuss the reasons for proposal of the amendments. It will look at the new law, the changes in philosophy it reflects and procedures it implements. Finally, it will examine challenges to the law which have been brought or are likely to be made as new cases accumulate.

Provisions in Existence Prior to 1977

The Oregon Criminal Code as revised in 1971 removed the phrase "Not guilty by reason of insanity"[7] and substituted "Not guilty by reason of mental disease or defect excluding responsibility."[8] This terminology was changed in keeping with the replacement of Oregon's version of the M' Naghten test with the American Law Institute test.

After judgment was rendered, the trial court decided whether or not the defendant would be released. Since implementation of the insanity defense, in Oregon it has been the practice to allow a judge discretion to commit. While there has been some confusion over whether the presence or absence of mental illness alone is enough to make the decision, case law has settled,[9] and the statutes have become more definitive with each revision, that if a judge finds that the defendant's behavior might pose a danger to himself or others and that he is in need of care, supervision and treatment, he should be committed.

Under the 1971 revisions, all orders of release and conditions of release remained under the jurisdiction of the trial court. A defendant found in need of commitment was sent to the State mental institution. The hospital was ordered by the court to receive him for custody, care and treatment.[10]

Before the revisions in 1971, the Superintendant had authority to discharge without a court order. Requiring application to the court was a step

away from total reliance on medical opinion. It was based on a policy decision which reasoned that, since commitment was a determination of the court, a decision to release should be made by the court as well. The State, by a preponderance of evidence showing continued dangerousness, could prove that the person should not be released.

The difficulties created by having to make decisions affecting individual liberty as well as the public safety were anticipated by the authors of the revisions. The burden of these difficulties was placed on the court system since the final decision regarding release or commitment of n.g.i. defendants was taken away from the treating facility and placed in the courts. After the revised statutes went into effect and the court assumed jurisdiction over the n.g.i. population, there were several incidents of serious anti-social behavior among the released population, which pointed to the need for more stringent supervision. The Psychiatric Security Review Board grew out of this need.

Psychiatric Security Review Board

Goals proposed by House Bill 2382[11] in 1977 were set out by representatives of the Mental Health Division and representatives of a Governor's Task Force:

1. Criteria for commitment should be more clearly defined and conditional release to the community should be clearly defined and related to dangerousness to others.
2. That such persons should have full due process protection at any hearing that may affect their placement, treatment or freedom.
3. That a Psychiatric Security Review Board should be established, with a sunset provision, to see if such a board could make more efficient and appropriate decisions.

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Proponents of the change found that the trial courts' retention of jurisdiction over n.g.i. cases was inadequate. Courts had no staff to handle the problems and no way to arrange for supervision and treatment. The result was "risk to the community" and "no supervision."[12]

The Board is composed by statute of a psychiatrist, experienced in the criminal justice system; a licensed psychologist, experienced in the criminal justice system; a member with substantial experience in the processes of parole and probation, a member of the general public and a lawyer with substantial experience in criminal trial practice.[13]

The original plan was that a special unit of "Mental Health Officers" to "Bridge the gap between courts, corrections and mental health"[14] would be attached to the Board, but funding for these positions was not implemented.

In the amended provision, the wording in the Form of Judgment is once again revised. "Not guilty by reason of" is now changed to read "Not responsible due to mental disease or defect."[15] This change is significant if

read in conjunction with ORS 161.336, which states that "The period of jurisdiction of the Board shall be equal to the maximum sentence the court finds the person could have received had he been found responsible." There is an implication in these two sections read together that, had he been found responsible, the defendant would have been guilty, in short, that raising the insanity defense incorporates an admission of guilt. The court shall determine on the record what offense the person would have been convicted of had the person been found responsible.

This implied guilt determines that the Board may exercise jurisdiction over the person for as long as the maximum sentence for that charge, without considering that the charge would have been tried and quite possibly lowered. This would be especially likely in the case of a specific intent crime.

That this provision looks at raising the defense of insanity as an implied admission of guilt finds support in the testimony made to the House Judiciary Committee in which proponents of the bill said the change would allow the courts to "require" the defendant to report to a mental health facility and "Accept mental health treatment as a condition of probation." Just how far such requirements might be carried before they become impermissible has not been tested. Perhaps lack of funding for "Mental Health Officers" has delayed the inevitable confrontations that would result in test cases.

This quasi penal tone of the statute is carried through other provisions. The factors in a decision for conditional release, for example, are those that are in the best interests of justice, the protection of society and the welfare of the person.[16] It is probable that the probation-parole model was selected to give some power to the Board with which it could implement its authority. In any event, the provisions certainly clarify any remaining ambiguity between the preventive detention aspect of handling n.g.i. defendants and the therapeutic roots of commitment. Discharge from the hospital or conditional release is determined by dangerousness, whether or not mental disease continues. For the purposes of the statute, treatment is to cure dangerous behavior. The relevant questions then become: What administrative procedures are fashioned that assure fairness during the period in which a person is under the jurisdiction of the Board, and what standards are utilized by the Board to determine dangerousness when they are deciding whether to discharge, conditionally release or recommit?

After a case is turned over to the Board by the committing court, there must be an evaluation of the person and a determination made whether to commit or conditionally release. The standard for conditional release is a finding that a person presents a substantial danger to himself or others, but that he can be controlled adequately with supervision and treatment on conditional release, and that such supervision and treatment are available.[17] It is conceivable that a person may be considered untreatable by the admitting institution or that he might be placed in a facility where no appropriate

treatment is available. Can a person be held where there is no treatment? This question becomes more pointed when the person is not currently diagnosed as having a mental disease, but still exhibits dangerous behavior. It is likely that, in regard to the n.g.i. defendants, Oregon courts would rely on the position espoused in Newton v. Brooks, a 1967 Oregon appeals court decision which said that: "So long as mental disorder continues, whatever form it may take, or whatever name the doctors may give it, if it is probable that the disorder would make the person's liberty dangerous to the public, the legislative policy within constitutional bounds ought to be carried out."[18]

The Board has authority to set terms of conditional release and to require that a person cooperate with any treatment program recommended by the mental health facility. It has the authority to order that a mental health facility offer treatment. Until the present, this authority has not been challenged by persons subject to the order, but has been in one instance the cause of dispute between the Board and a physician regarding how much of a particular medication ought to be prescribed for an individual.[19]

A person on conditional release can be taken "into custody" on request of a community mental health program director, director of a treating facility, any police officer or any person responsible for supervision of the person when any of these people has reason to believe the person is a substantial danger to himself or others because of mental disease or defect and that the person is in need of immediate care, custody or treatment.[20] The Board has subpoena power to bring in anyone to aid in the conduct of a hearing.[21] If the person files a petition within 60 days, a final order of the Board can be appealed.[22] The person seeking court review is entitled to counsel and a copy of the record.

In Cardwell v. Psychiatric Security Review Board,[23] the Oregon Court of Appeals reviewed a Board decision to modify a person's conditional release and admit him to the hospital. The decision by the Board had been made on the basis of a phone call from an unknown caller who told the police that Cardwell had threatened suicide. The Board decided that, based on testimony concerning the surrounding circumstances, testimony by a treating physician and Cardwell himself, that he presented a substantial danger to himself or others, that he couldn't be adequately controlled or supervised on a conditional release, that necessary supervision and treatment wasn't available for him at that time, that release would not be "In the best interest of justice, the protection of society, as well as the welfare of John Cardwell."

Cardwell challenged the Board's finding that he presented a substantial danger. The court found that the Board's decision was "conclusory" and that, on the basis of the record, there was not adequate support for a finding that Cardwell posed a "substantial danger." The State argued that the Board had found that Cardwell was "Unfit for conditional release" after he violated the terms of the conditional release. The court, looking to the legislative intent of the statute, overruled the State's argument, and held

that unfitness for conditional release was not meant to be an "Independent criterion for commitment in the absence of dangerousness."[24]

From a due process perspective, this is an important decision. It is the first case to challenge a final order of the Board and, as such, its definitive statement on specific and limited criteria on dangerousness will affect subsequent challenges. Its requirement that the Board provide more than conclusory findings on review is a positive indication that the court will not rubber stamp Board decisions because of the Board's "professional expertise." House Bill 3016, submitted to the 1979 Legislature, amends ORS 161.346 to require the Board to make findings and specifies what evidence will come before the Board.

The Board may order commitment to the Oregon State Hospital if it is found that a person is currently affected by mental disease or defect, presents a substantial danger to himself or others and cannot be controlled on conditional release. The burden of proof is carried by the State by a preponderance of the evidence.

After six months in the hospital, the person or someone acting on his behalf may apply for discharge. The burden of proof by a preponderance of the evidence is on the patient, who may not apply more frequently than every six months. For those patients who do not take the initiative and file their own release applications, the statutes provide for a mandatory review by the Board every two years.

Where a person has been in the hospital for at least 10 years, ORS 161.351 (3) provides that the hospital superintendent must review the case and recommend to the Board whether: 1) he should be discharged: no danger and no mental illness; 2) he should be discharged though mentally ill, but not dangerous; 3) he should remain in the hospital. Where continued hospitalization is recommended, civil commitment proceedings under ORS, Chapter 426 are initiated.

This last provision seems somewhat inconsistent with the preceeding sections, which start from the implied admission of guilt, rely on dangerous behavior as the key standard for release and utilize a recorded sentence for the original crime as the guideline to the boundary of the Board's jurisdiction. It can be hypothesized that arriving at 10 years as a point at which civil procedures ought to be made available is an attempt to bring the rest of the provisions which may be challenged in line with recent decisions in this area.

Conclusion

In the spectrum of approaches to disposition after a successful insanity defense, Oregon has promulgated a statute which "Has as its primary concern the protection of society." While it emphasizes the compelling State interest of protection of society and the individual, the procedural machinery in these provisions is weighted on the side of the individual. The Board, made up of five citizens with professional experience, replaces a

court with few resources to plan for and follow-up on people. The Board has the opportunity to individualize in the disposition of every case. Where their restraints appear to be overbearing, or there is question regarding their decision, the individual can appeal in a court proceeding, which makes a full compliment of rights available.

The statutes creating the Psychiatric Security Review Board are sunset provisions and will be reviewed in 1981. It was the opinion of its proponents in 1977 that, though the change was much needed, it was a major shift in the responsibility in the supervision of people that could be very "hazardous" and, before a separate bureaucracy became entrenched, it would be wise to see that it was working well.[25]

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