Incompetency Commitment: The Need for Procedural Safeguards and a Proposed Statutory Scheme

N. Richard Janis
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I. Introduction

In all fifty states,¹ and in the federal courts,² a person charged with a crime cannot be tried if he is deemed incompetent to stand trial. Many jurisdic-

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Delaware apparently has no statutory provision, but does follow the common law rule. See Mills v. State, — Del. —, 256 A.2d 752 (1969).

Incompetency Commitment have codified the common law standard of incompetence, and close examination reveals that in nearly all the others the courts in fact apply the common law standard. A person who is found incompetent to stand trial is, in most states, automatically committed to a state mental institution until competency is restored and the judicial process is resumed. Since most states have not recognized that a determination of incompetency may lead to a deprivation of liberty more severe than a prison sentence, safeguards comparable to those surrounding criminal conviction or involuntary civil commitment are lacking.

Although the Supreme Court has indicated that the conviction of an accused person while he is legally incompetent violates due process, this doctrine had already been established by common law as a matter of fairness and humanity to the defendant. Today, most courts still operate under the assumption that an incompetency commitment is for the defendant's welfare. But the cold reality is that this assumption frequently is not true.

The poor quality of care offered by many state institutions falls far short of the treatment that committing judges seemingly assume committed de-


8. E.g., United States v. Chisolm, 149 F. 284 (S.D. Ala. 1906); Youtsey v. United
fendants will receive. All too frequently these institutions provide custodial care, not therapy; and thus at the outset there is almost no chance that the defendant will receive the kind of attention required to regain competency. Institutionalization itself may also have a profound adverse psychological effect on a patient, particularly if the treatment that is offered is inadequate. Many who might recover if given adequate treatment will actually suffer a deterioration in condition and may require institutionalization indefinitely.

Furthermore, a defendant may be further severely prejudiced, in a legal

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9. See Group for the Advancement of Psychiatry, Misuse of Psychiatry in the Criminal Courts: Competency to Stand Trial, Circular Letter No. 392, at 3 (Feb. 1972): "As one surveys the demeaning and degrading conditions which exist in hospitals for the criminally insane, the awful hypocrisy of our society and its system of criminal justice stands revealed in the worst light imaginable."


11. "It is our contention that the vast majority of defendants now found incompetent to stand trial could rapidly be returned to competence and so maintained if the facilities and treatments of modern psychiatry were made available to them." GAP, supra note 9, at 34-35.

12. "[U]nder prevailing conditions, we super-impose new disabilities upon existing disabilities—at least in many cases—when we forcibly commit sick people to places called mental hospitals which in reality remain custodial asylums." 1961 Hearings, pt. 1, at 44. See The Case of Bernard Goldfine, in J. Katz, J. Goldstein & A. Dershowitz, Psychoanalysis, Psychiatry, and Law 687 (1967) [hereinafter cited as Katz]. A tragic example of the consequences of inadequate treatment was offered in the case of forty-five year old Air Force Lieutenant Colonel Frederick Lynch. Having been charged with passing bad checks, he was confined at St. Elizabeth's Hospital in the District of Columbia. On January 22, 1962 he wrote: "Frankly, the conditions here are almost more than anyone can bear . . . the monotony—seventy-eight cents per day per patient food budget, no laundry, and above all no treatment. This hospital . . . is a human warehouse." On August 23, 1962, still without hope of early release and facing civil commitment proceedings, Frederick Lynch committed suicide. See Arens, Due Process and the Rights of the Mentally Ill: The Strange Case of Frederick Lynch, 13 Cath. U.L. Rev. 3, 38 & n.126 (1964).

13. See Bloom, A Proposal for a Community-Based Hospital as a Branch of a State Hospital, in Katz 664: "[O]nce a patient has remained in a large mental hospital for two years or more, he is quite unlikely to leave except by death. He becomes one of the large mass of so-called 'chronic' patients." One study reported that more than fifty percent of those found incompetent to stand trial would "spend the rest of their lives confined to the Hospital." Hess & Thomas, Incompetency to Stand Trial: Procedures, Results, and Problems, 119 Am. J. Psych. 713 (1963). See also McGarry, The Fate of Psychotic Offenders Returned for Trial, 127 Am. J. Psych. 1181 (1971).
sense, by commitment. He or his attorney might be able to prove his innocence or establish a defense to the state's case, thereby making the question of his incompetence irrelevant. However, since he is given no chance to test the validity of the state's case, he may be confined although demonstrably innocent of the crime. The unfairness involved is compounded when the defendant is not provided the procedural safeguards, and the state is not required to meet the substantive standards applicable to involuntary civil commitment. In addition, the long delay before trial often created by commitment may result in the loss of essential evidence or impair the ability of the defendant to present a defense. While this delay also threatens the prosecution's case, that fact hardly offsets the prejudicial effect on the defense. On balance, commitment represents more of a threat to a defendant, since facilities for gathering and preserving evidence are less readily available to a committed person. And, of course, the possibility always exists that the incompetency commitment will result in longer confinement than conviction for the offense charged.

Unfortunately, the courts and legislatures have, for the most part, failed to examine whether legitimate state interests are served by commitment and have continued to provide that a defendant who is found incompetent automatically be committed. This practice demonstrates a failure to recognize that the policies controlling whether a trial should be delayed are distinct from those controlling whether a person should be involuntarily committed. Whereas a trial should be delayed when the defendant cannot intelligently

14. Foote argues that this may be true in three different types of situations: The first is the instance where the defendant can show that the prosecution is barred as a matter of law; [an] example would be an indictment which on its face discloses that the statute of limitations has run. Second are cases where the defendant alleges that he can show an intrinsic defect in the prosecution's factual case which will prevent conviction, for example, that essential evidence was obtained by an unlawful search and seizure or that the prosecution's evidence shows entrapment as a matter of law. Third, counsel for an incompetent defendant may wish to assert an affirmative defense which can be established without participation of the defendant. In a robbery prosecution based on identification evidence, for example, counsel may be able to establish from employment records and the testimony of third parties that the defendant was at work in another city at the time of the crime.

Foote, supra note 8, at 841.

15. Generally, there must be a full-fledged judicial proceeding, frequently including the empaneling of a jury, at which the state must carry the burden of proof. Note, Civil Commitment of the Mentally Ill: Theories and Procedures, 79 HARV. L. REV. 1288 (1966).

16. Generally, there must be a finding that the person is dangerous to himself or others, or that he is in need of care and lacks the capacity to fend for himself. Id.

17. See, e.g., The Case of Tony Savarese, in Katz, 634-50 (thirty-four year commitment before arraignment).

18. Foote, supra note 8, at 842.

19. See note 13 supra.
participate, the involuntary commitment of a person who has not been found guilty of any crime should be authorized only where the necessity for confinement and the likelihood of effective treatment justify the loss of liberty. If the psychiatric data indicates that an individual is never likely to regain competence to stand trial, further commitment by the state and deprivation of the individual's liberty cannot be justified as serving either the defendant's welfare or a legitimate state interest. If the individual can be treated on an outpatient basis or by a private doctor, no necessity exists for confinement and the resulting deprivation of freedom. Clearly, an individual not in need of confinement as a means for treatment should not be committed unless the state can make a showing which meets the standards of civil commitment. Indeed, commitment of such persons might actually prevent recovery and, by unnecessarily crowding our institutions, deprive those in real need of institutionalization of the attention and treatment they require.

As most states are slow to recognize the inadequacies and injustices of present incompetency procedures, it is not surprising that the impetus for reform should come from the Supreme Court.

II. The Supreme Court's Response

The Supreme Court recently considered equal protection and due process limitations on pretrial commitment of incompetent defendants in *Jackson v. Indiana*, noting with respect to the state's power to order all types of commitment, that "[c]onsidering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power have not been more frequently litigated." The Indiana statute provided that if the trial judge had reasonable grounds to believe the defendant incompetent to stand trial, he should set a date for a competency hearing and appoint two disinterested physicians to examine the defendant and testify as to their findings. The defendant was entitled to introduce evidence at the hearing. If the court determined,

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20. See The Motion to Dismiss Indictment in *United States v. Pound*, in *Katz* 582. Ezra Pound was indicted on November 26, 1945 for making treasonous broadcasts during World War II. On February 13, 1946 he was found incompetent to stand trial and was confined until the indictment was finally dismissed with the consent of the Government in April, 1958, even though the likelihood of his committing further acts of treason was almost nonexistent, his condition was incurable and would forever render him incompetent, and he was not in need of institutional care.

21. See *GAP*, supra note 9, at 41. Such commitment, of course, also results in the unnecessary expenditure of state funds.

22. See pp. 726-36 *infra*.


24. *Id.* at 737 (footnotes omitted).

on the basis of the evidence offered at the hearing, that the defendant lacked "comprehension sufficient to understand the proceedings and make his defense," the statute ordered the defendant remanded to the state department of mental health for commitment to an "appropriate psychiatric institution" until the superintendent of that institution certified to the court that the defendant had been restored to competence. There was no statutory provision for periodic review of the defendant's condition by either the court or mental authorities, nor was the likelihood of the defendant's improvement a factor to be considered in determining whether the defendant should be committed.

The petitioner, a twenty-seven year old mentally defective deaf mute who could not read, write, or intelligently communicate, was charged with separate robberies of two women. But before any trial began the trial court set in motion the procedures for determining competency to stand trial. The medical testimony at the competency hearing indicated that Jackson's condition precluded his comprehension of the nature of the charges against him or an effective participation in his defense. Further, the prognosis was "dim" and it appeared that Jackson's intelligence was not sufficient to enable him to ever develop the necessary communicative skills. Nonetheless, the court, finding Jackson incompetent, ordered him committed until such time as he could be certified by the health department as "sane" and thus possessing "comprehension sufficient to understand the proceedings and make his defense."

The Supreme Court found that the record clearly established "that the chances of Jackson's ever meeting the competency standards of § 9-1706a are at best minimal, if not nonexistent. The record also rebuts any contention that the commitment could contribute to Jackson's improvement. Jackson's § 9-1706a commitment is permanent in practical effect." Moreover, the Court compared the State's procedures for indeterminate commitment of incompetent defendants with its procedures for commitment of the feeble-minded and for involuntary civil commitment, and found their standards substantially different. The Court concluded:

. . . [W]e 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,

26. Id.
27. 406 U.S. at 727.
29. Id. at §§ 22-1201 to -1256 (Supp. 1973).
30. In particular, the Court emphasized that under the incompetency commitment statute the state needed to show only the defendant's inability to stand trial to commit him indefinitely, while under the involuntary civil commitment statute the state was required to make a showing of at least (1) mental illness and (2) a need of "care,
and by thus condemning him in effect to permanent institution-
alization without the showing required for commitment or the op-
portunity offered for release afforded by § 22-1209 or § 22-1907, 
Indiana deprived petition of equal protection of the laws under 
the Fourteenth Amendment.\footnote{31}

The Court also found Indiana's provision for commitment of a criminal de-
fendant solely on account of his incompetency to stand trial violative of the 
due process clause of the fourteenth amendment:

We hold, consequently, that a person charged by a State with 
a criminal offense who is committed solely on account of his in-
capacity to proceed to trial cannot be held more than the rea-
sonable 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 commi-
ment proceeding that would be required to commit indefinitely 
any other citizen or release the defendant. Furthermore, even if 
it is determined that the defendant probably soon will be able to 
stand trial, his continued commitment must be justified by progress 
toward that goal.\footnote{32}

\section*{III. The Present Procedures}

An examination of current state statutes reveals that there had been only 
limited reform in this area of the law prior to the \textit{Jackson} decision. Although 
a few states have begun to show increasing awareness of the policy issues 
involved and have moved to curb potential abuse,\footnote{33} the majority of states 
continue to operate under wholly inadequate systems that will have to be 
revised to comport with the standards set forth in \textit{Jackson}.

\begin{footnotes}
\footnote{31. 406 U.S. at 730 (footnote omitted).}
\footnote{32. \textit{Id.} at 738 (footnote omitted). The Court also hinted (but did not decide) that 
prolonged commitment might be violative of the sixth amendment right to a speedy 
trial, or might be a denial of due process in that criminal charges are held indefinitely 
over one who may never have a chance to prove his innocence. \textit{Id.} at 740 (footnotes 
omitted).
}
\footnote{33. \textit{See, e.g., Idaho Penal and Correction Code} §§ 18-404 to -406 (Sess. Laws 
\end{footnotes}
Typical of the procedures outlined in most of the state laws is the District of Columbia statute.\(^3\) Like those of most states,\(^3\) the District of Columbia statute allows the court to commit temporarily, for observation and examination, a defendant whose competency to stand trial is in doubt. Unfortu-

34. D.C. CODE ENCYC. ANN. § 24-301 (Supp. 1972) states in part:
(a) If it appears to a court having jurisdiction of—
(1) a person arrested or indicted for, or charged by information with an offense, or
(2) a child subject to a transfer motion to the Family division of the Superior Court of the District of Columbia pursuant to section 16-2307, that from the court's own observations or from prima facie evidence submitted to it and prior to the imposition of sentence, the expiration of any period of probation, or the hearing on the transfer motion, as the case may be, such person or child (hereinafter in this subsection and subsection (b) referred to as the "accused") is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense, the court may order the accused committed to the District of Columbia General Hospital or other mental hospital designated by the court, for such reasonable period as the court may determine for examination and observation and for care and treatment if such is necessary by the psychiatric staff of said hospital. If after such examination and observation, the superintendent of the hospital . . . shall report that in his opinion the accused is of unsound mind or mentally incompetent, such report shall be sufficient to authorize the court to commit by order the accused to a hospital for the mentally ill unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial or to participate in transfer proceedings. If the court shall find the accused to be then of unsound mind or mentally incompetent to stand trial or to participate in transfer proceedings, the court shall order the accused confined to a hospital for the mentally ill.
(b) Whenever an accused person confined to a hospital for the mentally ill is restored to mental competency in the opinion of the superintendent of said hospital, the superintendent shall certify such fact to the clerk of the court in which the indictment, information, or charge against the accused is pending and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial or to participate in transfer proceedings, unless the accused or the Government objects, in which event, the court, after hearing without a jury, shall make a judicial determination of the competency of the accused to stand trial or to participate in transfer proceedings.

. . . (g) Nothing herein contained shall preclude a person confined under the authority of this section from establishing his eligibility for release under the provisions of this section by a writ of habeas corpus.

nately, these "temporary" commitments may be for extended periods since frequently no observation or examination is even begun until the defendant has been at the institution for quite some time.86 Even in those states that place a time limit on the temporary commitment, extensions are frequently allowed.87 Only a few states specifically provide that these examinations may, when possible, be conducted on an outpatient basis.88 Normally, a defendant so committed is given no opportunity to challenge this deprivation of his freedom either on grounds that outpatient or private observation would suffice as an alternative to confinement, or on grounds of undue delay.89

The District of Columbia statute is also typical in its failure to recognize that the policy interests involved in the determination of incompetency differ from those involved in the determination of whether the defendant should be committed. As in the majority of states, a finding of incompetency automatically leads to commitment until recovery.40 There is no inquiry required into the questions of whether, in fact, recovery of competency to stand trial is ever likely to occur; whether, if competency can be restored, the defendant will receive the therapeutic treatment that is required to do so; or whether there are alternatives to confinement such as outpatient treat-

37. See, e.g., HAWAI'I REV. STAT. ANN. § 711-91 (1968) (temporary commitment of ten days or until completion of the examination); IDAHO PENAL AND CORRECTION CODE § 18-405 (Session Laws 1971, ch. 143) (temporary commitment for not more than sixty days or such longer period as the court determines to be necessary); MONT. REV. CODES ANN. § 95-505 (1969) (temporary commitment for not longer than sixty days or such longer period as the court determines to be necessary); VT. STAT. ANN. tit. 13, § 4822 (Supp. 1972) (temporary commitment for not more than sixty days with extensions of fifteen days). See also Model Penal Code § 4.05 (Proposed Official Draft, 1962) (temporary commitment for not more than sixty days or such longer period as the court determines to be necessary).

In the District of Columbia outpatient examination has been specifically provided by case law. In Marcey v. Harris, 400 F.2d 772 (D.C. Cir. 1968), the United States Court of Appeals held that pretrial commitment under § 24-301(a) is only for purposes of a pretrial examination and is not a ground for bail denial, otherwise contemplated under the bail statute. Thus, upon the request of the accused, his commitment for a pretrial mental examination should be limited to an examination on an outpatient basis, unless the court is advised by the hospital authorities, setting forth reasonable grounds, that inpatient commitment is necessary to assure effective examination.
40. See note 5 supra, and accompanying text.
ment or private care.\footnote{41} Nor are defendants who face commitment granted the procedural and substantive safeguards guaranteed in involuntary civil commitment proceedings.

Even before \textit{Jackson}, however, some states were beginning to demonstrate an increasing awareness of the need to explore these considerations and of the distinct issues presented by commitment following a determination of incompetency. A few states specifically provide that the issues of incompetence and commitment should be determined separately,\footnote{42} and a number of others no longer automatically require commitment after it is determined that a defendant is incompetent to stand trial.\footnote{43} Some states authorize the courts to provide for alternatives to commitment that may or may not be tied to outpatient or private treatment;\footnote{44} others now provide that a defendant found to be incompetent is not to be confined unless he is dangerous to himself or others.\footnote{45} As the Supreme Court of New Jersey stated in discussing that state's incompetency commitment statute:

\begin{quote}
A determination that persons are unfit to stand trial is persuasive on the question of whether they should be confined under NJS 30:4-82. However, this statute only authorizes confinement of persons who are a hazard to themselves or others, persons who
\end{quote}

\footnote{41} However, the holding of the United States Court of Appeals for the District of Columbia in Rouse v. Cameron, 373 F.2d 451 (1967), that a person involuntarily committed to an institution, on being acquitted of an offense by reason of insanity, has a right to treatment, and that continued confinement cannot be justified if he is not receiving therapy, would appear to offer support for incompetent defendants who challenge their confinement on this ground. Moreover, in Ashe v. Robinson, 450 F.2d 681 (D.C. Cir. 1971), the court held that a defendant found not guilty by reason of insanity is entitled not only to treatment, but to treatment under the least restrictive, alternative approach consistent with the legitimate purposes of commitment. \textit{Cf.} Miller v. Overholser, 206 F.2d 415, 418-19 (D.C. Cir. 1953).


\footnote{43} See notes 44-45 infra. See also United States v. Klein, 325 F.2d 283 (2d Cir. 1963), in which the court held that there were not sufficient grounds for commitment where the defendant demonstrated that he would receive private psychiatric care that was likely to restore his competency, even though the state intended to provide effective and beneficial treatment.

\footnote{44} See, e.g., KAN. CODE CRIM. PROC. § 22-3303 (Supp. 1971); ILL. REV. STAT. ch. 38, § 1005-2-2 (Smith-Hurd Supp. 1972); ME. REV. STAT. ANN. tit. 15, § 101 (Supp. 1972); MD. ANN. CODE art. 59, § 24 (1972); ORE. REV. STAT. § 136.160 (1971); PA. STAT. ANN. tit. 50, § 4408 (1969); VT. STAT. ANN. tit. 13, § 4829 (Supp. 1972). See also, \textit{The Case of Bernard Goldfine}, in KATZ 687, in which the court ordered an incompetent defendant released on condition that he undergo outpatient psychiatric treatment, after it concluded that the institutional care he was receiving was not improving his condition, that he was not dangerous to himself or others, and that if he were not confined he could pay for and would receive treatment more likely to bring about recovery.

cannot fend for themselves. It is not a blanket authorization to commit persons with any condition of mental illness or retardation . . . . Since the statute authorizes confinement of a person and loss of his freedom, the courts must be careful to see that the statute is not used as a catch-all device to punish persons under indictment without an adjudication of guilt at a criminal trial. The statute does not turn on guilt or innocence of a criminal charge, but on the need of the individual or society for protection.46

An increasing number of states have taken steps to ensure that defendants need not have recovered before seeking release from commitment. Some states now give a defendant committed for incompetency a status similar to individuals who have been involuntarily civilly committed47 and, if he is not dangerous to himself or others,48 nor in need of inpatient care, and able to fend for himself,49 allow his release from custody.50 Michigan has taken a forward step by requiring civil commitment proceedings to be brought if it is likely that the defendant cannot recover competence to stand trial within eighteen months, or if after eighteen months of commitment, the defendant has not regained competence.51

The District of Columbia statute, on the other hand, sets no maximum time limit for an incompetency commitment, and in this respect also is typical.52 It reflects a failure to recognize that many individuals will never regain competence, or at least that their chances of regaining competence are too remote to justify continued deprivation of liberty. To hold these individuals indefinitely not only serves no legitimate state interest but may also lead to a deterioration in their condition and the imposition of what is essentially a life sentence.53 Thus, there is a danger that commitment is merely

46. State v. Caralluzzo, 49 N.J. 152, 228 A.2d 693, 695 (N.J. 1967) (footnote added). Interestingly, while it is a forward step to recognize that defendants found incompetent to stand trial should not automatically be committed, this approach may be open to criticism on the ground that it fails adequately to take account of the legitimate state interest in commitment—to restore the defendant to competency so he may be tried—and does not ensure treatment for the defendant.
47. See VT. STAT. ANN. tit. 13, § 4829 (Supp. 1972), which explicitly gives a defendant committed for incompetency the same status as an individual who has been involuntarily civilly committed, including the right to receive care and treatment, and to be discharged.
50. But see State v. Lewis, 11 N.C. App. 226, 181 S.E.2d 163 (1971), where the court held that a finding that commitment is in the best interest of the defendant or for the protection of society is not required.
52. See note 5 supra, and accompanying text.
53. See notes 13 & 19-21 supra, and accompanying text.
Incompetency Commitment

being used as a form of punishment for those who have not been tried, or as an expedient—and less restricted—alternative to civil commitment.

In this area there had been some reform even before Jackson, when certain states began to recognize the injustice involved in indeterminate commitments, but it has been limited and not wide spread. The federal courts have imposed a "rule of reasonableness" upon the federal incompetency commitment statutes, 18 U.S.C. §§ 4244 et seq. which the Supreme Court summarized in Jackson:

Without a finding of dangerousness, one committed under [c§ 4244 et seq.] can be held only for a "reasonable period of time" necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future. If the chances are slight, or if the defendant does not in fact improve, then he must be released or granted a §§ 4247-48 hearing.

A few state statutes set, or require a committing court to set, a maximum period of commitment. After this period has expired, any further commitments must be in accordance with the procedures for involuntary civil commitment. New York requires release of defendants charged with misdemeanors after ninety days of commitment, and release and dismissal of charges against defendants charged with felonies after they have been committed for two-thirds of the maximum sentence for the offense charged. Once the charges against the defendant have been dropped, the rationale for incompetency commitment, restoration of the defendant to a condition in which he can intelligently participate in trial, no longer exists. Some states have explicitly recognized this by requiring the defendant to be released or civilly committed if the indictments have been dismissed. In addition, a


55. See Foote, supra note 8, at 832-33.

56. See 406 U.S. at 733 and cases cited therein.

57. Id. at 733. 18 U.S.C. §§ 4247-48 (1970) permit commitment of federal prisoners whose sentences are about to expire if the prisoner is (1) insane or mentally incompetent, (2) would be dangerous if not committed and (3) suitable arrangements for custody are not available in a state facility.


61. See, e.g., Alas. Stat. Ann. § 12.45.110 (1962); Mo. Ann. Stat. § 552.020 (Supp. 1971); N.Y. Code Crim. Proc. § 662b (McKinney Supp. 1970). In the District of Columbia, the established practice is to release a defendant who has been committed as incompetent if the indictment is dismissed. The rationale is that the commitment order was an order in the criminal case and that once the criminal case is
number of states allow the court to dismiss the charges if so much time has passed that a trial would be unjust. Finally, a few states permit a defendant who has been committed as incompetent to apply for release in the same manner as those who have been involuntarily civilly committed.

Like nearly all state statutes, the District of Columbia statute does not make provision for an incompetent defendant, through his counsel, to test the merits of the state’s case. In the Model Penal Code, the American Law Institute suggests adoption of a provision whereby: “The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution which is susceptible of fair determination prior to trial and without the personal participation of the defendant.” Montana has adopted this provision. As an alternative, the Model Penal Code suggests a statutory provision for a special post-commitment hearing if the defendant’s counsel certifies to the court that he believes that the defendant has a defense on the merits to the crime with which he is charged.


65. Model Penal Code § 4.06 alternative subsection (3) (Proposed Official Draft, 1962). In Jackson the Supreme Court stated:

Both courts and commentators have noted the desirability of permitting some proceedings to go forward despite the defendant’s incompetency. . . . We do not read this Court’s previous decisions to preclude the States from allowing, at a minimum, an incompetent defendant to raise certain defenses such as insufficiency of the indictment, or make certain pretrial motions through counsel.

406 U.S. at 740-41 (footnotes omitted).


[(3) At any time within ninety days after commitment as provided in Subsection (2) of this Section, or at any later time with permission of the court
alternative. The Supreme Court of Wisconsin, in State v. McCredden, has also opened the door to an examination of the merits of the state's case prior to prolonged commitment. There, the court concluded that

the proper procedure to be followed by the circuit court, where a defendant is bound over by the magistrate to determine the issue of insanity, is to hold a hearing to establish whether it is probable that he committed the felony charged in the information. The information should first be filed but no plea thereto should be required. If the defendant is without counsel, counsel should be provided with the right to cross-examine the state's witnesses and to call witnesses on behalf of the defendant. At the conclusion of this hearing a finding should be made on the issue of probable guilt. If this finding is in the affirmative then the court shall proceed to determine the insanity issue. If on the other hand the finding is that the state has failed to prove the probability that the defendant has committed the felony charged in the informa-

granted for good cause, the defendant or his counsel or the Commissioner of Mental Hygiene . . . may apply for a special post-commitment hearing. If the application is made by or on behalf of a defendant not represented by counsel, he shall be afforded a reasonable opportunity to obtain counsel, and if he lacks funds to do so, counsel shall be appointed by the Court. The application shall be granted only if the counsel for the defendant satisfies the Court by affidavit or otherwise that as an attorney he has reasonable grounds for a good faith belief that his client has, on the facts and the law, a defense to the charge other than mental disease or defect excluding responsibility.]

[(4) If the motion for a special post-commitment hearing is granted, the hearing shall be by the Court without a jury. No evidence shall be offered at the hearing by either party on the issue of mental disease or defect as a defense to, or in mitigation of, the crime charged. After hearing, the Court may in an appropriate case quash the indictment or other charge, or find it to be defective or insufficient, or determine that it is not proved beyond a reasonable doubt by the evidence, or otherwise terminate the proceedings on the evidence or the law. In any such case, unless all defects in the proceeding are promptly cured, the Court shall terminate the commitment order . . . and order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from mental disease or defect, order the defendant to be committed to an appropriate institution. . . .]

68. IDAHO PENAL AND CORRECTION CODE §§ 18-406 to -407 (Sess. Laws 1971, ch. 143). The preferability of this post-commitment procedure to a pretrial determination of the state's case seems questionable. First, by requiring the defendant to wait until after commitment to raise, through his counsel, a defense on the merits, the state may be requiring the defendant to suffer an unnecessary and unjustifiable deprivation of his freedom until the hearing is applied for, granted, and conducted. Second, it is quite possible that a defendant, once committed, will not himself be sufficiently knowledgeable or assertive to make the application for a post-commitment hearing, or fully understand his right to do so; and he may not, at that time, have anyone to assist him. Third, in those states which do not automatically commit incompetent defendants, restricting the right to defend on the merits to those under commitment means that incompetent defendants who are not committed will not have an opportunity to test the state's case.

69. 33 Wis. 2d 661, 148 N.W.2d 33 (1967).

70. The issue in the case revolved around whether the defendant "was legally insane and unable to stand trial." Id. at 669, 148 N.W.2d at 35 (footnote added).
tion, or all of the felonies charged if there is more than one, the defendant should be discharged subject to the right of the court to temporarily detain him so as to permit civil proceedings to be instituted. . . . 71

Unfortunately, other states have been slow to recognize the anomaly and injustice of committing a defendant as incompetent to stand trial when he can presently prove his innocence. Clearly, there is no legitimate state interest involved when this is the case. 72

Finally, the District of Columbia statute is typical in that it places the decisional responsibility regarding release from commitment upon the superintendent of the institution, 73 though it does provide for release through habeas corpus also. 74 In some states, certification by the superintendent is followed by a judicial hearing on the defendant's competency, 75 but in others it is deemed conclusive. 76 Although at first blush it might appear that the superintendent is in the best position to observe the defendant and report on his condition, there are a number of problems involved in reliance upon his discretion. First, competency is a legal question and ought to be determined in a judicial proceeding. 77 Indeed, there is evidence that psychia-

71. Id. at 670, 148 N.W.2d at 37-38.
72. See Foote, supra note 8, at 844.
76. See, e.g., D.C. CODE ENCYC. ANN. § 24-301 (Supp. 1972) (unless the government or defendant objects); MINN. STAT. ANN. § 631.18 (Supp. 1971).
77. "The psychiatrist can best perform his function if he presents relevant information to the court without himself attempting to relieve the court of its difficult legal question." GAP, supra note 9, at 28.
trists frequently misunderstand the test of incompetency, or become confused in its application. Moreover, the present system may impose a responsibility upon the superintendent that can prove administratively burdensome and ethically problematic. Second, given the understaffed conditions of most state mental institutions, it is quite possible that a defendant will rarely, if ever, be examined with the thoroughness required to determine whether he has recovered competency. He may become "lost" in the institution, his condition becoming chronic as his stay becomes more permanent. A number of states have, at least to some extent, reduced their reliance upon the superintendent. For example, some states have set maximum periods of commitment, others require periodic reports to the court, and a few require civil commitment proceedings to be instituted if the defendant has not been able to recover after a specified period of time. Moreover, a number of federal courts had concluded even before Jackson that a committing court has a duty to inquire into the defendant's condition from time to time, and that commitment should not be continued if the defendant is unlikely to recover.

Nevertheless, present procedures for dealing with a defendant whose competency to stand trial is in doubt are, for the most part, wholly inadequate. In the majority of jurisdictions there is no statutory awareness of the dis-

78. Oliver, Remarks, Panel on Recognizing and Determining Mental Competency to Stand Trial—Insanity as a Defense, 37 F.R.D. 155, 158-60 (1964).
79. See GAP, supra note 9, at 26-34.
80. One such ethical dilemma arises when submission of the defendant to the criminal process would conflict with his need for therapy.
81. See note 13 supra.
86. See pp. 738-39 infra. The problems of incompetency law reflect a basic ambivalence in society's attitude toward mentally ill criminal offenders. On the one hand, there is a feeling that persons who are mentally disabled ought to be sheltered from the severity of the criminal process while, on the other, there is a desire to protect society by confining and punishing persons thought guilty of criminal conduct. While the first objective has led to a progressive expansion of the class of persons considered incompetent, the second has motivated an insistence that they be automatically committed to institutions for the criminally insane. Although this system has been ra-
tinct policies involved in the need for delaying a trial because of the inability of a defendant to participate intelligently, as opposed to the need of the individual for, or the interest of the state in confinement of the defendant to an institution. This unawareness has led to a system that provides inadequate protection against unwarranted deprivations of liberty and offers the potential for abuse and injustice. Even in those states where an awareness of these realities has sparked reform, the changes have not been sufficiently comprehensive.

IV. A Suggested Procedure

In order to ensure that the rights of criminal defendants are protected, while at the same time ensuring that legitimate state interests are vindicated, any pretrial commitment procedure should be limited in the following ways:

(1) *Temporary commitments for observation should be for the shortest duration possible and should be authorized only where confinement is necessary and examinations cannot be conducted on an outpatient basis.* The defendant should be placed in the institution only when the staff is ready to examine him, and the examination should begin at once. In no event should any temporary commitment be for more than ten days, and the defendant should expressly be given the right, and the procedure provided, to challenge temporary commitment as being unnecessary or as creating undue delay. Moreover, after the examination is completed, the defendant should be returned to the court, there to be confined or released on bail pending a determination of his competency. These requirements will ensure that the device of temporary commitment will not be abused by the courts, but will be employed only where a legitimate state interest requires it. Further, they will ensure that temporary commitment will not be used as a device for confining defendants when bail would otherwise be authorized, and that any commitments that are necessary will be kept within stated time limits.

Fictionalized by the assumption that commitment is more humane than criminal conviction, the contradictions inherent in its objectives have been repeatedly demonstrated by the actual consequences for incompetent defendants. Not only has a broad application of incompetency law failed to mitigate the operation of the criminal process, but in many instances it has caused hardship more severe than criminal conviction.

87. See Harvard Note, supra note 74, at 472.

88. There is currently pending before Congress legislation which provides a substantial measure of reform in the procedural safeguards available to criminal defendants in the federal courts. See S. 1, 93d Cong., 1st Sess. (1973); S. 1400, 93d Cong., 1st Sess. (1973); H.R. 6046, 93d Cong., 1st Sess. (1973).

89. In 1971 in Massachusetts, only seventy-four out of 1806 pretrial admissions to state mental hospitals were eventually found to be incompetent. GAP, supra note 9, at 40.

90. See note 17 supra, and accompanying text.
nally, this proposal calls for prompt return of the individual to the court, and impedes the use of our state mental hospitals as jails or holding institutions.\textsuperscript{91} The responsibility should be placed on the state to make a swift determination as to the defendant's competency, and then to deal with him according to law.

(2) \textit{The defendant should be given an opportunity to challenge the validity of the state's charges before he is committed; if he can prove them invalid, he should be released or temporarily detained for civil commitment proceedings.} Clearly, it is anomalous to "protect" the defendant from the criminal process and confine him until he can assist in his own defense when his attorney can presently prove the invalidity of the state's charges without the participation of the defendant. One way to provide for such a demonstration would be to have the trial on the merits first, followed by a determination of competency only if the defendant is found guilty.\textsuperscript{92} If the defendant is found incompetent, the verdict would be set aside and treated as a nullity. An advantage of this procedure is that the behavior of the defendant during trial would provide extensive evidence as to his competence and allow the judge or jury to base their application of the legal test on their own observations rather than being forced to rely almost exclusively on psychiatric testimony and prediction.\textsuperscript{93} On the other hand, the cost of conducting so many trials in which verdicts would be set aside raises a practical objection to this proposal, particularly in light of the fact that our judicial system is already greatly overloaded.\textsuperscript{94} Perhaps a more practical way to

\begin{itemize}
  \item \textsuperscript{91} See Guy v. Ciccone, 439 F.2d 400 (6th Cir. 1971) (eighty-nine day confine-for observation).
  \item \textsuperscript{92} In the analogous situation of acquittal by reason of insanity, some states have a trial on the merits first and inquire into insanity at the time of the offense only if the defendant is found guilty in the first trial. \textit{See, e.g.}, \textit{Ariz. Rev. Stat. Ann.} § 13-1621.01 (Supp. 1971).
  \item \textsuperscript{93} See Pouncey v. United States, 349 F.2d 699 (D.C. Cir. 1965), where events during the trial cast doubt on the defendant's competency. Some of the dangers inherent in the reliance by judges and juries on expert psychiatric testimony in interpreting legal standards are discussed in Dershowitz, \textit{Psychiatry in the Legal Process: A Knife That Cuts Both Ways}, 4 \textit{TRIAL} 29 (1968).
  \item \textsuperscript{94} Harvard Note, \textit{supra} note 74, at 469. The objection might also be raised that it is anomalous to inquire into whether the defendant will be competent to stand trial after he has already, in fact, stood trial. If he \textit{is} incompetent then the trial was itself unfair and the defendant has been subjected to precisely that which incompetency commitment was intended to avoid—a trial at which he was unable to understand the nature of the proceedings against him or to effectively assist his counsel in preparing a defense. This objection overlooks two points, however. First, the post-trial hearing would not be one to determine whether the defendant \textit{will} be competent but rather to determine whether, during the preceding trial, he \textit{was} competent. Rather than relying solely on psychiatric data and expert testimony to make a prediction about future behavior, the court may refer to some extent to the defendant's behavior during trial, and thus make a judgment, at least partially, on the basis of behavior it has \textit{observed}. Second, it must be reemphasized that the primary purpose behind a determination of incompetency is to protect
\end{itemize}
provide a means for the defendant to test the state's case would be to have a pretrial probable guilt hearing prior to a resolution of the competency issue, along the lines suggested by the Supreme Court of Wisconsin in *State v. McCredden*.95 Finally, the defendant could be allowed to challenge the validity of the state's charges after a determination of incompetency but before commitment.96 Of course, all of these alternatives are dependent upon forceful representation of the defendant's interests by his counsel. Thus, counsel should be provided during such procedures if the defendant cannot afford or is otherwise unable to retain private counsel.97

(3) A defendant, even when found to be incompetent, should be committed only when necessary to serve a legitimate state interest and only for a specified period of time. There is no legitimate state interest in commitment of an incompetent defendant if commitment is unlikely to lead to recovery or if there are alternative means of treatment that result in a less substantial deprivation of liberty. Thus, before any defendant is criminally committed, the court should be required to make a determination that it is not unlikely that the defendant, if given proper treatment, will regain competency; that such treatment cannot be administered on an outpatient or private basis; and that the type of treatment required is available and will be administered at the institution to which the defendant is to be committed. If commitment cannot be justified as a necessary and likely means to restore competency, the defendant should be released—subject to the right of the court to order outpatient treatment or private care—or be civilly committed.

The defendant from an unfair trial resulting in a determination of guilt. The defendant is protected since he is faced with a no-loss proposition: if his attorney can prove him innocent, with or without his assistance, he need not face the problem of incompetency commitment; if he is found guilty but is deemed to have been incompetent, the verdict is set aside and treated as a nullity. Another, and perhaps more serious objection might be that judges who have sat through an entire trial and who have been convinced of the defendant's guilt may be reluctant to nullify the trial by finding the defendant incompetent, and thus may be tempted to use a less stringent standard for competency.

95. 33 Wis. 2d 661, 148 N.W.2d 33 (1967). See pp. 733-34 supra. Such a hearing would be similar in effect to a preliminary hearing in a felony case. If probable guilt is found, the court proceeds to determine the competency issue. On the other hand, if probable guilt is not found, the case is dismissed, but jeopardy would not attach and the reinstatement of the charges at a later time would not be barred. Of course, if charges were to be reinstated while there remained doubt as to the defendant's competency, the state would still be forced to make a showing of probable guilt at a pretrial hearing. Moreover, if the state was unable to show probable guilt after continually reinstating the charges, the defendant would be able to move to dismiss the indictment or information as violative of due process.


97. Foote, supra note 8, at 845. For the conclusion that providing counsel after commitment is the best means to protect defendants from abuse, see Lewin, *Disposition of the Irresponsible: Protection Following Commitment*, 66 Mich. L. Rev. 721 (1968).
Incompetency Commitment

When a defendant is committed, the commitment should be limited to a specified period of time. If competency is not restored within that period, or if it becomes clear during that period that competency cannot be restored, the defendant should be released or civilly committed. One study suggested that a period of two years, with a possible six month extension, was a reasonable period of time, while a more recent study has suggested a period of six months, with a possible six month extension. Michigan has provided for a limit of eighteen months. In addition, commitment should be terminated if the indictments against the defendant are dismissed. Since there is no longer a legitimate state interest in confinement, the defendant should be released or civilly committed.

(4) The decision to release or return for trial a committed defendant should not be left solely to the discretion of the superintendent of the institution; periodic reviews should be required and procedures should be established under which the defendant or his counsel can challenge continued commitment. Although the limitations on the period for commitment that are suggested above provide the defendant with a great deal of protection from the potential abuses of indeterminate commitment, there is still the danger that he is being unduly deprived of his liberty even under a commitment of specified duration. The longer the period set for commitment, the more likely it is that the defendant is being unnecessarily confined and the

98. GAP, supra note 9, at 41-42:
It is our belief that new techniques and drugs can bring most persons initially found to be incompetent to a competent state well within six months. This is the maximum length of time normally required at this time to treat most civilly committed patients in hospitals. After six months of treatment the vast majority of all incompetency cases will be in one of two categories: (a) they will be competent to stand trial; or (b) they will be suffering from a type of mental disability such as that due to gross mental retardation, brain damage, or chronic deteriorated states which make it possible for the psychiatrist to predict that the defendant will never regain competency. The first group should, of course, stand trial. Criminal charges against this second group should be dropped, and they should instead be subject to civil commitment proceedings where their dangerousness should be reassessed to determine the type of institutionalization, if any, which is required. Those persons who will never return to competency and who pose no threat to themselves or the community, should be released.

99. GAP, supra note 9, at 42:
There will be a small number of incompetency cases which do not fit into either of these categories. After six months of treatment they will not be competent to stand trial, nor will it be apparent that they can never return to competency. For these few the judge should hold a hearing, and if indicated, grant a six month extension of the initial treatment period. At the end of the extension period, a total of twelve months treatment, the defendant should be returned to trial or civilly committed to that institution which is best equipped to treat him.

The court should conduct periodic inquiries and the defendant or his counsel should be made aware of the procedures by which to challenge continued commitment. If the defendant is shown to have regained competency, or if there is not a substantial probability that he will regain competency, or if he is not receiving the type of treatment required, or if continued confinement is no longer necessary for treatment, the defendant should be released from criminal commitment and discharged, tried, treated, or civilly committed, as the case may be. Since in all cases we are dealing with individuals who have not been found guilty of a crime, it is imperative that any confinement and concomitant loss of liberty be kept to the minimum that is necessary to vindicate only the legitimate interests of the state.101

A proposed statute along the following lines would incorporate these limitations:

Proposed Statute

(1) If doubt is raised as to the defendant's competency to stand trial,

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101. These suggested limitations would not contravene the holding in Jackson that by subjecting the defendant 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 offered for release by civil commitment statutes, the state deprived petitioner of equal protection of the laws under the fourteenth amendment.

The Court's decision recognizes that the pendency of a criminal proceeding offers a rational basis for distinguishing an incompetent defendant from other persons who are mentally ill, only on the ground of an interest in his recovery and return to trial. See Harvard Note, supra note 74, at 464. Thus, it requires that the same standards applicable to civil commitment be applied to incompetency commitment when confinement is indeterminate. Indeed, the Court emphasized that "[w]here the State's factual premise that Jackson's commitment is only temporary a valid one, this might well be a different case." 406 U.S. at 725. The limitations suggested here, while continuing to draw a distinction between incompetency commitment and civil commitment, ensure that incompetency commitment will not be indeterminate—indeed, that it cannot continue beyond one year—and that such commitment will only continue when there is substantial probability that the defendant will recover competency and can be returned to trial. Moreover, the proposals require the state to show more than "only [the defendant's] inability to stand trial." Id. at 727. It must also show that it is not unlikely that treatment will restore competency, that confinement is necessary for that treatment, and that the treatment required is in fact available and will be administered to the defendant. Further, the defendant must be released if any of the conditions required for commitment are no longer being met, and there is provision for institutional, periodic review as well as procedures by which the defendant himself can inquire into the need for continued commitment. Thus, the defendant would be subject to neither "a more lenient commitment standard" nor "a more stringent standard of release than those generally applicable to all others [who are indeterminately committed but who are] not charged with offenses." Id. at 730.
the court shall first conduct the trial on the merits of the offense or offenses charged and then, if the defendant has been found guilty, conduct a hearing and make a determination on the defendant's competency to stand trial. In conducting such a hearing the court may rely on its observations of the conduct of the defendant during the trial on the merits, as well as upon the testimony of experts introduced at the hearing. In all such proceedings the defendant shall be represented by counsel. The court may order the defendant temporarily committed for observation if, but only if, it concludes that confinement is necessary and any examinations required cannot be conducted on an outpatient basis; the defendant shall begin such temporary commitment only if and when the staff of the institution can commence its examination upon his arrival; upon completion of the examination the defendant shall be returned to the custody of the court to be confined or released on bail pending a determination of his competency. In no event shall any temporary commitment be for more than ten (10) days. The defendant or his counsel may apply directly to the court for immediate release if his examination is unduly delayed, and the defendant or his counsel may at any time question the legality of his commitment by writ of habeas corpus. If, at the hearing on competency the defendant is found to be competent, the verdict will stand and he will be sentenced according to law; if the defendant is found to be incompetent, the verdict will be set aside and treated as a nullity and the court shall proceed to consider whether the defendant should be committed, in order to restore his competency, under section (2).

Alternative: (1) If doubt is raised as to the defendant's competency to stand trial, the court shall hold a hearing to establish whether it is probable that the defendant committed the offense or offenses charged. In all such proceedings the defendant shall be represented by counsel. At the conclusion of the hearing a finding shall be made on the issue of probable guilt. If the finding is that the charges of the state are defective or insufficient or not proved by a preponderance of the evidence, the indictment or information shall be quashed and the defendant shall be discharged, subject to the right of the state to institute civil commitment proceedings. A determination that the state has not proved probable guilt shall not cause jeopardy to attach and shall not be a bar to reinstitution of the state's charges at a later time. If the finding is that it is probable that the defendant committed the offense or offenses charged, the court shall then conduct a hearing to determine the defendant's competency to stand trial. The court may order the defendant temporarily committed for observation if, but only if, it concludes that confinement is necessary and any examinations required cannot be conducted on an outpatient basis. The defendant shall begin such temporary commitment only if and when the staff of the institution can
commence its examination upon his arrival; upon completion of the ex-
amination the defendant shall be returned to the custody of the court to
be confined or released on bail pending a determination of his competency.
In no event shall any temporary commitment be for more than ten (10) days.
The defendant or his counsel may apply directly to the court for immediate
release if his examination is unduly delayed, and the defendant or his coun-
sel may at any time question the legality of his commitment by writ of
habeas corpus. If, at the hearing on competency, the defendant is found
to be competent, he shall be tried according to law; if the defendant is
found to be incompetent, the court shall proceed to consider whether the
defendant should be committed, in order to restore his competency, under
section (2).

(2) The court shall order commitment only if it finds that:

(a) it is not unlikely that the defendant, if given proper treatment,
will regain competency; and

(b) such treatment cannot be administered on an out-patient basis
or by a private physician and that confinement is necessary; and

(c) the type of treatment required is available and will be adminis-
tered at the institution to which the defendant is to be committed.

If all these conditions are not met, the court shall order the defendant released,
subject to the right of the state to institute civil commitment proceedings.
In any case in which the court orders the defendant released it may make
the further order that the defendant undergo outpatient observation and
treatment at a state institution or treatment by arrangement with a private doc-
tor, and the court shall make periodic inquiries into the defendant's progress
toward recovery of competency to stand trial. The court shall retain
jurisdiction over the charges and shall have the power to proceed to trial if
the defendant shall regain competency to stand trial; provided, that the
court shall dismiss the charges when it is of the view that so much time
has elapsed that it would be unjust to resume the criminal proceeding.

(3) No commitment, in order to restore competency, shall continue if
the charges against the defendant have been dismissed. Any commitment
made in accordance with section (2) shall be for six (6) months. After
six months, the court shall conduct a hearing, at which the defendant shall
be represented by counsel, to determine if the defendant is still incompetent
to stand trial. If the defendant is found to be competent, he shall be tried
according to law. If the defendant is found to be still incompetent and if
the court finds that there is not a substantial probability that he will ever
be restored to competency, he shall be released subject to the right of the
state to institute civil commitment proceedings. If the defendant is found
to be still incompetent and if the court finds that there is a substantial probability that he can be restored to competency through continued treatment and if the court further makes the findings required as a prerequisite to commitment in section (2), then the court may order one six-month extension of the initial commitment period. If, after this six-month extension the court, after a hearing at which the defendant shall be represented by counsel, determines that the defendant is still incompetent to stand trial, he shall be released, subject to the right of the state to institute civil commitment proceedings. In no event shall any commitment be continued beyond a period of twelve (12) months. The court shall retain jurisdiction over the charges and shall have the power to proceed to trial if the defendant shall regain competency to stand trial after his release from commitment; provided, that the court shall dismiss the charges when it is of the view that so much time has elapsed that it would be unjust to resume the criminal proceeding.

(4) Whenever a defendant is committed in accordance with section (2) the court shall conduct periodic inquiries to determine if there is a continued need for confinement and if there is a substantial probability that the defendant will be restored to competency. Such inquiries may take the form of written reports, at stated intervals, from the superintendent of the institution and from the defendant's counsel. If it appears to the court upon its own examination, or upon the application of the superintendent of the institution, that the defendant has regained competency; or if it appears that continued confinement for treatment is no longer necessary; or if it appears that the defendant is not receiving the kind of treatment required for recovery, then the court shall order a hearing, at which the defendant shall be represented by counsel, to determine whether continued commitment is warranted. If the defendant is found to be competent, he shall be tried according to law; otherwise, the court shall proceed in accordance with section (2).