

purposefully refusing to communicate with his attorneys. He also had a history of behavior suggesting that he might exaggerate his symptoms for secondary gain, and there was evidence to suggest he was engaging in manipulative behavior. The court found that the district court's competency finding was neither arbitrary nor unwarranted and affirmed the lower court's decision.

The Fifth Circuit ruled against Mr. Simpson's claim that his Sixth Amendment right to effective counsel had been violated. He argued that his counsel was ineffective for three reasons: a complete breakdown in communication with his attorneys had occurred, entitling him to substitute counsel; the nature of the appointment of liaison counsel was unclear to him and deprived him of his right to an unambiguous appointment of counsel; and the liaison counsel appointment was not conflict free, as the counselor had to serve two masters.

A previous decision by the Fifth Circuit in *United States v. Young*, 482 F.2d 993 (5th Cir. 1973), stated that substitute counsel should be appointed only for "good cause," which includes a complete breakdown in communication. The court had already determined that a conviction reversal was inappropriate when the breakdown can be attributed to the defendant's intransigence and not to the neglect of defense counsel or the trial court. In two cases cited by Mr. Simpson, *United States v. Lott*, 310 F. 1231 (10th Cir. 2002), and *United States v. Mullen*, 32 F.3d 891 (4th Cir. 1994), the circumstances were different. The breakdown in communication in *Lott* occurred because the defense attorney did not respond to the defendant's letters and seemed to ignore the defendant altogether. In *Mullen*, on the day of trial, the defendant had to choose between *pro se* representation and continuing with previously appointed counsel after requesting that a family-hired attorney be appointed to the case. The Fifth Circuit agreed with the district court that Mr. Simpson, not the attorneys, was the root cause of the communication problem that he had experienced with his attorneys. As Mr. Simpson was adjudged competent, it was reasonable to conclude that he was capable of cooperating with his lawyers. The Fifth Circuit could not find good cause to appoint substitute counsel where none exists. "Under the facts before us, neither the Sixth Amendment nor our precedent suggests that Simpson was entitled to the

appointment of substitute counsel" (*Simpson*, pp 308–9).

The court also held that he was not entitled to a non-death-qualified jury.

Discussion

The lack of communication between an attorney and client can affect a defendant's competency to stand trial. Competency is defined as a defendant's having "the present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him" (*Dusky v. United States*, 362 U.S. 402 (1960)). However, the question here is the defendant's intentional refusal to communicate with his attorney, rather than a mental impairment as the cause of the breakdown in communication. In this case, the defendant's purposeful lack of communication did not make him incompetent. He expressed that he would communicate with other attorneys if they were appointed for him, and he was not pleased with his two appointed attorneys because they questioned his competency.

A defendant's intentional refusal to communicate with his attorneys does not lead to a violation of his Sixth Amendment right, as Mr. Simpson proposed. Rather a defendant's intentional failure to communicate is a problem that the defendant chooses to make for himself. If a breakdown in communication occurs because the attorneys fail to fulfill their legal duties, then the defendant may have cause to request and obtain new counsel. However, this was not so in Mr. Simpson's case. As Mr. Simpson was determined competent, one can assume he could have communicated with his attorneys if he had chosen to do so.

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Continued Civil Commitment of Insanity Acquittees

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Differential Procedures Used for Continuing the Civil Commitment of Insanity Acquittes Have a Rational Basis, Compared with Those for Civil Committees

In *State v. Long*, 19 A.3d 1242 (Conn. 2011), the Connecticut Supreme Court affirmed an order for the continued commitment of a defendant found not guilty by reason of mental disease or defect, ruling that his equal protection challenge to Connecticut General Statute § 17a-593(c) (2011) was precluded under the doctrine of *res judicata* and that there is a rational basis for the differential treatment of civilly committed insanity acquittes.

Facts of the Case

Calvin Long had a history of schizophrenia and delusions that others were making homosexual advances toward him. He acted violently in response to those delusions. After striking a person in the head with a hammer (second-degree assault) he was found not guilty by reason of mental disease or defect in 1986, and the trial court ordered his commitment to the jurisdiction of the Psychiatric Security Review Board (PSRB) for up to five years, the maximum sentence he could have received had he been found guilty. Connecticut's PSRB is a quasi-judicial body consisting of a layperson and experts in mental health, law, victims' rights, and probation and parole.

Before the expiration of his five-year commitment term, the state petitioned for Mr. Long's continued commitment pursuant to statute. Under Conn. Gen. Stat. § 17a-593c, if there is reasonable cause to believe that the acquittee is psychiatrically or developmentally disabled (mental retardation) and that his discharge would represent a danger to himself or others, the state can petition for continued commitment. The trial court granted the state's motion and continued Mr. Long's commitment for another three years. The state successfully petitioned the court on three additional occasions to continue Mr. Long's commitment.

In March 2001, after the state again petitioned for his continued commitment, Mr. Long filed a motion to dismiss. He argued that since he had reached his maximum term of recommitment, further recommitment under § 17a-593c was unconstitutional in treating him differently from civilly committed individuals. The trial court ruled in his favor, holding that committed acquittes belong to a constitutionally protected class and that strict scrutiny is therefore the proper standard to use in reviewing the constitu-

tionality of § 17a-593c. Under a strict scrutiny test, § 17a-593c was deemed unconstitutional. The court opined that, as an insanity acquittee, Mr. Long was not afforded periodic judicial review of his status, which was a violation of his due process rights. The court further held that there was no rational basis for the disparate treatment of committed insanity acquittes and civilly committed inmates under the current system. The state appealed the decision to the Connecticut Supreme Court.

The Supreme Court of Connecticut held that Mr. Long's equal protection rights had not been violated. It reasoned that rational basis was the proper level of scrutiny and that there was a rational basis for the legislature's differential treatment of insanity acquittes and inmates subject to civil commitment, given that the risk of erroneous commitment is far less for an insanity acquittee. The court held that the PSRB's oversight of the recommitment of insanity acquittes was appropriate because the board is familiar with all acquittes and is in a better position to make decisions about their ongoing commitment.

In analyzing Mr. Long's due process claims, the court reviewed the existing procedural protections that were already in place for insanity acquittes facing recommitment, including the right to review all documents, the right to be present at hearings and to have representation by counsel, and the right to an independent review by a psychiatrist or psychologist. Acquittes additionally had the right to apply directly to the court for discharge every six months; however, Mr. Long had not invoked this right on the five prior occasions that the state had petitioned for his commitment.

The case was remanded to the trial court, which then granted the state's petition for continued commitment for another three years. Mr. Long appealed the ruling.

He then filed a second motion for dismissal. He conceded that he was seriously and persistently mentally ill and unlikely to improve. He had been in the jurisdiction of the PSRB for close to 22 years. During that time, he had committed about 15 assaults and had kissed and fondled female hospital staff members. However, he argued that, as an insanity acquittee who was unlikely to improve, he was likely to be held in the custody of the PSRB for the rest of his life. Mr. Long reasoned that had he been a civil committee, he most likely would have been transitioned into the community, rather than continued in the hospital.

Mr. Long argued that these differences in the treatment of similar classes of committed persons resulted in an as-applied violation of his equal protection rights. He asserted that intermediate scrutiny, not rational-basis review, was the appropriate level of scrutiny for his equal protection claim. Insanity acquittees, he reasoned, face stricter substantive standards than do civilly committed inmates. Although these differences may be constitutionally sound before the acquittee serves a commitment term equivalent to the maximum sentence he would have received if found guilty, they are not constitutional if applied after the acquittee has been committed for a period equivalent to the maximum prison term.

The trial court denied Mr. Long's second motion to dismiss, stating that there was clear and convincing evidence that he was mentally ill and a danger to others. The court further stated that Mr. Long had been unable to demonstrate how the statute, which the court had previously held as facially constitutional, was unconstitutional as applied to him.

On subsequent appeal to the Supreme Court of Connecticut, Mr. Long argued that a different level of scrutiny, intermediate, should be applied in reviewing the constitutionality of the commitment scheme. He also challenged whether it was a violation of his equal protection rights to commit him under the PSRB's jurisdiction rather than under the civil commitment system, arguing that under the board's jurisdiction, the prognosis of all acquittees is worse than that of civil committees. Thus, Mr. Long raised four questions to the supreme court. Was continued commitment under the jurisdiction of the PSRB, rather than under the civil commitment system, a violation of his equal protection rights? Was intermediate scrutiny the appropriate level for his equal protection claim? If rational-basis review was the appropriate standard of scrutiny, was there evidence of a change in conditions since § 17a-593c was enacted that now made § 17a-593c unconstitutional? Was § 17a-593c facially unconstitutional?

Ruling and Reasoning

The Supreme Court of Connecticut held unanimously that there is a rational basis for the differential treatment of civil committees and committed insanity acquittees, and as such, Mr. Long's equal protection rights were not violated by committing him under the PSRB's jurisdiction; the proper level of scrutiny for his equal protection claim was ratio-

nal-basis review; and the doctrine of *res judicata* precluded Mr. Long's facial challenge of § 17a-593c.

The court acknowledged that the legislature had imposed different mandates for overseeing the commitment of civil committees and committed insanity acquittees. However, this difference was viewed as rational, given that the PSRB's focal concern was the protection of society from dangerous insanity acquittees. The court additionally reviewed its ruling on Mr. Long's first motion, in which it had identified legitimate reasons for the disparate treatment of insanity acquittees.

The court further held that since Mr. Long had conceded on his first claim that rational-basis review was the proper level of scrutiny for his equal protection claim, under the doctrine of *res judicata*, he could not raise further action on this same claim or proceed with his facial challenge of the statute. *Res judicata* (the matter judged) means that once an issue has been decided, it may not be relitigated in subsequent proceedings.

Discussion

This case touches on several important questions raised in the landmark cases of *Jones v. United States* (463 U.S. 354 (1983)), *Vitek v. Jones* (445 U.S. 480 (1980)), and *Addington v. Texas* (441 U.S. 418 (1979)).

In *Jones v. United States*, the U.S. Supreme Court stated that since commitment occurs only after the insanity acquittee proves a defendant's criminal act was the product of mental illness, then there is diminished concern for error. Similarly in *Long*, the Connecticut Supreme Court reasoned that since the acquittee himself initiated the commitment process by offering an insanity defense and proving that mental illness led to his crime, there was a diminished concern for error. The Supreme Court of Connecticut stated that to be adjudicated not guilty by reason of mental disease or defect, a defendant had to prove that he had committed his criminal act as a result of mental illness, which eliminated the risk that he was being committed for mere idiosyncratic behavior.

In *Vitek v. Jones*, the U.S. Supreme Court held that due process requires a hearing and other procedural safeguards to transfer a prisoner to a psychiatric facility. In *Long*, the Supreme Court of Connecticut highlighted the existing procedural safeguards that were in place, many of which were similar to those outlined in *Vitek*, such as the right to review all documents (*Long*), the right to adequate notice (*Vitek*),

and the right to representation by counsel (*Long* and *Vitek*). However unlike in *Vitek*, where there was a finding of a right to an adversary hearing before an independent decision maker, the Supreme Court of Connecticut held that a hearing before the Psychiatric Security Review Board was constitutionally sound. The idea was that the public must be protected from dangerous insanity acquittees, and the board was in the best position to provide that security. The Supreme Court of Connecticut acknowledged that this was in contrast to the treatment of civil committees. In the latter, the legislature had given physicians authority to form opinions about the patients and inform the probate court whether a less restrictive placement is available.

In *Addington v. Texas*, the U.S. Supreme Court held that a clear and convincing evidence standard, with the state having the burden of proof, is the constitutional minimum required by the Fourteenth Amendment in a civil commitment proceeding. The *Addington* Court reasoned that a lower standard jeopardizes individual liberty interest, while a higher standard is too restrictive to the state and poses a barrier to psychiatric treatment. In the hearing on his first motion to dismiss, Long referenced *State v. Metz*, 645 A.2d 965 (Conn. 1994), which interpreted Connecticut statute § 17-593c as requiring a burden of proof similar to that in *Addington*: clear and convincing evidence of mental illness and dangerousness to extend the commitment of an insanity acquittee.

The *Long* decision is in keeping with the public's intense and sometimes unreasonable fear that insanity acquittees will commit further violent crimes. Although the recidivism rate for insanity acquittees is substantially lower than that for released prisoners, the public appears to have taken a zero-tolerance stance. There is almost an implicit contract that in exchange for the NGRI finding, no further criminal conduct will be accepted.

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Undue Influence: Untangling the Web

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The Wyoming Supreme Court Upheld a Trial Court Ruling That the Testator's Stepdaughter and Her Husband Exercised Undue Influence in Procuring Testamentary Documents That Disinherited His Son and Made Them the Primary Beneficiaries of His Estate

In *Kelly v. McNeel*, 250 P.3d 1105 (Wyo. 2011), a testator's stepdaughter and her husband (the Kellys), appealed orders from the District Court of Sublette County finding that they had obtained their interest in his estate through undue influence and by removing Mrs. Kelly as guardian. The Wyoming Supreme Court upheld both orders.

Facts of the Case

Robert Lee McNeel, a 59-year-old widower, married Paula Webb in 1985. They had a son, Roby McNeel, in 1987. In 1997, Mr. McNeel's primary care physician suspected that he had an organic brain syndrome. By 2001, Mr. McNeel was taking donepezil (Aricept) for Alzheimer's disease. In 2002, he began accusing his wife of infidelity and claiming that Roby was not his biological son.

In February 2003, Mr. McNeel filed for divorce shortly after his stepdaughter, Roberta Jenkin, from his prior marriage, which lasted 36 years, moved to his ranch. Mrs. McNeel alleged that Mr. McNeel lacked the capacity to divorce. Mr. McNeel's attorney retained Dr. Bruce Kahn to examine Mr. McNeel. Dr. Kahn's diagnosis was mild dementia with delusions, and he concluded that Mr. McNeel had a delusional belief that Roby was not his biological son, despite DNA evidence to the contrary.

In June 2003, Mr. McNeel amended his trust. He disinherited his wife and named Roby as the sole beneficiary of his estate. In July 2003, Eva Kelly (Mr. McNeel's other stepdaughter and Mrs. Jenkin's sister) returned to live with her father after he told her that he needed help with the ranch. She was joined by her husband in 2005. Shortly after Mrs. Kelly moved in, Roby McNeel, who was then 15, left the home. He believed the two sisters were monitoring him and listening in on his conversations.

Mr. McNeel's house burned down in January 2005. A few days later, Mr. Kelly drove Mr. McNeel to an attorney's office to change his estate plan, dividing the estate between Mrs. Kelly and Mrs. Jenkins equally. On January 20, 2005, at Mr. McNeel's request, Mr. Kelly called the attorney to ask him to