Legal Update

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Tennessee Developments (from Jeff Feix)

- New statute requires counties to pay for ct-ordered inpatient juvenile evals (reflecting court decision); previously DMH covered cost; inpatient referrals dropped after court decision from almost 60/ mo to only 8 over a 9-mo period
- New statute requires ct-ordered juvenile evals to be done outpatient-- inpatient only if recommended by outpatient evaluator
- New statute requires post-NGRI committability evals to be done outpatient; note that 60% of NGRI's released after initial eval

TN, con't

- New statute requires counties to pay for all ct-ordered evals and treatment for criminal def's with misdemeanor charges; state continues to pay for felonies
- New statute provides for post-conviction evals of def's with death sentence to assess MSO/NGRI (if not done previously) and whether def has MR-- effort to avoid post-conviction challenges based on effective assistance of counsel
- New statutes provide that patients may be admitted to state hospitals only when Commissioner determines that suitable accommodations are available-- intended to allow DMH to limit beds in accordance with budget cuts

Indiana v Davis (Ind S Ct, 2008)

- Jackson v Indiana Issue: Must charges be dismissed when def found unrestorable and confined for max sentence?
- Def IST for criminal recklessness (3 yr max sentence)
- 3 mos later, hosp opines def unrestorable, initiates civil commitment
- Though def civilly committed, charges still active and court maintains oversight (must approve release)
- "Statute is silent" on status of IST commitment after finding of unrestorability and civil commitment

Davis, con't

- So long as charges pending, George Parker says courts almost never approve a def's release
- Def requests dismissal of charges after 3 yrs (max sentence)-- Trial court grants motion, appeals court reverses; on to the Ind S Ct
- S Ct reverses appeals court, orders dismissal of charges: Unless state demonstrates legit interest in prosecution (e.g., to assure sex off registration), due process requires dismissal where def is unrestorable and maximum sentence has expired-- State has no legit interest in prosecuting this def

Davis, con't

- But what about restrictions on civil commitment (requiring ct approval for release)? If charges have not been dismissed, are these restrictions constitutional after def found unrestorable?
  - Language in the opinion (discussing Jackson) suggests no: Remember, Jackson said differential treatment violated equal protection
  - But holding stops short-- only requires dismissal of the charges after def found unrestorable and confined for as long as max sentence

Ohio v. Williams (OH Ct Apps, 2008)

- Another Jackson Case: Constitutionality of Law that Permits Special Commitment of Unrestorably IST Def (variation on ABA CJ/MH Std 7-4.13)
- Ohio Law: If def unrestorably IST for certain serious felonies and state proves by clear and convincing evid that (i) def committed crime charged ("factual guilt") and (ii) def meets heightened commitment std, criminal court may retain jurisdiction up to max sentence and order commitment to state hospital

Williams, con't

- Hospital must report periodically re def's competency and committability
- Court must approve release or movement to less restrictive confinement; state forensic center must weigh in if hosp makes proposal
- Commitment ends only when (i) court finds def no longer committable, (ii) def restored to CST, or (iii) max sentence expires-- then prosecutor may seek civil commitment

Williams, con't

- Def unrestorably IST for rape, etc, committed under this special statute; def appeals

- Ct Appeals Reverses:

  -- Commitment violates equal protection: No reasonable basis for more onerous release procedures (citing Jackson)

  -- Commitment violates due process: Impermissible "end run around Jackson"

  -- Indictment must be dismissed when def found unrestorable

  -- Also, commitment is criminal, not civil, so def would be entitled to criminal protections at "factual guilt" determination if such a proceeding were constitutional (right to jury trial, proof beyond reasonable doubt, etc)

New Mexico v. Adonis (NM S Ct, 2008)

- Another Jackson case re Constitutionality of Law Permitting Special Commitment of Unrestorably IST Def's … but with *very* different outcome!
- NM law: If def unrestorably IST and state proves crime charged by clear and convincing evid, court may commit def for pd of time "equal to the max sentence" possible
- Def unrestorably IST for murder, committed under special statute for 30 yrs to life (penalty for 1st degree murder)

Adonis, con't

- Def challenges commitment:

  -- Argues that statute denies right to jury trial and finding beyond a reas doubt, citing Ring v AZ (req'd if proceeding may find facts increasing sentence)-- didn't argue Jackson

  -- Argues that evid didn't support finding of "deliberate intention" to kill, required for 1st degree murder

- Court agrees denies Ring claim, finding that commitment is not punishment (is civil) but agrees that evid insufficient to show 1st degree murder-- remands case for re-commitment consistent with finding of 2nd degree murder (Whoah!)

Ray v Maryland (MD Ct of Apps, 2009)

- Question: What constitutes “extraordinary cause” for denying dismissal of charges after stautory period?
- MD law: Charges must be dismissed if def IST for lesser of the max sentence or 3 yrs (minor crime), 5 yrs (violent crime), or 10 yrs (capital crime) *unless* prosecution shows “ extraordinary cause” not to dismiss
- Def IST for attempted murder
- Def moves for dismissal after 5 yrs
  - State argues def is highly dangerous (sends threatening letters to victim and others)
  - DMH opines def restorable if took Clozapine

Ray, con’t

- Trial court finds extraordinary cause (def dangerous and restorable), denies motion to dismiss; def appeals
- Ct of Appeals: “Extraordinary cause” means “out of the ordinary”
- Q: Is it out of the ordinary for an IST def who maxes out to be dangerous and restorable? No-- Def may not be committed unless dangerous and can’t be retained if not restorable; thus, no “extraordinary cause”
- NOTE: Dismissal of charges is “without prejudice ,” so state may reinstitute charges….

US v. Moruzin (Fed'l D Ct NJ, 2008)

- Sell case
- Review: Sell permits invol meds to restore CST if:
  - Gov'ts interest important
  - Meds likely to restore CST
  - No less intrusive alternatives
  - Meds unlikely to cause side effects that would undermine trial fairness
  - Meds medically appropriate
- Def's charge: Bank robbery, jury tampering

Moruzin, con't

- Court denied forced med order (Haldol):
  - Gov't interest not sufficiently important b/c state indicated it would civilly commit def if motion denied, "diluting the strength of the need for prosecution"
  - Def's poor response to meds in the past suggests these meds not likely to restore CST
  - Risk of TD potentially undermining trial fairness
  - Less intrusive alternative-- def willing to take mood stabilizer
  - Gov't failed to prove meds medically appropriate (risks outweighed benefits)

US v. Rix (Fed'l D Ct TX, 2008)

- Another Sell case
- Def's charge: 3 counts of unlawful possession of firearm by person with hx of psych commitment
- Diag: Delusional disorder
- Court denied forced med order (Haldol):
  - Not likely to render def CST b/c "meds have low success rate in treating delusional disorders"
  - Meds not medically appropriate-- likely to worsen def's delusional disorder, drawing providers into delusions
  - Risk of side effects that would undermine trial fairness

US v. Pinson (10th Cir Ct Apps, 2008)

- “MI inmate with a propensity for making grandiose threats” threatens the president and others (“DIE BUSH, DIE!”)
- Def pleads guilty
- Court sentences def to statutory max on all charges (20 years), varying sentence upward (within sentencing guidelines) from <10 years based on def’s dangerousness due to MI
- Appeal: Def argues that threatening letters were “hyperbole,” def not violent since age 13

Pinson, cont'd

- Court upholds sentencing (sufficient evid of dangerousness), "though not without some qualms," as offenders who are dangerous because of MI may be civilly committed at end of sentence

- Query: Should opportunity for post-sentence commitment render dangerousness due to MI inapplicable to sentencing determination?

Dicta in Pinson

“When a court enhances a sentence because the defendant’s mental illness [increases] the risk he poses to the public, the court in effect circumvents the civil commitment procedure and the procedural and substantive protections that go along with it: specifically, the clear and convincing evidence standard is replaced by the lower preponderance of the evidence standard [applicable at sentencing]. This is particularly troubling given that [post-sentence civil commitment] provides for evaluation of the defendant’s risk *after* he has received treatment during incarceration; the prediction of the risk the defendant will pose to the public upon release, made *before* treatment, is far more imprecise.”

Pinson dicta, cont’d

“We stop short of prohibiting courts from considering whether a defendant’s mental illness justifies an upward variance because it causes him to pose a risk to the public. But we encourage sentencing courts to consider that civil commitment procedures will be available if the defendant continues to pose a considerable risk to the public after confinement, mitigating the need for a prophylactic upward sentence.”

Bean v. DHMH (MD Ct. of Apps., 2008)

Question: Is “dangerousness” due to a mental disorder, a “complicated medical question” requiring expert testimony?

- Def found NCR (NGRI) for assault with intent to murder, committed to hospital
- Def granted conditional release three times, revoked each time
- Def petitions for conditional release again, requests jury trial

- To win conditional release, def must prove he is not dangerous due to a mental disorder or mental retardation
- Def testifies: acknowledges mental disorder but denies dangerousness--claims he would take his meds
- Def’s friend testifies: employed def as a contractor during earlier conditional release, had daily contact without incident
- Def offers no expert testimony

- State psychiatrist testifies: Def dangerous because of a mental disorder--symptoms/behavior improved on meds but def not likely to take meds in the community
- Jury approves conditional release
- State appeals: NCR patient must produce expert testimony of non-dangerousness-- a “complicated medical question”
- Court of Special Appeals agrees with State, overturns jury decision
- Def appeals

- Court of Appeals reverses: lack of dangerousness "does not always present a complicated medical question necessarily requiring . . . expert testimony"
- Here, dangerousness turned on whether def would take his meds—a "factual dispute, dependent to a great extent on a credibility assessment of def's testimony, a matter within the jury's ken"

Note: Expert testimony regarding dangerousness was presented in def's case (state psychiatrist). Must jury decision reflect expert opinion? Even if dangerousness is a "complicated medical question," couldn't jury weigh expert's assessment of violence risk and determine that this risk was not sufficient to constitute "dangerousness?"

North Carolina DOC v North Carolina Medical Board (NC S Ct, 2009)

- Question: May state Medical Board forbid physicians from actively participating in state executions?
- NC Law:
  - Physician must “be present” at execution
  - Recent DOC protocol requires physician to monitor inmate’s body function and notify warden if inmate shows signs of undue pain or suffering (protocol written to satisfy previous court decision)

NC DOC, con’t

- After DOC protocol established, Medical Bd issued position statement: “ Any physician who engages in any verbal or physical activity [beyond being “present” at execution] that facilitates the execution may be subject to disciplinary action by the Board”

- Citing Board’s statement, no physicians in NC willing to participate in executions

- DOC sues Board, demanding it not discipline physicians

- Bd moves to dismiss; Court denies motion; Board appeals

NC DOC, con’t

- NC S Ct upholds dismissal of motion--DOC’s lawsuit has merit to proceed:
  - Long-standing law requiring physician to be present must have contemplated some medical role; physician not expected to be “potted plant”
  - Med’l Bd’s position “runs afoul” of law requiring physician to be present
  - “To allow Medical Board to discipline its members solely for mere participation would elevate the statutorily created Board over its creator, the General Assembly”

US v Comstock (4th Cir, 2009)

- Question: Is Commitment of “SexuallyDangerous Persons” (SDP’s) Under Federal Adam Walsh Act Constitutional?
- Federal District Courts divided– Comstock is first Fed’l Apps Ct decision on the question
- Def certified by AG as SDP after serving 3 yr sentence for receipt of child pornography
- Fed’l District Ct finds commitment provision unconstitutional b/c federal gov’t has no constitutional power to civilly commit

Comstock, con't

- 4th Cir Apps affirms D Ct:
  - Fed'l statutes must be supported by "specific enumerated Constitutional powers"
  - Civil commitment traditionally within the province of the states
  - Commerce Clause not enough– not an activity that "substantially affects interstate commerce"
  - Necessary and Proper Clause not enough– not necessary to maintain a federal criminal justice and penal system or to support any other constitutional power: "These powers are too far removed from the indefinite civil commitment of persons *after* the expiration of their prison terms based solely on possible future actions that the federal gov't lacks authority to regulate directly"

Comstock, con’t

- Commitment of federal IST’s distinguished: Federal gov’t’s authority to prosecute these def’s not exhausted so long as they “might someday regain CST”
- Federal gov’t not without recourse: “may wield its spending powers to encourage state action” to protect public agst SDP’s
- NOTE: US S Ct has granted cert, will review this opinion in the upcoming term

RR v NJ DOC (NJ Super Ct App Div, 2009)

- Committed SVP has no right to conjugal visits:
  - Policy eliminates opportunity to engage in sexually aggressive behavior
  - Policy ensures that treatment not subverted by "possibly incompatible conduct"

- SVP's still permitted to "kiss and hug their spouses during visiting hours"

Mentally Ill Offender Treatment and Crime Reduction Act of 2004

- Reauthorized in 2008 for 5 more years
- $50 million grant program (but not all appropriated—$9 million in 2009)
- Has funded jail diversion programs, police crisis intervention teams, CJ/MH planning committees, MH courts, etc.
- Approximately 11% of applications approved in previous years

Wellstone-Domenici Mental Health Parity Act of 2008 (effective 1/1/10)

- Group health care plans that cover 50 or more employees and provide both med/surg and MH benefits must provide equal coverage for both
- Financial requirements the same (co-pays, deductibles, etc.)
- Treatment limitations the same (frequency and number of visits, days of coverage, etc.)
- Plan exempt if costs increase 1% (2% first year)