Brigham Young University Law School
BYU Law Digital Commons

Utah Supreme Court Briefs (1965 –)

1982

State of Utah v. David Riley Jacob : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Part of the Law Commons

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.
Ginger L. Fletcher; Attorney for Appellant;
David L. Wilkinson; Attorney for Respondent;

Recommended Citation
Brief of Appellant, *State v. Jacobs*, No. 18173 (Utah Supreme Court, 1982).
https://digitalcommons.law.byu.edu/uofu_sc2/2829

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
DAVID RILEY JACOB,	:	Case No. 18173
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from the findings and order of the Third Judicial District Court entered August 7, 1981, in and for Salt Lake County, State of Utah, the Honorable Christine M. Durham, presiding.

GINGER L. FLETCHER
Salt Lake Legal Defender Association
333 South Second East
Salt Lake City, Utah 84111
Telephone: 532-5444
Attorney for Appellant

DAVID L. WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

FILED

DEC 16 1982

Clerk, Supreme Court, Utah

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
DAVID RILEY JACOB,	:	Case No. 18173
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from the findings and order of the Third Judicial District Court entered August 7, 1981, in and for Salt Lake County, State of Utah, the Honorable Christine M. Durham, presiding.

GINGER L. FLETCHER
Salt Lake Legal Defender Association
333 South Second East
Salt Lake City, Utah 84111
Telephone: 532-5444
Attorney for Appellant

DAVID L. WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS

Page

STATEMENT OF THE NATURE OF THE CASE 1

DISPOSITION IN THE LOWER COURT. 1

RELIEF SOUGHT ON APPEAL 1

STATEMENT OF THE CASE 2

ARGUMENT

I: THE TRIAL COURT ERRED IN ITS APPLICATION OF §77-14-5, UTAH CODE ANN. (1953 AS AMENDED, EFFECTIVE JULY 1, 1980) TO THIS ACTION. BECAUSE THIS CASE WAS ALREADY PENDING AT THE TIME §77-14-5 TOOK EFFECT, FORMER §77-24-15 AND §77-24-16 APPLY BY VIRTUE OF THE UNITED STATES AND UTAH CONSTITUTIONAL PROHIBITIONS AGAINST EX POST FACTO LAWS. 5

II: TO THE EXTENT THE COURT BASED ITS DETERMINATION ON THE PROPER STANDARD OF WHETHER THE APPELLANT HAD BEEN RESTORED TO HIS SANITY, IT USED AN IMPROPER DEFINITION OF SANITY 9

III: THE STANDARD FOR DETERMINING WHETHER THE APPELLANT HAS BEEN "RESTORED TO SANITY" MUST BE BASED ON THE STANDARD DEFINED BY §76-2-305(1). 15

IV: THE COURT SHOULD HAVE FOUND THAT THE FACTS IN THIS CASE SATISFY THE REQUIREMENT THAT THE APPELLANT'S SANITY HAS BEEN RESTORED. . . . 18
TO HOLD OTHERWISE AMOUNTS TO AN UNCONSTITUTIONAL INCARCERATION BASED ON STATUS. 19

CONCLUSION. 23

CASES CITED

Bolton v. Harris, 295 F.2d 642 (D.C. Cir. 1968) 11

Cannon v. McDonald, 615 P.2d 1268 (Utah 1980) 11

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS (continued)

Clark v. State, 151 Ga. App. 853, 261 S.E. 2d 764 (1979). . . 11,12

Connally v. General Construction, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). 11,16

Estate of Baker, 222 Kan. 127, 563 P.2d 431 (1977). 11

Johannessen v. United States, 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066 (1912). 8

Johnson v. Morris, 87 Wash. 2d 922, 557 P.2d 1299 (1976). . . 9

Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883). 6

Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, 890 (1939) 11

Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937) 6

People v. Giles, 557 P.2d 408 (Colo. 1976). 11,12

Robinson v. California, 370 U.S. 660 82 S.Ct 1417, 8 L.Ed. 758 (1962). 19,23

State v. Andazola, 95 N.M. 430, 622 P.2d 1050 (1981). . . . 16

State v. Maik, 60 N.J. 203, 287 A.2d 715 (1973) 21

State v. Packard, 122 Utah 369, 340 P.2d 561 (1952) 16

State v. Staten, 25 Ohio St.2d 107, 267 N.E. 2d 122 (1971). 17

State v. Rhodes, 92 Wash. 2d 755, 600 P.2d 1264 (1979). . . 16

Thompson v. Harris, 107 Utah 99, 152 P.2d 91 (1944) 11

Thompson v. Missouri, 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed.2d 204 (1898). 6

Wolonsky v. Balson, 58 Ohio App. 2d 25, 387 N.E.2d 625 (1976). 16,17,18

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

TABLE OF CONTENTS (continued)

OTHER AUTHORITIES CITED

AMA Drug Evaluations, Third Edition (1977) 21

Criminal Law 322 (1972) 13

Colorado Statute §16-8-120 C.R.S. (1973) 12

Insanity of Defense, The, Goldstein, A.. 13,18

New Jersey Statute Annotated §2A-163-3, 163-2 (1971) . . 21

U.S. Constitution, Article I, §10. 6

Utah Constitution, Article I, §18. 6

Washington, D.C. Code §24-301(3) (1967). 12

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
DAVID RILEY JACOB,	:	Case No. 18173
Defendant/Appellant	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, David Riley Jacob, appeals from the finding and order of the Third Judicial District Court, Salt Lake County, State of Utah, entered August 7, 1981.

DISPOSITION IN THE LOWER COURT

The above captioned matter came before the Court on the appellant's motion for a hearing to review whether or not his sanity had been restored. On August 7, 1981, the Honorable Christine M. Durham found as a fact that the appellant had not recovered from his mental illness and ordered that the appellant continue to be maintained at the Utah State Hospital.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the order of the District Court that he continue to be maintained at the Utah State Hospital pursuant

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

to §77-14-5, Utah Code Ann. (1953 as amended) vacated. Appellant seeks an order releasing him from the custody of the Utah State Hospital as having recovered his sanity pursuant to former §77-24-16, Utah Code Ann. (1953 as amended: repealed July 1, 1980).

STATEMENT OF THE CASE

On April 15, 1980, the appellant was found not guilty by reason of insanity on a charge of aggravated arson, a second degree felony. (4/15/80 T.3. See also stipulation of facts for trial entered into by both the prosecution and defense.) On that day the trial court remanded the appellant to the custody of the sheriff, providing that his custody be maintained at the Utah State Hospital. This committment was pursuant to §77-24-15, Utah Code Ann. (1953 as amended, repealed July 1, 1980) pending a determination under the same statute as to "whether or not the defendant has fully recovered his sanity" (4/15/80 T.5). In its order of May 6, 1980, the court appointed two individuals to help the court make its determination. The court ordered that both examiners report concerning the restoration of sanity under the definition as follows:

> The defendant's sanity is such that he is no longer a danger to himself or others.

A hearing on this matter was held July 18, 1980. After hearing evidence and argument, the court ordered the appellant transported back to the state hospital to be maintained there pending its ruling, (7/18/80 T.67) On January 30, 1981, the court made the following finding of fact and conclusions of law:

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

FINDINGS OF FACT

1. That the defendant David Riley Jacob suffers from a mental illness called schizophrenia.
2. That his condition is chronic.
3. That this condition can be treated and is currently being treated by the use of antipsycotic drugs and that when the defendant is treated with these drugs his symptoms of this disease subside.
4. That when defendant's symptoms of his mental illness subside he thinks and acts as a person who is sane.
5. That when defendant does not receive medication symptoms of his chronic mental illness reappear and he then is insane and is a danger to himself and others.

CONCLUSIONS OF LAW

1. The defendant having submitted stipulated facts to the Court, April 15, 1980, the crime having occurred September 21, 1979, and the Court having found the defendant not guilty by reason of insanity April 15, 1980, the defendant is therefore entitled to have determination on the question of his current mental state to be made according to the statutes in effect on the date of the trial, that being §77-24-15, Utah Code Ann (as amended) and which has since been amended on July 1, 1980.
2. The language of that section of the code requires that the "Court shall determine whether or not the defendant has fully [sic] recovered his sanity."
3. The Court does not accept defendant's definition of sanity that sanity for purposes of this hearing be based on the opposite condition of the "defense of insanity" as defined in §76-2-305(1) that is [sic] shall be a defense that the defendant "at the time of the prescribed conduct as a result of mental disease or defect lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."
4. The Court finds that sanity although not defined in the procedural section of the code in effect at the time should be a standard similiar to the standard used in civil proceedings. Therefore the standard used by this Court basically is that the defendant should be reasonably expected to not be a threat or a danger of harm to himself or to others in the foreseeable future.

THE COURT HEREBY CONCLUDES that the defendant,

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

DAVID RILEY JACOB, suffers from a chronic mental illness and finds with regard to the issue of whether or not he has fully recovered his sanity the following:

1. That when the defendant, DAVID RILEY JACOB, is being maitained with antipsychotic medication he is in a condition which meets the test of sanity and therefore is recovered.
2. That when the defendant, DAVID RILEY JACOB, is not being maintained with antipsychotic medicine his condition does not meet the test of sanity and therefore has not recovered his sanity.

The court also issued an order of conditional release providing that the defendant be released from the Utah State Hospital upon terms and conditions advised by the staff and under the supervision of Adult Parole and Probation. This release was to be on the specific condition that he be maintained on anti-psycotic medicine at a level enabling him to remain sane or be returned immediately to the custody of the Utah State Hospital. The appellant was never released pursuant to that order.

On June 2, 1981, the appellant requested a hearing pursuant to §77-24-16, Utah Code Ann. (1953 as amended, repealed July 1, 1980) to review whether or not his sanity had been restored. That hearing was held July 22, 1981. The court issued its order on August 7, 1981.

In that order the court vacated its previous order of conditional release and found that, based on the evidence presented, the findings of fact and conclusions of law entered January 30, 1981 were still applicable. The court made the following additional findings of fact and conclusions of law:

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> The defendant suffers from a chronic mental illness which apparently has a biochemical cause and psychological and behavioral manifestations. He is not now, and will in all likelihood never be, recovered from the biochemical aspects of the disease. However, it appears that so long as he receives an appropriate maintenance dosage of medication, his psychological and behavioral manifestations disappear. Historically, he has on many occasions failed to maintain his medication level when not institutionalized, and he has consequently (and in every instance) become psychotic. In that condition, there is no question, based upon the historical information, that he is extraordinarily dangerous to others and to himself.
>
> Under the circumstances just described, this court cannot find that the defendant has recovered from his mental illness within the meaning of the Utah statutes, and orders that the defendant continue to be maintained at the Utah State Hospital. Since there is no likelihood that a cure for defendant's illness will be discovered soon, the above ruling may well result in the lifetime institutionalization of an individual who could function adequately, and without danger, in the community, if his medication were carefully and closely supervised. However, no means of lawful supervision appears to exist at this time, and some revision of existing law would seem to be required before the defendant in his present condition could be released. (Emphasis added.)

The appellant appealed from this order on September 1, 1981.

ARGUMENT

I

THE TRIAL COURT ERRED IN ITS APPLICATION OF §77-14-5, UTAH CODE ANN. (1953 AS AMENDED, EFFECTIVE JULY 1, 1980) TO THIS ACTION. BECAUSE THIS CASE WAS ALREADY PENDING AT THE

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

TIME §77-14-5 TOOK EFFECT, FORMER §77-24-15 AND §77-24-16 APPLY BY VIRTUE OF THE UNITED STATES AND UTAH CONSTITUTIONAL PROHIBITIONS AGAINST EX POST FACTO LAWS.

The United States Constitution Article I, §10 and the Utah Constitution Article I, §18 prohibit the enactment of ex post facto laws. Laws have been found to violate this prohibition which retroactively increase the punishment for a crime, Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed 1182 (1937), or retroactively make changes in evidence and procedure which operate to the disadvantage of the criminal defendant. Thompson v. Missouri, 171 U.S. 380, 18 S.Ct. 922, 43 L.E.2d 204 (1898). In particular, procedural changes have been found to violate this prohibition when they retroactively affect a substantial right to which the accused was entitled at the time of his offense. Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506 (1883).

The new Utah Code of Criminal Procedure became effective July 1, 1980. Section 77-14-5 of that code provides:

> 77-14-5. Hearing on mental condition of defendant found not guilty by reason of mental illness--Commitment to state hospital--Subsequent hearings.--(1) When a jury renders a verdict of "not guilty by reason of mental illness" pursuant to section 76-2-305, the court shall proceed to determine whether the defendant has recovered from his mental illness. If, after hearing, the defendant is determined to be mentally ill, the court shall order him committed to the Utah state hospital. The defendant shall not be released from confinement therein until the court which committed the defendant shall, after hearing, find that the defendant has recovered from his mental illness. Notice shall be given to the prosecuting attorney of the hearing.
>
> (2) A defendant committed to the Utah state hospital pursuant to subsection(1) may apply,

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> not sooner than six months from the date of the commitment, to the district court of the county from which he was committed, for an order of release on the grounds <u>that he has recovered from his mental illness</u>. <u>At any time that the defendant has recovered</u> from his mental illness, the clinical director of the state hospital shall certify that fact to the court. The court shall conduct a hearing within ten working days of the receipt of the clincal director's report. If the finding is adverse to the defendant, he shall not be permitted another hearing more often than once each year, unless the court otherwise orders. In such hearings, the burden of proof is on the applicant. (Emphasis added.)

The applicable statutes in effect on September 27, 1979, the date the crime which gave rise to this action occurred, were former §77-24-15 and §77-24-16:

> 77-24-15. Verdict of not guilty by reason of insanity--Procedure.--Upon a verdict of not guilty by reason of insanity being rendered by a jury, the court shall determine whether or not the defendant has fully recovered his sanity, and the defendant shall be remanded to the custody of the sheriff until his sanity shall have been finally determined in the manner prescribed by law. If the defendant is committed to a state hospital he shall not be released from confinement, unless and until the court which committed him, or the district court of the county in which he is confined, shall, after notice and hearing, <u>find and determine that his sanity has been restored</u>. In the event such hearing is held in the county from which the defendant was committed, notice as ordered by the court shall be given to the district attorney for the district in which said county is located. In the event such hearing is held in the county where the defendant is confined, notice as ordered by by the court shall be given to the district attorney for the district in which said county is located, and also to the district attorney for the district in which the county is located from which said defendant was committed.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

> 77-24-16. Application for release on ground sanity restored.--A person who has been committed to a state hospital, as provided in section 77-24-15, may apply to the district court for the county in which he is confined or for the county from which he was committed, to be released on the ground that his sanity has been restored. No hearing upon such application shall be allowed a person until he shall have been confined for a period of not less than one year from the date of the order of commitment, and if the finding of the court be adverse to him upon such, or any subsequent application for release, on the ground that his sanity has not been restored, he shall not be permitted to file a further application until one year has elapsed from the dateof hearing upon his last preceeding application. In any hearing authorized by this section, the burden of proving that his sanity has been restored shall be upon the person applying for such hearing.
> (Emphasis added.)

The appellant maintains that the retroactive use of the new standard of "recovered from the mental illness" subjects him to a higher burden of proof in his case than the standard of "sanity has been restored." Thus its use operates to his disadvantage, deprives him of a substantial right to which he was entitled at the time of his offense, and comes within the constitutional prohibitions.

It is true that the ex post facto prohibition applies only to laws respecting criminal punishment. Johannessen v. United States, 225 U.S. 227, 32 S.Ct. 613, 56 L.Ed. 1066 (1912). Although the procedures for inquiry into the continuing insanity of a person acquitted by reason of insanity are not purely criminal in nature, they are at least quasi-criminal. They are part of the criminal code, they require notice to the district

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

attorney, and most importantly they involve involuntary incarceration as the result of the prior commission of a crime.

The Washington Supreme Court applied this principle in Johnson v. Morris, 87 Wash.2d 922, 557 P.2d 1299 (1976). That case dealt with changes in the Washington State juvenile code. The court held that even though the juvenile code was not technically a criminal code and not punishment oriented, it did involve restraint of liberty and involuntary incarceration. The court held proceedings under the code were subject to the same strict constitutional scrutiny they would be if there were deemed "criminal proceedings" and involuntary incarceration under the code was punishment within the purview of the ex post facto prohibition. 557 P.2d at 1304, 1305.

Whether or not the appellant's mental health had been restored was both a subject of inquiry at the July 22, 1981 hearing and a basis for the trial court's order of August 7, 1981. It was error for the court to consider this standard in any way in its determination since such a standard requires the appellant to show a higher degree of "wellness" than merely that he has been restored to his sanity.

II

TO THE EXTENT THE COURT BASED ITS DETERMINATION ON THE PROPER STANDARD OF WHETHER THE APPELLANT HAD BEEN RESTORED TO HIS SANITY, IT USED AN IMPROPER DEFINITION OF SANITY.

Although in its order of August 7, 1981, the court relied

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

on the new code's "restoration of mental health" inquiry, the court also found that is former order of January 30, 1981, relying of the proper inquiry of "restoration of sanity," was still applicable. In that order the court had used a definition of sanity similar to the standard used in civil proceedings "that the defendant should be reasonably expected to not be a threat or a danger of harm to himself or others in the foreseeable future."

The defense counsel contends that this definition for "restoration of sanity" was clearly erroneous. The definition of the defense of mental disease or defect §76-2-305, the verdict returned against the appellant of not guilty by reason of insanity, §77-33-4 (repealed July 1, 1980) and the procedures to be taken following such a verdict are all part of the Utah Criminal Code and the Utah Code of Criminal Procedure. §76-1-106 of the Criminal Code provides that "all provisions of the code. . . shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law and general purposes of §76-1-104. Section 76-1-104(4) provides that one of those purposes is to "prevent arbitrary or oppressive treatment of persons accused or convicted of offenses." In addition, §68-3-11 dealing with the rules of construction to be applied to the 1953 codification of the Utah Code Annotated provides:

> 68-3-11. Rules of construction as to words and phrases.--Words and phrases are to be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined by statute, are to be construed according to such

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

peculiar and appropriate meaning or definition.

Due process requires that meanings of statutes not be decided arbitrarily. In fact, protection from arbitrary governmental action is the very essence of due process. Estate of Baker, 222 Kan. 127, 563 P.2d 431 (1977), Thompson v. Harris, 107 Utah 99, 152 P.2d 91 (1944). The Supreme Court of the United States has held that "no one may be required at peril of life, liberty or property to speculate at the meaning of penal statutes." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888, 890 (1939). Further, it has held in accord with the Utah rules of construction that courts may construe statutes in terms of the text of the statutes and the subjects with which they deal. Connally v. General Construction, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). See also Cannon v. McDonald, 615 P.2d 1268 (Utah 1980).

There is no mention in the Utah Criminal Code or the Utah Code of Criminal Procedure of any standard of sanity based on an accused's potential for harm to himself or others. It appears from the record (4/15/80 T.7) that the court used this standard based on a mistaken reliance on several cases cited by the prosecutor (7/18/80 T.13,14,43,62, 65) and the letter of Dr. Austin dated June 24, 1980. These cases were Bolton v. Harris, 395 F.2d 642 (D.C.Cir. 1968), Clark v. State, 151 Ga. App. 853, 261 S.E. 2d 764 (1979), aff'd. 245 Ga. 629, 266 S.E.2d 466 (1980), and People v. Giles, 557 P.2d 408 (Colo. 1976). All of these cases dealt with statutory requirements not found in the corresponding Utah scheme.

The Bolton case held that a criminal acquitee must be

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

given a hearing after his acquittal by reason of insanity. The standard for release at that hearing was held to be as provided in the Washington, D.C. Code §24-301(3) 1967, to-wit: unconditional release requires the superintendent of the mental hospital to certify (1) that such person has recovered his sanity, and (2) in the opinion of the superintendent such person will not in the reasonable future be dangerous to himself or others (emphasis added).

The Clark case dealt with a Georgia standard for release of an insanity acquitee based on whether or not the person was still mentally ill so as to authorize his involuntary commitment under the Georgia Code Ann. §88-501(a) and (v) (Ga. L.1978, pp 1789-1790). That code section provides that a mentally ill person requires involuntary treatment if he "1. . . presents a substantial risk of imminent harm to himself or others as manifested by recent overt acts or recent expressed threats of violence which present a probability of physical injury to himself or to other persons. . .". Although this case dealt with a schizophrenic, it is particularly inapplicable because the person had refused to take his medication two weeks before his hearing. The Giles case, cited by Dr. Austin, was decided under the Colorado statutory language of §16-8-120 C.R.S. (1973), which requires for release of an insanity acquitee a finding that "the defendant has no abnormal mental condition which would be likely to cause him to be dangerous either to himself or to others or to the community in the reasonably foreseeable future." While Giles held that it was permissable to have

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

different standards for being found not guilty by reason of insanity and being released following such a verdict, it certainly did not mandate such a difference.

Even if the Utah civil standard were applicable to this case, it would require not just a "foreseeable danger" but "an immediate danger" as required by the civil commitment standard of §64-7-36(10)(a) and (b), Utah Code Ann. (1953 as amended). Dr. LeBegue testified that after cessation of medication "it may take months to a year for disorderly thinking, feeling, and behavior to occur" in the appellant (7/18/80 T.23,37-39). In fact, all the expert witnesses testified that the appellant did not meet the civil standard for commitment (Dr. LeBegue 7/18/80 T.18, Dr. Mirow and Dr. Austin 7/22/81 T.25,31).

The various state statutory criteria for the release of insanity acquitees fall into four groups of inquiry: 1) Is the patient sane? 2) Is the patient not dangerous? 3) Is the patient sane and not dangerouse? 4) Is the patient sane or not dangerous? LeFave and Scott, Criminal Law 322 (1972), quoting Goldstein, A., The Insanity Defense (1967). In his treatise Abraham Goldstein points out that in state statutory schemes using the term "sanity" alone, there is virtually nothing to explain it. Id at 147. A great many states, however, he notes, make no reference to recovery of sanity at all, but inquire only whether continued detention of an insanity acquitee is necessary for the safety of the patient or the public. Id at 148.

Because the Utah statutory scheme makes no mention of the

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

issue of dangerousness or foreseeable harm, it was a violation of the appellant's right to due process of law for the trial court to consider these factors and arbitrarily determine that they apply. It was also error for the court to consider in its decision of this matter, the desire of the psychiatrists, prosecutor, and the court to have this case litigated so that the Supreme Court and/or the Utah Legislature might respond with a more definite standard for review or with more "satisfactory" requirements for review and provisions for conditional release.[1]

---

[1] Prosecutor discussing the possibility of conditional release (7/18/80 T.11,14): "It will take a little bit of aborting the law to a degree, because I don't think the law really covers it. . . There is some basis for the statutory position that we don't have a better alternative, then we better keep Mr. Jacob there or adopt some type of a program, maybe change the law ourselves or force the legislature into some type of situaion where they can change the law to coincide with the needs of Mr. Jacob.

Dr. LeBegue was asked, "Is it your desire to have this matter litigated by the Supreme Court, that you might have a middle ground that you have been asking for or wish to see enacted somewhere?" He answered, "It is indicated that for treatment reasons that middle ground should be available." (7/18/80 T.41)

Dr. Austin was asked, "What I am trying to get at, really, doctor, is why have you indicated in the final sentence of the letter, 'We cannot certify to the court that he's recovered from his mental illness? I am trying to find the underlying basis and why you are saying that, why, when he is on medication, he's fine." He answered, "The underlying reason is that there is absolutely no standard at this point for us to certify that he is recovered from his mental illness. Therefore, we are quite willing to present all the information to the court. We are saying the psychological manifestations are in remission and therefore he is recovered to that extent. However, we feel, based on our best medical knowledge, that the biochemical disorder is still there, therefore he isn't recovered from that part of the mental illness, and we are willing to present that information and then let the court decide whether that recovery from mental illness actually means [sic] in this state." (7/22/81 T.14) (Footnote continued.)

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

It may be quite proper for state mental health authorities and the state's prosecuting authorities and trial judges to encourage law reform and the enactment of statutes which recognize the problems of the mentally ill and the advances in the treatment of schizophrenia and other mental illnesses. But, depriving David Jacob of his liberty by refusing and neglecting to apply the stautuory standard in effect at the time the crime which gave rise to his incarceration was committed, is not a proper means of such encouragement. Any future judicial or statutory changes would only apply to the appellant if they operate in favor of his substantial right to his liberty.

III

THE STANDARD FOR DETERMINING WHETHER THE APPELLANT HAS BEEN "RESTORED TO SANITY" MUST BE BASED ON THE STANDARD DEFINED BY §76-2-305(1).

Section 76-2-305(1) provides:

> Mental disease or defect.--(1) In any prosecution for an offense, it shall be a defense that the defendant, at the time of the prescribed conduct, <u>as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law</u>. (Emphasis added.)

---

1 continued

The court's order of August 7, 1981: Since there is no likelihood that a cure for defendant's illness will be discovered soon, the above ruling may well result in the lifetime institutionalization of an individual who could function adequately, and without danger, in the community, if his medication were carefully and closely supervised. However, no means of lawful supervision appears to exist at this time, and some revision of existing law would seem to be required before the defendant in his present condition could be released.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

The verdict against the appellant was entered pursuant to former §77-33-4 (replaced July 1, 1980 with §77-35-2(a) providing for a not guilty by reason of mental illness verdict). §77-33-4 provided:

> When the defendant is acquitted on the ground that he was insane at the time of the commission of the act charged, the verdict must be "not guilty by reason of insanity."

The procedure to follow such a verdict was set out in §76-24-15 and §76-24-16, supra. Thus the context in which "recovered his sanity" was used, directly related to insanity as a criminal defense and is the only standard available to the court under the applicable criminal law and procedure.

If this court finds that there is no standard or that what standard there is, is too vague for the court to be able to ascertain it's meaning, then §76-24-15 and 16 must be deemed unconstitutional and the appellant must be released.

A statute violates the first essential of due process if it is so vague that persons of common intelligence must necessarily guess at its meaning. State v. Packard, 122 Utah 369, 340 P.2d 561 (1952), State v. Andazola, 95 N.M. 430, 622 P.2d 1050 (1981). A statute meets due process requirements if it provides explicit standards to prevent arbitrary and discriminatory enforcement. A statute which fails to provide such standards is unconstitutionally vague. State v. Rhodes, 92 Wash. 2d 755, 600 P.2d 1264 (1979). See Connally, supra.

In Walonsky v. Balson, 58 Ohio App. 2d 25, 387 N.E.2d 625 (1976) the Ohio Court of Appeals dealt with an Ohio statutory

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

scheme similar to Utah's. In that case, an insanity acquitee was seeking release from commitment to the state hospital. The Ohio Code Section 2945.39 provided for release "when a patient's sanity has been restored." Under this language the court held that the issue was "not whether the petitioner may still be dangerous to himself or society or whether he still is mentally deficient or mentally ill, but whether he is legally sane." The Ohio definition of legal sanity was established in State v. Staten, 25 Ohio St.2d 107, 267 N.E. 2d 122 (1971). The Wolonsky court applied that definition and held that the question was 'whether he now has the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of law." 387 N.E.2d at 625,626.

Ohio, at the time of this decision, had no provision for conditional release. The court held without discussing any of the particular facts of diagnosis, medication, or the previous criminal history of the patient, that a person restored to sanity [in fact admitting that he had been restored to sanity] though the use of drugs which he must continue to take to remain sane, was not sane within the meaning of the statute." Id at 627.

In 1978, the Ohio Code was changed to provide for a hearing to determine whether a person is mentally ill and the least restrictive commitment alternative consistent with the public safely and the welfare of the person. Ohio R.C. 2945.39 and 2945.40.

Approximately two-thirds of the states have provisions

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

for conditional release of an insanity acquitee. All the states have systems of indefinite detention. Goldstein, supra at 150. It is very difficult to ignore the issue of whether a person will continue to be nondangerous when a state has no provision for conditional release. An insanity acquitee is found innocent for lack of capacity to formulate mens rea, yet the presence of an actus rea and the possibility of a potential future actus rea means that though innocent, he continues to be controlled by the processes of the criminal law. This can make him subject to deprivation of his liberty not because of his current mental condition as it relates to sanity but because of the possibility of future misbehavior. Comment, 27 Rutgers L.Rev.160 (1973).

While it is difficult to ignore this potential for harm, the appellant contends it must be done in his case because as the law stands in Utah it is not a valid basis of consideration. To take it into account and at the same time maintain it shouldn't be taken into account as the Wolonsky court did amounts to a legal absurdity and ignores common logic and the ordinary meaning of language. A person is either restored to sanity or not restored to sanity. A person is either able to appreciate the wrongfulness of his conduct and conform his conduct to the requirements of the law or he is not.

IV

THE COURT SHOULD HAVE FOUND THAT THE FACTS IN THIS CASE SATISFY THE REQUIREMENT THAT THE APPELLANT'S SANITY HAS BEEN RESTORED.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

TO HOLD OTHERWISE AMOUNTS TO AN UNCONSTUTIONAL INCARCERATION BASED ON STATUS.

All the testimony by the expert witnesses was that the appellant presently met the standard of being able to appreciate the wrongfulness of his conduct and being able to conform his conduct to the requirements of law. (Dr. Mirow and Dr. Austin, 7/22/81 T.26,31,32, Dr. LeBegue 7/18/80 T.29). In addition, the testimony was that the appellant had been, for more than a year, free from any manifestations of his illness (7/22/81 T.3, 8,12-14,21,31). To find, in view of that testimony, that the appellant has not been restored to his sanity amounts to subjecting him to a criminal commitment based on status. To hold that any insanity acquitee must be restored to his sanity so as to be unquestionably permanently sane amounts to an impossibility. Lex non intendit aliquid impossibile. (The law does not intend anything impossible.)

The appellant would argue that the trial court was correct in its assessment that the definition of sanity must be a functional definition. Otherwise, the court stated, "we really would be dealing with an incarceration based on one's status as a chronic schizophrenic." (7/18/80 T.60).

In Robinson v. California, 370 U.S. 660 82 S.Ct.1417, 8 L.Ed. 758 (1962), the United States Supreme Court examined a California statute which made it a crime to be a drug addict. The court held that a state law which imprisons a person thus afflicted as a

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

criminal even though he has never touched any narcotic drug within the state, or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. 370 U.S. at 667, 8L.Ed at 763.

The Court based it's decision in part on the fact that narcotics addiction is an illness which can be contracted innocently or involuntarily. Id.

The same is true of the illness with which the appellant is affected. The recovery of sanity by a person previously insane can be effected by a variety of means. It can occur as a result of psychotherapy, administration of electric shock therapy or antipsychotic drugs, cessation of the use of mind altering chemicals or simply by an Act of God.

The appellant contends that he has no more potential for a return to insanity than persons restored to their sanity in other ways. In fact, it can be argued he has less potential because he is fortunate enough to have a mental illness which can be and has been diagnosed and completely controlled by a readily available medication.[2]

In the past, the appellant had had some difficulty finding the right medication to control his illness. At the July 18, 1980 hearing, Dr. LeBegue testified that the appellant had not responded

---

[2] Schizophrenia is not a uncommon illness. It is estimated that 25% of all hospitable admissions for mental illnesses are diagnosed as schiozophrenia. Approximately 1% of the people of the United States will be diagnosed as schizophrenic during their lifetimes. Abnormal Psychology, Current Perspectives 271 (1972).

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

well to the long acting form of antipsycotics and would require lifetime daily treatment (7/18/80 T.19-22). But at the July 22, 1981 hearing, Dr. Austin testified that the appellant was functioning extremely well on an injection of .5 cc's of prolixin every two weeks with an elimination of the psychological manifestations of his illness even though the biochemical disorder remained (7/22/81 T.3,4,13,14).

David Jacobs testified at the July 22, 1981 hearing that while in the past he was taking as much as 2.5 cc's of prolixin every two weeks and having substantial side effects of severe muscle contortions and an inability to control his tongue, that presently he was having no side effects, that the trouble had been getting the right amount of the right medication, and that on his present dose he did not feel medicated (July 22, 1981 T.27-29,30). See AMA Drug Evaluations, Third Edition (1977) for overview of various antipsycotic agents.

The New Jersey Supreme Court in State v. Maik, 60 N.J.203,287 A.2d 715 (1973), dealt with the New Jersey statute which required the court fo find that a person had been "restored to reason". N.J. Stat. Ann. §2A-163-3, 163-2 (1971). The case concerned a person who had suffered a psychotic, schizophrenic break as a result of using hallicinogenic drugs. The court held that restoration to reason occurs when the underlying latent condition or illness precipitating the defendant's psycotic episode is removed or effectively neutralized. 287 A.2d at 723. The court rejected a standard of mere remission, because the cause and duration of a

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

spontaneous remission is unknown. Id at 722-23.

The appellant contends that he has experienced since the time of his offense, not only a remission but also an effective neutralization of the chemical disorder with which he is afflicted. This has come about because the doctors have finally found the best medication for the appellant which he has now been on for more than a year. There is absolutely nothing more the appellant can do to show or prove himself more sane that he has done already. To continue to punish him for being unable to do this and for being afflicted with a disease which he has through no fault of his own is the essence of cruel and unusual punishment. Under absolutely no other standard of sanity in the law would there be any question as to David Jacob's sanity in his present condition. He would undoubtedly be found sane enough to write a will, make a contract, be a witness, get married, commit a crime, and stand trial for that crime. Would a jury find him not guilty of that crime on the basis that the court has found that he is not sane? Certainly not. All the experts have testified that he is sane for that purpose.

The appellant recognizes that if he is given his liberty there will be a possibility that he will not continue to receive the medication which neutralizes his disease. The law would not be powerless in the face of such an eventuality. The civil and criminal laws would still apply to the appellant as they do to every other citizen.

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

Risk cannot be eliminated from the processes of law, but laws are in effect to cover such risk.

If the appellant is to be sentenced to an incarceration based on past misdeeds it must be after a criminal conviction. The trial court found that the appellant is sane in his present condition. The trial court's ruling, in effect, sentences the appellant to a possible life long commitment based on the possibility of future misdeeds because of the specific way by which he has been restored to his sanity. But it is the only way he can be restored to his sanity. Thus it is an incarceration based on his statute as a sane person with schizophrenia, a mental illness for which he bears no responsibility. This is precisely the kind of incarer-ation for status which was condemned by the United States Supreme Court in Robinson v. California, supra.

CONCLUSION

The trial court erred in it's application of §77-14-5 to this case by basing its order on whether the appellant has recovered from his mental illness. The court should have applied former §77-24-15 and §77-24-16 and inquired whether the appellant's sanity has been restored. The court erred in using the standard of sanity "of being reasonably expected to not be a threat or a danger of harm to himself or others in the foreseeable future." The court should have used a definition of sanity as it is defined in §76-2-305 (1) as "being able to appreciate the wrongfulness of one's conduct and conform one's conduct to the requirements of law."

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.

If the proper standards had been used the court should have found, based on all the evidence, that the appellant has been restored to his sanity and ordered him released from the custody of Utah State Hosptial.

The appellant requests relief from these errors of the trial court in the form of an order releasing him from the Utah State Hospital since, according to all the evidence, his sanity has been restored. In the alternative, the appellant requests an order remanding this matter to the trial court for further proceedings consistent with the proper standards of law.

Respectfully submitted this

15th day of December, 1982,

Ginger L. Fletcher
GINGER L. FLETCHER
Attorney for Appellant

DELIVERED a copy of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this _____ day of _______________, 1982.

____

Sponsored by the S.J. Quinney Law Library. Funding for digitization provided by the Institute of Museum and Library Services
Library Services and Technology Act, administered by the Utah State Library.
Machine-generated OCR, may contain errors.