

RESPONSE TO MOTION TO DISMISS FOR RULE 11 TRANSPORTATION DELAY

When a defendant is found incompetent and ordered committed to the State Hospital for competency restoration treatment, but is not immediately transported to the hospital for treatment but instead remains in jail, the defendant is not entitled to dismissal of the charges against him simply because of the delay in transporting him for treatment.

I. Facts

(Insert facts: The defendant is charged with [what charges are pending against the defendant]. [Explain who moved for a Rule 11 prescreening, and when, and when the trial court granted it.] As a result of that prescreening report, this Court ordered a full competency review on [date]. [Explain what doctors were appointed, and when. Explain whether the court held a hearing or the parties submitted the issue on the doctors' reports.]

On (date), this Court found the defendant incompetent to stand trial and ordered him committed to the Arizona State Hospital [ASH] for competency restoration treatment under A.R.S. § 13-4510. However, because of space limitations at ASH, the defendant has not yet been transported to ASH and he remains in the custody of the Maricopa County Sheriff's Office. The defendant has moved to have this Court dismiss the charges against him with prejudice, claiming that his due process rights have been violated under *Jackson v. Indiana*, 406 U.S. 715 (1972) because of the delay and asserting that dismissal of the charges against him is the appropriate remedy for this constitutional violation.

II Law and Argument

A. The defendant is not entitled to dismissal of the charges against him under *Jackson v. Indiana* because the commitment order is not indefinite, but rather is limited in extent by statute and rule.

Jackson v. Indiana, supra, does not support the defendant's position. In that case, the United States Supreme Court held that *indefinite* confinement of a defendant based solely on his incompetency to stand trial violated both equal protection and due process. The defendant in *Jackson* had been committed to a state hospital for more than three years, and it was highly unlikely that he would ever be competent to stand trial. The Court stated:

We hold ... 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.

Id. at 738. Still, the Court recognized that "in light of differing state facilities and procedures," it was not appropriate for the Court to set "arbitrary time limits" for an incompetent defendant's release. *Id.*

By contrast to the indefinite commitment order found to violate the defendant's due process rights in *Jackson, supra*, this Court's order committing this defendant to ASH for competency restoration treatment was expressly limited in extent, both by statute and by rule. Under A.R.S. § 13-4512(F), a competency restoration treatment order is valid for 180 days unless terminated sooner, such as when a defendant regains competency or the treating agency reports that there is "no substantial probability that the defendant will regain competency within twenty-one months after the date of the

original finding of incompetency.” Further, A.R.S. § 13-4515(A) states in part, “An order or combination of orders that is issued pursuant to § 13-4512 or 13-4514 shall not be in effect for more than twenty-one months.” Rule 11.5(a)(3), Ariz. R. Crim. P., explains that there is a “15 month limit” for competency restoration treatment, and that term may be extended once for an additional six months if the defendant is making progress towards restoration of competency. Accordingly, this Court’s order is limited in extent and cannot be effective for more than twenty-one months.

The Comment to Rule 11.5(b), Ariz. R. Crim. P., states that the Rule was drafted expressly to comply with *Jackson, supra*. The limited time for preconviction commitment orders and the mandatory progress reports from the treating agency to the court act to ensure “a frequent review of each incompetent’s status and progress.” Rule 11.5, Comment. The Arizona statutes and rules thus protect a defendant’s right to due process by prohibiting indefinite commitment orders and setting an outside date for regaining competency. Therefore, the defendant is not entitled to any relief under *Jackson, supra*, or its progeny.

B. The defendant’s motion is premature because no progress report to this Court is due yet.

The defendant’s motion is also premature, in that no progress report is yet due regarding the defendant’s treatment under this Court’s current order. When a court issues an order for inpatient treatment for competency restoration, A.R.S. § 13-4514(A)(1) provides that the treatment agency must make a written report to the court “after the first one hundred twenty days of the original treatment order and after each one hundred eighty days of treatment thereafter.” In addition, the supervisor of the treating agency must report to the court whenever the supervisor either “believes the

defendant is competent to stand trial” or “that there is no substantial probability that the defendant will regain competency within twenty-one months after the date of the original finding of incompetency.” § 13-4514(A)(3), (4). Rule 11.5(b)(4), Ariz. R. Crim. P., also requires such progress reports and specifies their content.

Note that the law does not specify when treatment must begin. While a brief delay in transporting a defendant from the jail to the hospital may cut into the defendant’s treatment time, the total time during which a defendant is confined is not increased by any transportation delay. This is so because the length of confinement and the due dates for the progress reports are determined from the date of the *order*, not from the date treatment begins. A.R.S. §§ 13-4512(F)(1), 13-4514(A)(1).

Since this Court has ordered the defendant to undergo inpatient treatment, the first progress report is not due until “after the first one hundred twenty days after the original treatment order.” If by the time 120 days have elapsed, the defendant’s inpatient treatment has begun, the defendant’s motion would become moot. The State anticipates that the defendant will be under treatment at ASH before that time period has elapsed.

In addition, there are no grounds as yet to set any hearing to redetermine competency under Rule 11.6(a). Therefore, this Court should deny the defendant’s motion.

C. Dismissal of criminal charges is not an appropriate remedy for any delay under *Jackson, supra*.

In *Jackson, supra*, the United States Supreme Court did not reach the issue of whether charges should be dismissed when an incompetent defendant, who was unlikely to be restored, was detained for an extended period of time. *Jackson*, 406 U.S.

at 740. Further, no Arizona case has held that charges should be dismissed unless the defendant is found to be *permanently* incompetent. In *State v. McPherson*, 158 Ariz. 502, 763 P.2d 998 (App. 1988), the trial court committed a defendant for competency treatment at ASH. At a second competency hearing held more than a year after the original commitment order, the court found that the defendant was permanently incompetent and dismissed the charges against him with prejudice. However, finding the defendant to be a danger to others, the trial court ordered that he be committed to ASH for up to six months. The Court of Appeals upheld the trial court's orders. The Court interpreted Rule 11.6(e), Ariz. R. Crim. P., as giving the trial court "discretion to dismiss charges against a defendant found to be incompetent at any time," noting that the Comment to that Rule says that it is intended to give the trial court "the power to dispose of charges at the outset in cases where there is clearly no reason to maintain them (e.g. when the defendant's condition is permanent and he is charged with a comparatively minor offense." *McPherson*, 158 Ariz. at 504, 763 P.2d at 1000. The Court said that other grounds might also justify dismissal and that therefore, dismissal is left to the trial court's discretion "subject only to the requirements of reasonableness and accepted legal principles." *Id.* The Court concluded that the trial court did not abuse its discretion in dismissing the charges against the defendant. However, the defendant in *McPherson* actually fit the Comment's example of when dismissal was appropriate – that is, the defendant's condition in *McPherson* was *permanent*. That case says nothing about dismissal of charges against a defendant who may still become competent with court-ordered treatment.

In *State v. Superior Court*, 113 Ariz. 432, 556 P.2d 6 (1976), the Court of Appeals held that a dismissal of charges against a permanently incompetent defendant should be *without* prejudice. In that case the defendant was charged with aggravated assault and kidnapping. After a hearing, the trial court found the defendant to be incompetent and ordered him committed to ASH for up to six months. After two more competency hearings, the trial court found that the defendant was still incompetent and unlikely to improve. The court granted the defense's motion to dismiss the charges with prejudice. On special action review, the Court of Appeals held that the dismissal under Rule 11.6(d) should be *without* prejudice, stating:

The purpose of the rule is twofold: that a person charged with a crime, who is committed solely on account of his incapacity to proceed to trial, be held no longer than is necessary to determine whether he will attain that capacity in the foreseeable future; and that such a person whose mental incapacity will continue indefinitely be treated procedurally and substantively the same as persons subject to civil commitment. Neither Rule 11.5 nor Rule 11.6 deal with the merits of the criminal charge.

Id. at 433-434, 556 P.2d at 7-8.

The defendant here is awaiting treatment pursuant to this Court's original order of [date] in which this Court found that there was no clear and convincing evidence that defendant would not be restored to competency within fifteen months. A.R.S. § 13-4510(C). The time has just begun to run, and it is still possible that the defendant can proceed to trial in the "foreseeable future." The defendant is being held no longer than necessary to determine his competency, and dismissal is therefore inappropriate. This defendant is not in the same position as those who must be released because they cannot be restored to competency.

The defendant's reliance on civil case law, such as *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003), is misplaced. In that case, advocates for the mentally ill sued the state hospital for failing to transport pretrial detainees for treatment. The Ninth Circuit upheld an injunction requiring the hospital to admit mentally incapacitated criminal defendants within seven days of a judicial finding of incapacitation. *Id.* at 1123. While *Mink* may support a *civil* action requiring government officials to provide treatment, it does not support the defendant's motion here seeking dismissal of *criminal* charges. *Mink* simply did not address whether any remedies or sanctions would be appropriate in the underlying criminal cases because the defendants had not been transported promptly.

Courts in other states, although interpreting their specific statutes, have held that due process does not require dismissal of the charges against an incompetent defendant. "Several courts have considered this issue in light of *Jackson*, but none has held that charges against an incompetent accused must be dismissed as a matter of due process." *People v. Zapotocky*, 869 P.2d 1234, 1242 (Colo. 1994).

Though an incompetent defendant who is unlikely to achieve competency in the future may have a constitutional right not to be held in custody based solely on the fact that a Grand Jury has issued an indictment, "such defendant does not have a corollary right to dismissal of the charges, given the public's countervailing interest in the court's continuing jurisdiction over the defendant to monitor the defendant's condition and location." *People v. Schaffer*, 86 N.Y.2d 460, 468-469, 657 N.E.2d 1305, 1310, 634 N.Y.S.2d 22, 27 (1995). The New York court noted that a defendant who has been released under *Jackson, supra*, "is not automatically entitled to a dismissal of the

charges. The granting of *Jackson* relief per se does not affect the pendency of the indictment.” *People v. Schaffer*, *id.* at 468, 657 N.E. 2d at 1310, 634 N.Y.S.2d at 27. *Accord*, *People v. Lewis*, 95 N.Y.2d 539, 548, 742 N.E.2d 601, 606, 720 N.Y.S.2d 87, 92 (2000).

In *State v. Rotherham*, 122 N.M. 246, 264, 923 P.2d 1131, 1149 (1996), the New Mexico Supreme Court discussed the issue of delay of proceedings under *Jackson*, *supra*. In that case, the defendants did not receive hearings on their competency within the time limits prescribed by New Mexico law. They argued that these deadline violations should result in automatic dismissal. The New Mexico Court rejected this argument, stating:

We do not agree that the remedy for delay is automatic dismissal. ... Significantly, the Supreme Court in *Jackson* did not articulate a hard and fast time limitation on commitment to attain competency, requiring only that commitment be for a “reasonable period of time.” We too expect there may be reasonable delays in administration and treatment that would require hearings to be held later than anticipated.

Thus, the New Mexico Supreme Court recognized that “reasonable delays in administration” may delay the process without requiring dismissal. The State asserts that the delay in this case, caused by shortage of space at ASH, likewise does not require that the charges against the defendant be dismissed.

III. CONCLUSION:

Dismissal of the charges here would unfairly penalize the State and create additional expense and delay for both parties. The Rule 11 process, which has only just begun, would have to begin anew. This Court likely would find defendant incompetent once again, and he would be ordered into treatment once again. Because the defendant has been detained only briefly while awaiting treatment, the interests of justice require

that restoration to competency be continued under the current order and that pending charges not be dismissed.

Further, the County is setting up its own restoration program in Madison Jail that should begin in the near future. Therefore, as soon as that program begins, any delay in beginning treatment should be reduced.

Finally, dismissal and release back into the community might unnecessarily endanger victims or the defendant himself (if, after attempts at restoration, he is found incompetent, not restorable and a danger to himself or others). Additionally, if a defendant has a hold, other than the Rule 11 case, dismissal would not accomplish the goal of release from custody.

For all these reasons, the State asks this Court to deny the defendant's motion to dismiss.