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S.B. 133: THE NEAR RESOLUTION OF A MAJOR PROBLEM:
FITNESS IN THE CRIMINAL LAW

DONALD PAULL*

At the interface of criminal law and the psychological sciences, an area increasingly recognized under the rubric of mental health law, a major problem is the legal disposition of the incompetent-unfit defendant. The goal is to balance the constitutional rights of the individual against society's right to provide for the common weal by attempting to minimize criminal behavior.

BACKGROUND: PERTINENT ILLINOIS LAW

Three statutory schemes have been used recently in Illinois with regard to the issues of fitness and competency to stand trial. The first was the incompetency statute,¹ repealed effective on January 1, 1973, whereunder a person adjudicated to be incompetent to stand trial, to plead, to be sentenced, or to be executed could be given over to the

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1. ILL. REV. STAT. ch. 38, §§ 104-1 to 104-3 (1967) state:

104—1. Definition. For the purpose of this Article, "incompetent" means a person charged with an offense who is unable because of a mental condition:

- (a) To understand the nature and purpose of the proceedings against him; or
- (b) To assist in his defense; or
- (c) After a death sentence has been imposed, to understand the nature and purpose of such sentence.

104—2. Proceedings to Determine Competency.

(a) If before a trial, or after a judgment has been entered but before pronouncement of sentence, or after a death sentence has been imposed but before execution of that sentence, the court has reason to believe that the defendant is incompetent the court shall suspend the proceedings and shall impanel a jury to determine the defendant's competency. If a jury is waived by the defendant, the court shall conduct a hearing to determine the defendant's competency.

(b) If during the trial the court has reason to believe that the defendant is incompetent the court shall suspend the proceedings and shall conduct a hearing to determine the defendant's competency and shall at the election of the defendant impanel a jury to determine that issue.

(c) The burden of going forward with evidence of the defendant's incompetency shall be on the party, if any, requesting that determination.

(d) The court may appoint qualified experts who shall be compensated by the county to examine the defendant with regard to his competency and to testify at the hearing. Any party may introduce at the hearing other evidence regarding the defendant's competency. No statement made by the accused in the course of any examination into his competency provided for by this Section, whether the examination shall be with

Illinois Department of Mental Health² until such time as he could attain or regain the necessary legal capacity to defend against pending criminal charges.³ Under that statutory provision, the sole criterion for judicial remand to a mental hospital was a judicial determination of incompetency.⁴ There was no need to consider such factors as the defendant's amenability to treatment, the nature of the mental disorder, the availability of treatment, the probable duration of the person's stay in the mental hospital, or whether the defendant met the legal criteria for civil commitment.⁵ Indeed, the incompetency statute had the effect of creating a type of criminal, rather than civil, commitment. Further, under that quasi-criminal commitment, it would be possible for a defendant to be hospitalized for life.⁶ However, there were pressures toward change, and those pressures were acknowledged by the United States Supreme Court in 1972 in its landmark decision, *Jackson v. Indiana*.⁷

In *Jackson*, the Court held that the existence of two classes of commitment to mental hospitals, one criminal and one civil, was unconstitutional.⁸ It was easier for the class under criminal commitment to be admitted to a mental hospital, and more difficult for them to leave, than it was for the class under civil commitment; this violated the equal

or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

(e) If the defendant is found to be competent the proceedings which had been suspended shall be resumed.

(f) If the defendant is found to be incompetent he shall be committed or remain subject to the further order of the court in accordance with Section 104-3 of this Code.

104-3. Commitment of Incompetent.

(a) A person who is found to be incompetent because of a mental condition shall be committed to the Department of Mental Health during the continuance of that condition.

(b) When reasonable grounds exist to believe that an incompetent is now competent the court in the county wherein the incompetent is confined or the court in which incompetency was found shall conduct a hearing in accordance with this Article to determine the person's present mental condition. Reasonable notice of such hearing shall be given to the State, the incompetent and to his attorney of record, if any. If the court, following such hearing finds the person to be competent, the proceedings pending against him shall be resumed.

(c) A person committed to the Department of Mental Health under the provisions of this Article who is thereafter sentenced for the offense charged at the time of his commitment shall be credited with the time during which he was committed and confined in a public or private institution and that portion of his sentence shall be considered served.

2. That department is now the Illinois Department of Mental Health and Developmental Disabilities [hereinafter referred to as DMH/DD]. See ILL. REV. STAT. ch. 91½, § 100 (1977).

3. ILL. REV. STAT. ch. 38, § 104-3 (1967). For the text of the statute, see note 1 *supra*.

4. ILL. REV. STAT. ch. 38, § 104-2(f) (1967). For the text of the statute, see note 1 *supra*.

5. ILL. REV. STAT. ch. 91½, § 1-11 (1968).

6. *Id.* ch. 38, § 104-3(a) (1967). For the text of the statute, see note 1 *supra*.

7. 406 U.S. 715 (1972).

8. *Id.* at 730.

protection provision⁹ of the fourteenth amendment.¹⁰

The Court identified two additional situations involving due process issues.¹¹ The first of these was the situation where it is improbable that the defendant will ever regain or attain the capacity to defend against criminal charges:

At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.

. . . .

We hold, consequently, that a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.¹²

In sum, the Court issued a mandate to commit or release where it is likely the defendant would otherwise face a permanent criminal commitment in a mental hospital.

The second, corollary situation of concern to the *Jackson* Court exists where there is a substantial possibility that in the foreseeable future the defendant will attain or regain the requisite capacity to defend against pending criminal charges. “[E]ven 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.”¹³

In summary, the Supreme Court held that a person must be committed or released when there is a finding that he is unlikely to be competent in the foreseeable future. When there is a finding that he is likely to be competent in the foreseeable future, the only justification for detaining that person is progress toward the goal of attaining that capacity. Although the Court did not specify the remedy when there is no “continued progress toward that goal,” it may be inferred that discharge from criminal custody is the appropriate disposition in such cases.

9. U.S. CONST. amend. XIV provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

10. 406 U.S. at 730.

11. See note 9 *supra*.

12. 406 U.S. at 738.

13. *Id.*

Illinois Law From 1973-79

Between 1973 and 1979, the most important aspects of Illinois law with regard to mental competency¹⁴ were recognition of the differing

14. ILL. REV. STAT. ch 38, §§ 1005-2-1 to 1005-2-2 (1975) provide:

1005-2-1. Fitness for Trial or Sentencing.

(a) For the purposes of this Section a defendant is unfit to stand trial or be sentenced if, because of a mental or physical condition, he is unable:

- (1) to understand the nature and purpose of the proceedings against him; or
- (2) to assist in his defense.

(b) The question of the defendant's fitness may be raised before trial or during trial. The question of the defendant's fitness to be sentenced may be raised after judgment but before sentence. In either case the question of fitness may be raised by the State, the defendant or the court.

(c) When a bona fide doubt of the defendant's fitness to stand trial or be sentenced is raised, the court shall order that a determination of that question be made before further proceedings.

(d) When the question of the defendant's fitness to stand trial is raised prior to the commencement of trial, the question shall be determined by the court, or by a jury. The defendant or the State may request a jury or the judge may on his own motion order a jury. When the question is raised after commencement of the trial, the question shall be determined by the court.

(e) Subject to the rules of evidence, matters admissible on the question of the defendant's fitness to stand trial or be sentenced may include, but shall not be limited to, the following items:

(1) the defendant's social behavior or abilities; orientation as to time and place; recognition and correlation of persons, places and things; performance of motor processes; and behavioral functions, habits, and practices;

(2) the defendant's knowledge and understanding of the nature of the charge; of the nature of the proceedings; of the consequences of a finding, judgment or sentence; of the courtroom facilities and personnel; and of the functions of the participants in the trial process;

(3) the defendant's abilities before and during trial to observe, recollect, consider, correlate and narrate occurrences, especially those concerning his own past and those concerning the incidents alleged; to communicate with counsel; and to reason and make judgments concerning questions and suggestions of counsel before trial and in the trial process.

(f) Any party may introduce evidence as to the defendant's fitness.

(g) If requested by the State or defendant, the court shall appoint a qualified expert, or experts to examine the defendant and testify regarding the fitness. The court shall enter an order on the county board to pay the expert or experts.

(h) No statement by the defendant in any examination regarding his fitness, shall be admission on the question of guilt.

(i) Once a bona fide doubt has been raised concerning the defendant's fitness to stand trial or to be sentenced, the burden of proving the defendant is fit is on the State.

(j) The party raising the question has the burden of going forward with the evidence. If the court raises the question, the State shall have the burden of going forward with the evidence. At a fitness hearing held at the instance of the court, the court may call and examine witnesses on the question of fitness.

1005-2-2. Defendant found unfit: commitment and release.

(a) If the defendant is found unfit to stand trial or be sentenced, the court shall remand the defendant to a hospital, as defined by the Mental Health Code of 1967, and shall order that a hearing be conducted in accordance with the procedures, and within the time periods, specified in such Act. The disposition of defendant pursuant to such hearing, and the admission, detention, care, treatment and discharge of any such defendant found to be in need of mental treatment, shall be determined in accordance with such Act. If the defendant is not ordered hospitalized in such hearing, the Department of Mental Health and Developmental Disabilities shall petition the trial court to release the defendant on bail or recognizance, under such conditions as the court finds appropri-

legal tests for unfitness and civil commitment and the quanta of proof required for each: preponderance for the former,¹⁵ and clear and convincing for the latter.¹⁶ A defendant was, and continues to be, defined as unfit either to stand trial or to be sentenced if unable, because of a mental or physical condition, "(1) to understand the nature and purpose of the proceedings against him; or (2) to assist in his defense."¹⁷

Until January 1, 1979, the tests for civil commitment were:

[A]ny person afflicted with mental disorder, not including a person who is mentally retarded, . . . if that person, as a result of such mental disorder is reasonably expected . . . to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury or to provide for his own physical needs. This term does not include a person whose mental processes have merely been weakened or impaired by reason of advanced years.¹⁸

After January 1, 1979, the tests read as follows:

- (1) A person who is mentally ill and who because of his illness is reasonably expected to inflict serious physical harm upon himself or another in the near future; or
- (2) A person who is mentally ill and who because of his illness is unable to provide for his basic physical needs so as to guard himself from serious harm.¹⁹

Prior to January 1, 1979, a person found to be mentally retarded had not been subject to civil commitment. The new statute changed this, and the mentally retarded person was thereafter included if it was also shown "that he is reasonably expected to inflict serious physical

ate, which may include, but need not be limited to requiring the defendant to submit to or to secure treatment for his mental condition.

(b) A defendant hospitalized under this Section shall be returned to the court not more than 90 days after the court's original finding of unfitness and each 12 months thereafter. At such re-examination the court may proceed, find, and order as in the first instance under paragraph (a) of this Section. If the court finds that defendant continues to be unfit to stand trial or be sentenced but that he no longer requires hospitalization, the defendant shall be released under paragraph (4) of this Section on bail or recognizance. Either the State or the defendant may at any time petition the court for review of the defendant's fitness.

(c) A person found unfit under the provisions of this Article who is thereafter sentenced for the offense charged at the time of such finding shall be credited with time during which he was confined in a public or private hospital after such a finding of unfitness. If a defendant has been confined in a public or private hospital after a finding of unfitness under Section 5-2-6 for a period equal to the maximum sentence of imprisonment that could be imposed under Article 8 for the offense or offenses charged, the court shall order the charge or charges dismissed on motion of the defendant, his guardian, or the Director of the Department of Mental Health and Developmental Disabilities.

15. *Illinois v. Coles*, 11 Ill. App. 3d 412, 296 N.E.2d 773 (1973).

16. *In re Stephenson*, 67 Ill. 2d 544, 367 N.E.2d 1273 (1977).

17. ILL. REV. STAT. ch. 38, § 1005-2-1(a) (1977).

18. *Id.* ch 91½, § 1-11.

19. *Id.* § 1-119 (Supp. 1979).

harm upon himself or another in the near future."²⁰

Prior to 1979, after an adjudication of unfitness, the defendant was remanded for a hearing to determine whether or not he was civilly committable under the Illinois Mental Health Code.²¹ If so committed, the defendant was subject to the provisions of the code and to periodic review of his unfitness.²² If the defendant was not committed, or if committed and later discharged from the hospital while still remaining unfit, the DMH/DD was required to petition the trial court for release of the defendant on bail or recognizance.²³

Except for the court's discretion in granting release of the defendant, the Illinois procedure appeared to satisfy the *Jackson* mandate which called for a single type of commitment and for a decision to either commit or release. However, dissatisfaction with the statute arose for two reasons. First, because of the *Jackson* mandate, a defendant could be unfit and not committable with the result that the person was in legal limbo: he could not be tried but was left at liberty. The second difficulty had to do with the length of time for which a person could be committed. If he remained under commitment "for a period equal to the maximum sentence of imprisonment that could be imposed . . . for the offense or offenses charged,"²⁴ the court was to dismiss the charges on motion of the defendant or his guardian, or the director of DMH/DD.²⁵ Thus, the "continued progress" mandate of *Jackson* could be violated; the length of stay in the hospital was tied to the nature of the charge rather than to the defendant's amenability to treatment. For those reasons change was needed, and the stage was set for the enactment of Senate Bill 133.²⁶

S.B. 133: RESPONSE TO THE NEED FOR CHANGE

The Original S.B. 133

On November 19, 1976, Judge Joseph Schneider, Chairman of the Governor's Commission for Revision of the Mental Health Code of Illinois,²⁷ transmitted the long-awaited report of the commission to then Governor Daniel Walker.²⁸ Much of this report formed the basis

20. *Id.* § 4-500.

21. *Id.* ch. 38, § 1005-2-2(a)(19) (1977).

22. *Id.* § 1005-2-2(a), (b).

23. *Id.* § 1005-2-2(a).

24. *Id.* § 1005-2-2(c).

25. *Id.*

26. Hereinafter referred to as S.B. 133.

27. Hereinafter referred to as the commission.

28. Governor Daniel Walker's successor, Governor James Thompson, exercised his amenda-

for subsequently enacted legislation, including the revised Illinois Mental Health Code,²⁹ the Confidentiality Act,³⁰ the statute creating the Guardianship and Advocacy Commission,³¹ and changes in the Probate Act³² as it refers to mental patients. The section of the commission's report which dealt with unfitness was introduced into the 80th Illinois General Assembly as Senate Bill 256, which was tabled in committee, but was resurrected as S.B. 133 in the 81st Illinois General Assembly.

The major feature of S.B. 133, as introduced, consisted of hospitalization of the defendant for up to one year following a finding of unfitness³³ with substantial probability that the defendant would attain fitness within that one year.³⁴ At any time after a finding of unfitness, the defendant could demand a bench trial.³⁵ Upon a finding of not guilty, the defendant might face civil commitment, but without any further criminal responsibility for the criminal charges.³⁶ If the bench trial, styled a "discharge hearing" or a "not guilty only" hearing, did not result in a finding of not guilty, the treatment time of the still unfit defendant was extended for five years if the most serious offense charged against him was murder, or two years if the most serious offense charged against him was a class X or class 1 felony.³⁷ If the defendant did not demand the discharge hearing, the state could demand it at the end of the one year period of hospitalization.³⁸ Two other options open to the state at that time were to release the defendant with the four term rule³⁹ in operation, or seek civil commitment of the defendant.⁴⁰ If the defendant were ordered committed under the second option, the court would dismiss the pending criminal charges. Of course, during the one year or extended periods of treatment, the defendant could be brought to trial at any time he was adjudicated fit to stand trial.

tory veto on S.B. 133 before it was ratified by the Illinois General Assembly on December 28, 1979. See notes 54-55 *infra* and accompanying discussion in text.

29. ILL. REV. STAT. ch. 91½, §§ 1-100 to 1-128 (Supp. 1978).

30. *Id.* §§ 801-817.

31. *Id.* §§ 701-735.

32. ILL. REV. STAT. ch. 110½, §§ 11-15 (1979).

33. *Id.* ch. 38, § 104-17(b).

34. *Id.* § 104-16(d).

35. *Id.* § 104-23.

36. *Id.* § 104-25.

37. Citations will not be given, as here, when a section of the bill was later deleted or amended.

38. ILL. REV. STAT. ch. 38, § 104-25(f) (1979).

39. Under the four term rule, a person must be tried or discharged within 120 days if in custody or within 160 days if free on bond. *Id.* § 103-5.

40. See note 37 *supra*.

Another feature of S.B. 133, as introduced, was the creation of a class of court-appointed examiners, consisting of appropriately qualified clinical psychologists or social workers. The court-appointed examiner could conduct a screening examination, followed by examination by a psychiatrist if the initial screening indicated the defendant to be unfit.⁴¹

In sum, S.B. 133 appeared to offer a solution to the problems created or left unsolved by the statute in effect between 1973 and 1979.

The Modified S.B. 133

By the time S.B. 133 was reported out of committee, a number of substantive changes had been made in its original form. Appropriately qualified clinical psychologists were removed from the class of court-appointed examiners⁴² and placed on a par with psychiatrists; qualified social workers remained as the sole court-appointed examiners⁴³ to conduct the screening examination. Further, the role of clinical psychologists was changed. Formerly, a clinical psychologist could not offer opinion testimony on issues of fitness and sanity, but could testify about test results if those results were used by a testifying psychiatrist to help the latter arrive at his ultimate opinion.⁴⁴ Under the amended S.B. 133, clinical psychologists may testify about opinions with regard to fitness and sanity and are not limited to opinions based exclusively on test results.⁴⁵

The provisions for the discharge hearing were retained, as were the extended periods of treatment time,⁴⁶ the only addition being a fifteen-month period if the offense charged is a class 2, 3, or 4 felony.⁴⁷ The options open to the state at the end of the one-year period of treatment remain essentially the same; however, if the state seeks civil commitment and such civil commitment is ordered, the court dismisses the charges against the defendant "with leave to reinstate."⁴⁸

The most significant changes in S.B. 133 occurred in conference committee, concerning the ultimate disposition of the unfit defendant

41. *Id.*

42. ILL. REV. STAT. ch. 38, § 102-21(a) (1979).

43. *Id.* § 102-21(b).

44. *E.g.*, Illinois v. Noble, 42 Ill. 2d 425, 248 N.E.2d 96 (1969); Illinois v. Manning, 61 Ill. App. 3d 558, 378 N.E.2d 400 (1978); Illinois v. Felton, 26 Ill. App. 3d 395, 325 N.E.2d 400 (1975); Illinois v. Gilliam, 16 Ill. App. 3d 659, 306 N.E.2d 352 (1974).

45. ILL. REV. STAT. ch. 38, § 1005-2-5 (1979). *See* Illinois v. Lewis, 75 Ill. App. 3d 560, 393 N.E.2d 1380 (1979).

46. *See* text accompanying note 37 *supra*.

47. ILL. REV. STAT. ch. 38, § 104-25(c) (1979).

48. *Id.* § 104-25(f)(2).

following the periods of extended treatment.⁴⁹ These changes allow for civil commitment with dismissal of charges with leave to reinstate, if that course has not been elected previously by the state. If, however, the defendant is not civilly committed, he can be ordered to DMH/DD "for further treatment for a period not to exceed the period to which he or she was originally subject to under this Section."⁵⁰ The length of the period of further treatment is unclear, since that option is open only upon expiration of the extended treatment period. One possibility is that the imposition of another extended term is intended. A second possibility is that the new treatment period is covered by the statement that "in no event may the treatment period be extended to exceed the maximum sentence to which a defendant would have been subject had he or she been convicted in a criminal proceeding."⁵¹ In such a case, the defendant would be placed in exactly the same situation as under the previous statutes, a paradoxical effect because this situation was the impetus for the relief intended by the original S.B. 133. The version of S.B. 133 which emerged from conference committee requires that the new commitment to DMH/DD, aside from its length, must be based upon a determination by the court that the defendant "is reasonably expected to inflict serious physical harm upon himself or herself or others in the near future or constitutes a serious threat to the public safety."⁵²

Under S.B. 133, there is no requirement of a threshold determination that the defendant is mentally ill or mentally retarded, as is required by the new Illinois Mental Health Code.⁵³ This is an apparent violation of the mandate of *Jackson v. Indiana* since this creates a class of individuals under "criminal commitment" for whom it is more difficult to secure release than for persons under civil commitment.

The argument in support of the new procedure is that, by the time the defendant reaches this point, he will have been subject to more than mere probable cause determination and, in fact, will have been subject to a trial in which the state proved his guilt beyond a reasonable doubt. The stage is set, however, for a protracted legal battle on the issue of the constitutionality of the new class of commitment.

49. See text accompanying notes 38 and 47 *supra*.

50. ILL. REV. STAT. ch. 38, § 104-25(f)(3) (1979).

51. *Id.* § 104-25(f)(5).

52. *Id.* § 104-25(f)(3).

53. *Id.* ch. 91½, §§ 1-119, 4-500 (Supp. 1978); see text accompanying notes 19 and 20 *supra*.

The Amendatory Veto of S.B. 133 and its Emergence in Final Form

Governor Thompson,⁵⁴ in his amendatory veto of September 26, 1979, did not strike the sections creating the new kind of "criminal commitment." The amendatory veto did eliminate the screening examination as an unnecessary additional step, although it retained the definition of the court-appointed examiner, thus leaving these examiners with no functions to perform since they are not referred to elsewhere in the code. Eliminating the screening examination effectively extended from seven to forty-five days the time between the court's receipt of the examiner's report and the fitness hearing.⁵⁵

The Major Operation of the Statute

The simplest way to conceptualize the final form of S.B. 133 and its steps is in the form of the flow chart on page 1117.

The issue of fitness may be raised by the defense, the prosecution, or the court.⁵⁶ The defendant is ordered to be examined by one or more physicians, psychiatrists, or clinical psychologists when a bona fide doubt concerning the defendant's fitness has been raised.⁵⁷ If the defendant refuses to cooperate in the examination, he may later raise the defense of drugged or intoxicated condition, or of insanity, but is precluded from offering expert testimony in support of that defense.⁵⁸ Further, the fact of the defendant's refusal to cooperate may be admissible on the issue of his fitness.⁵⁹ In the discretion of the court, a qualified expert selected by the defendant may be appointed to examine him; and that expert will be paid on order of the court.⁶⁰

Within thirty days of the date of the appointment, examiners must submit reports to the prosecution, the court, and the defense.⁶¹ Within forty-five days of the court's receipt of these reports, a hearing must be held on the issue of the defendant's fitness.⁶² If this issue is raised *before* the trial, the fitness hearing may be either before the bench or before a jury, on motion of any of the parties. However, the hearing is always before the bench if the issue of unfitness is raised *after* the sub-

54. See note 28 *supra*.

55. ILL. REV. STAT. ch. 38, § 104-16(a) (1979). Other changes effected by Governor Thompson's amendatory veto are beyond the scope of this article.

56. *Id.* § 104-11(a).

57. *Id.* §§ 104-11(b), 104-13.

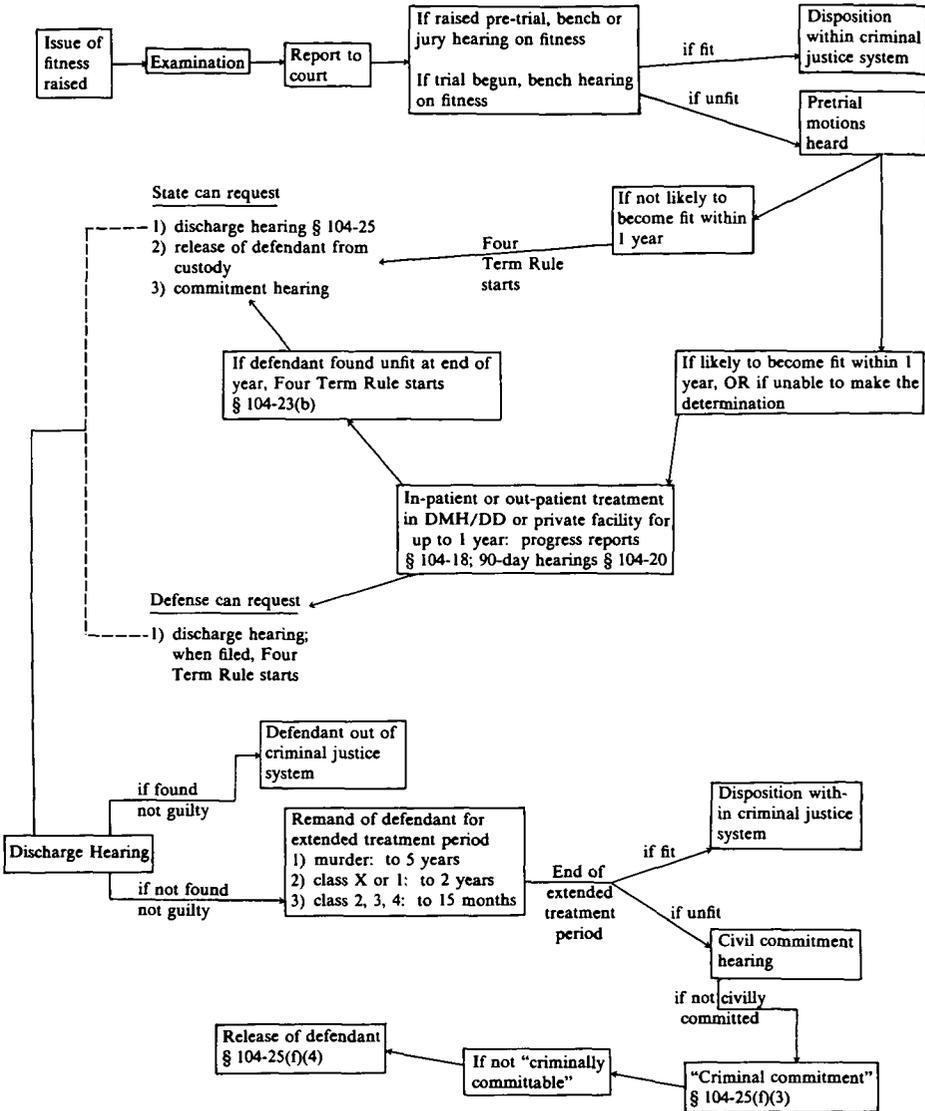
58. *Id.* § 104-14(a).

59. *Id.* § 104-14(c).

60. *Id.* § 104-13(e).

61. *Id.* § 104-15(a).

62. *Id.* § 104-16(a).



stantive criminal trial has begun or ended.⁶³ In all cases, the state carries the burdens of going forward with evidence and of proof at the preponderance level.⁶⁴ If the defendant is found fit, disposition is within the usual procedures of the criminal justice system. If the defendant is found unfit, pretrial motions may nevertheless be utilized in

63. *Id.* § 104-12.
 64. *Id.* § 104-11(c).

disposition of the charges pending against him.⁶⁵ The trier of fact will make the further determination as to whether or not the defendant is likely to become fit within one year.⁶⁶ If this likelihood is not found to exist, the provisions of the speedy trial act⁶⁷ or four term rule⁶⁸ control, and the state has three options: (1) request a discharge hearing; (2) ask for defendant's release from custody; or (3) ask for a commitment hearing and, if the defendant is committed, move the court to strike the charges with leave to reinstate.⁶⁹ On the other hand, if the likelihood exists that the defendant will be fit within one year, or if that determination cannot be made, the defendant is to be remanded for treatment⁷⁰ to the Illinois Division of Vocational Rehabilitation if the disability is physical⁷¹ or to a private DMH/DD facility if the disability is mental.⁷² Progress reports⁷³ and ninety-day hearings⁷⁴ are mandated. If the defendant continues to be unfit at the end of a year, the speedy trial provisions apply and the state has the same three options as if there had been a finding that the defendant was unlikely to attain fitness within one year.⁷⁵

After a finding of unfitness, the defense may at any time file for a discharge hearing, at which time the speedy trial provisions apply.⁷⁶ Thus, there are three points at which the request for a discharge hearing may be made: (1) at the fitness hearing, if the defendant is found not likely to become fit within one year; (2) after the defendant has undergone treatment for one year but continues to be unfit; and (3) after a finding of unfitness.

The discharge hearing is the most innovative aspect of S.B. 133. It is a full bench trial, at which the state bears the burden of proof beyond a reasonable doubt.⁷⁷ If the defendant is found not guilty, this trial completes the criminal process and renders to the defendant the constitutional protections of the double jeopardy clause,⁷⁸ although he may be subject to civil commitment if the legal tests for that disposition are

65. *Id.* § 104-11(d).

66. *Id.* § 104-16(d).

67. *Id.* § 103-5.

68. *See* note 39 *supra*.

69. ILL. REV. STAT. ch. 38, § 104-23(b) (1979).

70. *Id.* § 104-16(d).

71. *Id.* § 104-17(c).

72. *Id.* § 104-17(b).

73. *Id.* § 104-18.

74. *Id.* § 104-20.

75. *Id.* § 104-23(b).

76. *Id.* § 104-23(a).

77. *Id.* § 104-25.

78. *Id.* § 104-25(b).

met. If the discharge hearing does not result in a not guilty finding,⁷⁹ the defendant is remanded for extended periods of treatment: up to five years if the most serious charge is murder; up to two years if the most serious charge is a class X or class 1 felony; and up to fifteen months if the most serious charge is a class 2, 3, or 4 felony.⁸⁰

These extended periods of treatment may be vulnerable to attack on constitutional grounds. First, the statute is not clear whether the extended periods include the original one-year period of treatment, suggesting a violation of due process safeguards.⁸¹ Second, the length of treatment is tied to the seriousness of the criminal charge, whereas it should relate to the severity of the disability to be treated. To correlate the criminal charge with the length of treatment suggests a violation of the fundamental presumption of innocence and flies in the face of the *Jackson* mandate that "due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."⁸²

If the defendant is found fit at the end of the extended treatment period or at any time within it, the criminal charges against him are handled within the criminal justice system.⁸³ However, if the defendant remains unfit at the end of the extended treatment period, the court is required to order a civil commitment hearing; if the defendant is committed, charges are to be dismissed with leave to reinstate.⁸⁴ The possibility of criminal commitment,⁸⁵ with its questionable constitutional validity, remains.⁸⁶ Finally, if the defendant is not found criminally committable, he "shall be released,"⁸⁷ but since there is no further statutory prescription, it is unclear whether the defendant is only physically released from custody or whether he is also released from charges.

Other Aspects of the Statute

Three aspects of the statute are not directly discernible in the statutory line of operation as exemplified in the flow chart.

79. Lack of a not guilty finding does not indicate defendant's guilt, nor does it invoke the double jeopardy clause. *See id.*

80. *Id.* § 104-25(c).

81. U.S. CONST. amend. XIV; *see note 9 supra.*

82. *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

83. ILL. REV. STAT. ch. 38, § 104-25(f)(1) (1979).

84. *Id.* § 104-25(f)(2).

85. *Id.* § 104-25(f)(3).

86. *See text accompanying notes 48-52 supra.*

87. ILL. REV. STAT. ch. 38, § 104-25(f)(4) (1979).

(1) *Medication*⁸⁸—Although a defendant may be found fit while receiving medication, the court may order the defendant to continue treatment if it is found probable that such treatment will result in the defendant becoming fit without the use of medication.

(2) *Trials with special provisions*⁸⁹—The statute as it is presently worded seems to include as unfit those persons who speak foreign languages or who are deaf and communicate by sign language. It may also include those with communication difficulties arising from other mental or physical problems. Such unfitness could be overcome by appointing appropriate translators or communication experts. However, the statute's provisions for sentencing such persons are highly interesting. There is a presumption that such persons should not receive a sentence of imprisonment and should instead be sentenced to treatment.⁹⁰ Such persons cannot be sentenced to the death penalty, thus providing an equal protection argument for abolition of the death penalty.⁹¹

(3) *Retroactive application of the statute*⁹²—Within 180 days of the effective date of the statute, DMH/DD is directed to prepare a report on each defendant in its custody who was found unfit or incompetent prior to the effective date of the statute. These reports are to be sent to the administrative office of the Illinois courts, which shall distribute copies to the chief judge, state's attorney, and public defender of the county in which the criminal charges against the defendant were originally filed. Reports are also to be sent to the defendant's attorney of record if it is not the public defender. If the defendant has been in the custody of DMH/DD for time during which he might have been paroled, charges against the defendant shall be dismissed.⁹³ If the defendant has been in custody for less than this possible parole time, a fitness hearing shall be held. If the defendant is unfit, he shall proceed to a discharge hearing.⁹⁴

SUMMARY

The complicated operations of S.B. 133 are the result of protracted deliberations designed to strike a balance between the rights of the

88. *Id.* § 104-21.

89. *Id.* § 104-22.

90. *Id.* § 104-26.

91. *Id.* § 104-26(b).

92. *Id.* § 104-27.

93. *Id.* § 104-28(a).

94. *Id.* § 104-28(b).

chronically unfit defendant and those of a society concerned for the safety of its members. Although the complex operation of a statute should be of minimal concern to lawyers and judges involved in the criminal justice system, if that statute is likely to be declared unconstitutional in part or in whole, it does little to protect the competing interests of either the defendant or society. Amendatory language should be introduced into the legislature immediately in order to overcome the statute's constitutional infirmities and to prevent its demise due to judicial intervention.

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