



University of Arkansas at Little Rock Law Review

Volume 39 | Issue 2

Article 1


2017

Not Fit to Be Tried: Due Process and Mentally-Incompetent Criminal Defendants

J. Thomas Sullivan

University of Arkansas at Little Rock William H. Bowen School of Law, jtsullivan@ualr.edu

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NOT FIT TO BE TRIED: DUE PROCESS AND MENTALLY-INCOMPETENT CRIMINAL DEFENDANTS

*J. Thomas Sullivan**

ABSTRACT:

A mentally-impaired accused who cannot comprehend the nature of the proceedings or assist his counsel in presenting his defense to the criminal charge cannot be tried as a matter of due process of law. In Jackson v. Indiana,¹ the United States Supreme Court held that due process concerns also bar the never-ending jeopardy resulting from an inability to restore an impaired accused to competence for purposes of proceeding to trial. When an Arkansas circuit court ordered the dismissal of pending criminal charges against an impaired accused who could not be restored to fitness for trial, the Arkansas Supreme Court, in State v. Thomas, reversed the dismissal order, returning the defendant to a potential state of unending jeopardy.² In failing to implement the Court's directive in Jackson, the decision in Thomas leaves the state's trial courts without a clear remedy for addressing the problems posed by mentally-impaired defendants who will never recover, and also leaves those defendants in the abyss of never-ending jeopardy. The focus of this article is the Thomas court's failure to address the proper rem-

* Professor of Law, University of Arkansas at Little Rock School of Law; Adjunct Professor of Law and Psychiatry, University of Arkansas for Medical Sciences. A generous research grant provided by the UALR Bowen School of Law supported the writing of this article.

** I want to acknowledge the retirements at the end of the 2016-17 academic year of long-time UALR Bowen Law School Professors Frances Fendler and Coleen Barger. Professor Fendler edited this review while a student at UALR and taught Contracts, Business Associations and Securities over her career. Professor Barger, the Althiemer Distinguished Professor of Law, taught Legal Writing and sponsored the Moot Court program at Bowen over her career, serving as an Associate Research Editor of this Review while a student at UALR and was actively involved in the development of Legal Writing, an increasingly important academic subject for the nation's law schools. She has served as a founder of The Journal of Appellate Practice and Process and has served as Developments Editor of this faculty-edited publication since its inception. Both will be missed.

*** The Arkansas statutory scheme uses the word "fitness" rather than "competence," or "competency," in referencing the accused's mental state at the time of trial. See Arkansas Code Ann. § 5-2-302. Lack of *fitness to proceed* generally (emphasis added).

1. Jackson v. Indiana, 406 U.S. 715, 731 (1972).

2. State v. Thomas, 2014 Ark. 362, 439 S.W.3d 690.

edy when the trial court finds that an impaired defendant cannot be restored to fitness to proceed within a reasonable period of time.

During its 2017 session, the Arkansas General Assembly adopted new procedures for conduct of mental evaluations relating to an accused's fitness for trial or criminal responsibility in commission of the offense. The amendments bear on issues addressed in this article and are discussed briefly in the Legislative Update which follows.

LEGISLATIVE UPDATE:

Act 472, 91st General Assembly, Regular Session, 2017,
amending Arkansas Code Ann. §§ 5-2-301, *et. seq.* Mental Disease and
Defect

The Arkansas General Assembly amended the provisions of the Criminal Code that deal with mental impairment of criminal defendants during its 2017 general session.³ The amendments focused on two aspects of previous law. First, Act 472 renamed the affirmative defense based on mental impairment, previously titled “Lack of capacity,” by re-designating the affirmative defense as “Lack of criminal responsibility,”⁴ eliminating any confusing use of the term “capacity” in different sections and contexts in the prior language of the statute.⁵ The substantive definition of the affirmative defense based on mental disease or defect remains the same as in the previous statute, except for an expansion of the definition of mental defect, which now provides in Section 5-2-301(6)(A):

3. Act 472, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

4. *Id.* at sec. 10, amending ARK. CODE ANN. § 5-2-312, “SECTION 10. Arkansas Code § 5-2-312 is amended to read as follows:”

Lack of criminal responsibility — Affirmative defense.

(a)(1) It is an affirmative defense to a prosecution that at the time the defendant engaged in the conduct charged he or she lacked criminal responsibility.

5. For instance, the term “capacity” is used in the statute to refer to the defendant’s capacity to recognize reality; in the definition of “mental disease or defect in Section 5-2-301(6)(a)(i); in the definition of the affirmative defense of “lack of criminal responsibility” in the amended provision of Section 5-2-301(14); had been used in Section 5-2-302(a) in referring to the accused’s lack of *capacity* to understand the nature of the proceedings in defining fitness to proceed generally; in Section 5-2-302(a) language not changed by Act 472; and in Section 5-2-312(a) defining the affirmative defense: “he or she lacked *capacity* as a result of mental disease or defect.”

(iii) Significant impairment in cognitive functioning acquired as a direct consequence of a brain *injury or resulting from a progressively deteriorating neurological condition*.⁶

The Act added a definition for *lack of criminal responsibility* to the definitions section of the statute.⁷ Thus, the provision defining the affirmative defense in the amended statute does not include a reference to the alternative theories of insanity recognized under Arkansas law, but incorporates the definition provided for *lack of criminal responsibility* in Section 5-2-301(14).

Second, Act 472 also addressed the mental evaluation conducted by order of the trial court when a question of the accused's fitness to proceed to trial is raised, or when the defense gives notice of intent to rely on a mental state defense. The amendment effectively addressed the ongoing problem of evaluations combining the fitness for trial question (a procedural issue) with the question of the accused's sanity at the time of the offense or ability to form the culpable mental state required for commission of the offense; the amendment did so by separating the two different evaluations by statute. Section 5-2-305, which formerly provided for the evaluation protocol,⁸ was replaced by Sections 5-2-327 and 5-2-328, setting out separate protocols for the fitness and "criminal responsibility" evaluations, respectively. Section 5-2-305 had been amended in 2015 to require different exams for purposes of determining fitness and capacity, or insanity,⁹ expressly directing that the examinations not be combined but permitting them to be conducted at the same time if ordered by the court.¹⁰

6. Act 472, 91st Gen. Assemb., Reg. Sess. at sec. 10 (Ark. 2017) (emphasis added).

7. The Act amended ARK. CODE ANN. § 5-2-301 to include a new definition in subsection (14):

(14) "Lack of criminal responsibility" means that due to a mental disease or defect a defendant lacked the capacity at the time of the alleged offense to either:

(A) Appreciate the criminality of his or her conduct; or

(B) Conform his or her conduct to the requirements of the law.

8. ARK. CODE ANN. § 5-2-305, repealed by Act 472 and replaced by Sections 5-2-327 and 5-2-328.

9. *Id.* § 5-2-305(4)(a) as amended, Acts of 2015, Act 1155, §§ 1, 2, eff. July 22, 2015, repealed by Act 472.

10. *Id.* § 5-2-305(4)(a)(v), providing:

Fitness-to-proceed and criminal responsibility examination orders may be ordered at the same time in accordance with subdivision (a)(1) of this section, but they may not be combined into one (1) uniform examination order and shall be tracked separately by the division.

Nor, did the General Assembly's action in adopting Act 472 address the issues relating to the problem of impaired criminal defendants who are unfit for trial and cannot be restored to fitness, or competence, within a reasonable period of time, the primary subject of this article. The most important point in its amendment of subchapter 3 may well lie in the clearly intended differentiation of the fitness and criminal responsibility evaluations performed by mental health professionals in the adoption of the new Sections 5-2-327 and 328, respectively, addressing apparent problems in continuing practices of Arkansas trial judges and criminal defense counsel to rely on single evaluations to address both questions of fitness for trial, or competence, and sanity at the time of the offense.

This provision has been repealed by Act 472 and replaced with Sections 5-2-327 and 5-2-328.

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I. INTRODUCTION: MENTALLY IMPAIRED CRIMINAL DEFENDANTS

We also agree with the suggestion of the Solicitor General that it is not enough for the district judge to find that ‘the defendant (is) oriented to time and place and (has) some recollection of events,’ but that the ‘test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.’¹¹

In April 2005, the Bolivar [Mo.] Herald-News reported on the disposition of the capital murder case pending for some thirty years in Arkansas against Darrell Samuel Davis:

Davis, 56, was accused of four counts of capital murder in Van Buren County and one count of first-degree murder in Boone County on Dec. 16, 1974, court records show. He had pled not guilty by reason of insanity and was taken to the Arkansas State Hospital to be evaluated. A judge later issued a commitment order and Davis has been held at the facility since that time.

Last year, a doctor informed court officials that a change in Davis’ treatment and medication had shown positive results and he could now assist his attorneys in presenting a defense at trial. Davis previously had appeared in court in both Van Buren and Boone counties, but he was scheduled to appear in both courts today, where officials had come to an agreement that he was insane at the time of the killings and that he should spend the rest of his life in the State Hospital.¹²

11. *Dusky v. United States*, 362 U.S. 402, 402 (1960). The Court made clear that the same formula for competence to stand trial applies in state proceedings in *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (“A person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”).

The state law formulation of this constitutional prerequisite is set forth in Section 5-2-302 of the Arkansas Criminal Code:

(a) No person who lacks the capacity to understand a proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect shall be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.

(b) A court shall not enter a judgment of acquittal on the ground of mental disease or defect against a defendant who lacks the capacity to understand a proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect.

A few months earlier, in December 2004, the Harrison [Ark.] Daily carried a news story about Darrell Samuel Davis with the headline “Murder trial after 30 years?”¹³ The extreme circumstances of the *Davis* case,¹⁴ which involved restoration of an impaired defendant’s fitness for trial after decades, necessarily pose difficult problems for the criminal justice system.

The recent rejection of a speedy trial violation claim by Arkansas capital defendant Rickey Dale Newman illustrates the tension inherent in the response of the criminal justice system to the complex causes and symptoms of mental impairment.¹⁵ Newman was originally convicted of capital murder and sentenced to death in 2002 after representing himself and asking jurors to impose a death sentence. He has spent the past fourteen years in various postures¹⁶ that finally resulted in a successful attack on his conviction and

ARK. CODE ANN. § 5-2-302 (2001); *Id.* § 5-1-101 (1975) provides: “This act shall be known as the ‘Arkansas Criminal Code’”; *Drope v. Missouri*, 420 U.S. 162, 171 (1975); ARK. CODE ANN. § 5-2-302 (2001); *Id.* § 5-1-101 (1975).

12. James L. White, *Court Commits Davis*, BOLIVAR HERALD-FREE PRESS (April 18, 2005), http://bolivarnews.com/home/court-commits-davis/article_dd13c916-bac6-51a9-9be9-ae6b7564adfc.html.

13. James L. White, *Murder Trial After 30 Years?*, HARRISON DAILY (Dec. 5, 2014), http://harrisdaily.com/murder-trial-after-years/article_215c6964-d152-5313-951b-2dffabe75558.html. Davis apparently suffered from escalating mental and emotional problems following his military discharge and return from service in the Vietnam War, which included the following description of his military service:

Although he was assigned to the motor pool in Vietnam, he also volunteered to be a “tunnel rat,” crawling into tunnels with a flashlight and a pistol searching for people to bring out or enemy food to destroy.

During his time as a tunnel rat, he participated in two searches where enemy Viet Cong were found. He and fellow soldiers killed 20 VC in one tunnel and 30 VC in another, although the VC were unarmed and didn’t fire on the U.S. soldiers, the report said.

Id.

14. *State v. Darrell Davis*, Acquittal based on mental defect, No. 71 CR-74-52, Van Buren [Ark.] Circuit Court (Dec. 6, 2004).

15. *Newman v. Cottrell*, 2016 Ark. 413, 503 S.W.3d 74.

16. For example, Newman has asserted in letters to the trial court over the years that he wanted to be executed. *Id.*, 503 S.W.3d at 77. In the most recent case before the Arkansas Supreme Court, however, he unsuccessfully petitioned for certiorari to reverse the circuit court’s rejection of his motion to dismiss the charges based on violation of his speedy trial right under Rule 28.1 of the Arkansas Rules of Criminal Procedure, which provides, in pertinent part:

(b) Any defendant charged with an offense in circuit court and incarcerated in prison in this state pursuant to conviction of another offense shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to

sentence, causing the court to order a new trial in 2014.¹⁷ The prosecution has attempted multiple unsuccessful mental evaluations designed to determine whether Newman is, in fact, fit for trial; this is significantly due, at least in part,¹⁸ to Newman's refusal to cooperate with forensic professionals engaged in his mental evaluation.¹⁹

The Arkansas Supreme Court ruled against Newman on his petition for writ of certiorari based on the history of his mental impairment. Having demonstrated his lack of fitness for trial once his conviction had been vacated, the trial court's refusal to dismiss the prosecution based on an alleged speedy trial violation would logically fail because the trial court properly concluded that the evidence did not show that he had regained competence for retrial.²⁰ His lack of fitness to be tried effectively served to toll the operation of the speedy trial rule.²¹

trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3;

ARK. R. CRIM. P. 28.1(b).

17. *Newman v. State*, 2014 Ark. 7, at 29, 2014 WL 197789, at 15. Newman's conviction and sentence had been affirmed by the Arkansas Supreme Court in *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

18. A significant problem in the ultimate determination of Newman's competence at the time of trial arose because of post-trial litigation in which he established that the Arkansas State Hospital psychologist who evaluated his claim of lack of fitness to proceed to trial had "incorrectly scored the test he administered to Newman, resulting in a higher IQ score; used improper tests to determine Newman's competency; and improperly administered Newman's tests." *Newman v. State*, 2009 Ark. 539, *3, 354 S.W.3d 61, 64 (2009), citing *Newman v. Norris*, 597 F.Supp.2d 890, 895 (W.D. Ark. 2009). Based on the admissions of error by the evaluating psychologist, the Arkansas Supreme Court, on remand from the federal habeas court, re-invested jurisdiction in the state circuit court to consider Newman's petition for writ of error coram nobis based on his claim that he was incompetent to proceed at the time of trial and other claims based on the State's failure to disclose evidence arguably favorable to the defense. 2009 Ark. at *18, 354 S.W.3d at 71. On appeal from denial of relief by the circuit court, the Arkansas Supreme Court held in an unpublished opinion that Newman's "cognitive deficits and mental illnesses" had rendered him incompetent for trial and reversed his conviction and sentence and remanded the case for new trial. *Newman v. State*, 2014 Ark. 7, 29, 2014 WL 197789, at 15.

19. *Newman v. State*, 2014 Ark. 7, at 9–12, 2014 WL 197789, at 5–7. The Arkansas Supreme Court's opinion on its order granting Newman's motion to reinvest jurisdiction in trial court to permit litigation of petition for writ of error coram nobis includes a comprehensive recitation of the post-conviction litigation in the case. For a discussion of the significant facts in the diagnosis of Newman's mental impairment and legal consequences, *see id.* at 14–29, 2014 WL 197789, at 8–15.

20. *Newman v. Cottrell*, 2016 Ark. 413, at 5–7, 503 S.W. 3d 74, 78–79.

21. *Id.* at 8, 503 S.W.3d 74 at 79 (holding that "because, the period during when Newman was not competent to stand trial is excludable for purposes of calculating speedy-trial," he could not demonstrate a violation of the 12 month rule for bringing cases to trial); *see* ARK. R. CRIM. P. 28.1(b), *supra* note 16; ARK. R. CRIM. P. 28.3(a) (providing that "The period

The *Davis* and *Newman* cases reflect problems of delay inherent in the criminal process attributable to issues of mental impairment that often afflict individuals accused of committing crimes. The primary function of the criminal justice system is the determination of responsibility for the commission of criminal offenses and imposition of appropriate punishment, yet issues of mental impairment in the criminal law complicate those objectives by interposing considerations that make attainment of these objectives more difficult and results often less clear.

The question of an accused's fitness for trial due to alleged mental impairment often serves as a barrier to the process of making determinations as to guilt or punishment.²² Once the accused, the defense counsel,²³ or the prosecuting attorney²⁴ gives notice that the accused intends to rely on mental impairment as a defense to the charge, or that their fitness to proceed with trial will be challenged,²⁵ Section 5-2-305(a) of the Arkansas Criminal Code requires the trial court to suspend the proceedings and order a mental evaluation of the defendant.²⁶ The revision of the mental examination process authorized by Section 5-2-305 now bisects the forensic examination. A finding that the defendant is impaired and not fit to be tried effectively serves to preclude a separate forensic examination²⁷ to assess whether the defendant was insane at the time of the commission of the offense charged,²⁸ unless the defense expressly requests that the latter examination proceed.²⁹

of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial. . . .”

22. For instance, an extended period of impairment rendering the accused unfit to proceed to trial may delay the proceedings for such a long time that the ability of either the prosecution, or the defense, to produce necessary evidence will be compromised; ARK. CODE ANN. § 5-2-310(c)(2) (Repl. 2013) (authorizing the trial court to dismiss the charge in the event a defendant initially found unfit for trial becomes competent if it finds “that it would be unjust to resume the criminal proceeding”).

23. ARK. CODE ANN. § 5-2-304(a) (Repl. 2013).

24. *Id.* § 5-2-305(b)(1) (Repl. 2013) (the court may also act, *sua sponte*).

25. *Id.* § 5-2-304(a) (Repl. 2013).

26. *Id.* § 5-2-305(a) (Repl. 2013).

27. *Id.* § 5-2-305(a)(2)(A) (providing that “[t]he fitness-to-proceed examination, and the criminal responsibility examination and request for an opinion on the defendant’s criminal responsibility, are two distinctly different examinations”); see J. W. Looney, *The Arkansas Approach to Competency to Stand Trial: “Nailing Jelly to a Tree,”* 62 ARK. L. REV. 683, 718–19 (2009) (recommending that dual purpose examination orders, requiring evaluation of both mental state for fitness and sanity determinations, should not be used for numerous reasons).

28. *Id.* § 5-2-312 (Repl. 2013) (setting out the Arkansas lack of capacity, or insanity, affirmative defense). Section 52-312 has been amended by Act 472, 91st General Assembly, Regular Session 2017, which redesignated the affirmative defense as *lack of criminal responsibility*, consistent with the inclusion of that designation in Section 5-2-301(14) of the

However, the Arkansas Criminal Code arguably contains inconsistent provisions relating to the authority of the circuit court to consider whether the evidence available to the prosecution is sufficient to otherwise support the unfit accused's conviction on the offense charged. Section 5-2-302(b) expressly bars the court from proceeding with a trial that would include requiring a finding of factual guilt before ordering an acquittal based on the accused's mental state.³⁰ Section 5-2-313(a) authorizes the trial court to enter an acquittal based on mental state when the accused is fit, or has regained fitness, to proceed to trial.³¹ However, Subsection 313(b) authorizes the trial court to make a factual determination of the impaired accused's guilt and order an insanity acquittal even when the accused has not asserted that defense, even though he is presumably fit to make the decision with respect to relying on the insanity defense.³²

Problems of delay resulting from mental impairment arise in different stages of the criminal process. The delay may occur in the initial determination of fitness, often due to strained forensic resources available to make fitness determinations.³³ It may also occur when the individual accused is found to suffer from impairment compromising their fitness to stand trial, when the prosecution process must give way to the need for forensic experts to restore the impaired accused to a state of sufficient comprehension and capability to be fit for trial.³⁴ With respect to the latter, the decision of the Arkansas Supreme Court in *State v. Thomas* testifies to one particularly difficult problem posed by impaired defendants—the disposition of criminal charges when the impairment is not susceptible to successful treatment.³⁵

amended statute. See notes 217 and 229, *infra*, for text and discussion of the *lack of criminal responsibility*, or insanity, defense and affirmative defenses, generally, under Arkansas law.

29. ARK. CODE ANN. § 5-2-305(a)(2)(B) (Repl. 2013) (“The fitness-to-proceed examination and the criminal responsibility examination may be done at the same time only if the defendant simultaneously raises the issue of the defendant’s fitness to proceed and files notice that he or she intends to rely upon the defense of mental disease or defect.”).

30. *Id.* § 5-2-302(a) (2001).

31. *Id.* § 5-2-313(a) (1987).

32. *Id.* § 5-2-313(b).

33. *Id.* § 5-2-305(a)(2)(B) (Repl. 2013) (“The fitness-to-proceed examination and the criminal responsibility examination may be done at the same time only if the defendant simultaneously raises the issue of the defendant’s fitness to proceed and files notice that he or she intends to rely upon the defense of mental disease or defect.”). See ARK. R. CRIM. P. 28.1, *supra* note 16; see, e.g., *Carmago v. State*, 346 Ark. 118, 126-27, 55 S.W.3d 255, 261-62 (2001) (rejecting speedy trial dismissal claim based on delay in resolving fitness issue, holding this delay is excludable period under Rule 28.3(a)); *Scott v. State*, 337 Ark. 320, 323-25, 989 S.W.2d 891, 892-93 (1999); *Brawley v. State*, 306 Ark. 609, 816 S.W.2d 598 (1991) (discussed in *Scott*).

34. *State v. Thomas*, 2014 Ark. 362, 439 S.W.3d 690.

35. *Id.*

The focus of this article is the *Thomas* court's failure to address the proper remedy when the trial court finds that an impaired defendant cannot be restored to fitness to proceed within a reasonable period of time.

II. THE REQUIREMENT THAT AN ACCUSED BE COMPETENT, OR FIT, TO STAND TRIAL

A criminal defendant suffering from a mental disease or defect which renders him incapable of assisting his counsel in his defense, or unable to appreciate the proceedings in which he finds himself, cannot be tried, sentenced, or convicted as a matter of due process under the Fourteenth Amendment.³⁶ When an accused lacks competence or fitness³⁷ for trial, the trial court may direct state mental health authorities to attempt to restore competence so the criminal case may proceed.³⁸ Section 5-2-310(a)(1)(A) of the Arkansas Criminal Code precludes continuation of the proceedings when a defendant is determined to be unfit for trial:

If the court determines that a defendant lacks fitness to proceed, the proceeding against him or her shall be suspended and the court may commit the defendant to the custody of the Director of the Department of Health and Human Services for detention, care, and treatment until restoration of fitness to proceed.³⁹

Because significant numbers of individuals involved in the criminal justice system as defendants and inmates confined in prison suffer from

36. ARK. CODE ANN. § 5-2-302 (2001) (recognizing the constitutional due process protection afforded by the Fourteenth Amendment).

37. *Id.* (using the word "fitness" rather than "competence" or "competency").

38. *Id.* § 5-2-310(a)(1)(A) (Repl. 2016); *see supra* note 22 (explaining the significance of Ark. Code Ann. § 5-2-310).

39. *Id.* § 5-2-310(a)(1)(A) (emphasis added). Under prior state law, the fitness decision was committed to a jury impaneled to determine whether the accused was "insane" prior to trial, permitting commitment for restoration of his mental state in order to then proceed with the trial, as the court explained in *Forby v. Fulk*, 214 Ark. 175, 178, 214 S.W.2d 920, 922 (1948). The court denied the accused's petition for writ of prohibition to bar trial on his guilt until a separate jury found him sane and fit to proceed to trial. Instead, it concluded that the process was controlled by Initiated Act No. 3 of 1936, which provided that the trial jury could consider the defendant's sanity at the time of trial as a defense to the charge. It explained:

The purpose of the act was not to deprive the jury selected and empaneled to determine the guilt or innocence of the defendant, from also passing on the fact question as to defendant's sanity at the time of trial or when the crime was committed, if made an issue.

Id. at 181, 214 S.W.2d at 923.

mental disorders, the problems posed by mental impairment are substantial. Consider the finding reported by the Department of Justice:

According to a report from the Council of State Governments Justice Center, funded in part by the Office of Justice Programs' (OJP) National Institute of Justice (NIJ), 16.9 percent of the adults in a sample of local jails had a serious mental illness. That's three to six times the rate of the general population. And while the serious mental illness rate was 14 percent for men, it was 31 percent for women. If these rates were applied to 13 million jail admissions reported in 2007, the study findings suggest that more than two million bookings of a person with a serious mental illness occur *every year* (emphasis added).⁴⁰

A. Restoration of Fitness, Generally

Once a trial court has concluded that the criminal defendant suffers from an impairment sufficient to compromise their ability to comprehend the nature of the proceedings or assist counsel in the preparation and presentation of the defense, the proceedings must typically be held in abeyance.⁴¹ Suspension of the proceedings affords mental health professionals the opportunity to engage in therapeutic action designed to restore competence, or fitness, to proceed in the case.⁴²

In some cases, restoration may be accomplished through therapies that do not involve reliance on medication. Some temporary impairment may be addressed simply by the confinement of an incompetent individual charged with a crime in a hospital regimen. In such a hospital regimen, imposition of a schedule or contact with others serves to reorient the accused, to alleviate the accused's ongoing mental illness, and/or to respond to an accused's psychotic episode. In contrast, impairment resulting from mental defect, whether that described by Subsections (ii) or (iii),⁴³ would appear to be beyond

40. *Addressing Mental Illness in the Criminal Justice System*, UNITED STATES DEPARTMENT OF JUSTICE (Dec. 1, 2009), <https://www.justice.gov/opa/blog/addressing-mental-illness-criminal-justice-system>.

41. One alternative to proceeding with prosecution lies in the dismissal of charges, an option that prosecutors might elect as an option when the offenses charged are rather minor, or involve no injury to others or significant damage to property, or when proof of the offense charged might be particularly difficult in light of the evidence available to the prosecution. Otherwise, the proceedings will be stayed pending resolution of the attempt to restore the accused to fitness. However, the Criminal Code recognizes that certain matters, such as claims of insufficiency of the charging instrument, violation of the statute of limitations, prior jeopardy, or "any other ground that the court deems susceptible of fair determination" without the personal participation of the defendant may be considered with defense counsel's representation prior to trial. ARK. CODE ANN. § 5-2-311.

42. *Id.* § 5-2-310 (Repl. 2016).

43. *Id.* § 5-3-301(5)(A)(ii), (iii).

restoration because it is typically not amenable by treatment with conventional drug therapies.

For many, perhaps most, mentally ill defendants, the restoration process will necessarily involve treatment with psychoactive drugs. Psychopharmacology is an important therapeutic tool available to mental health professionals in the treatment of mental illness, and significant litigation has focused on the respective interests of the prosecution and defendants who refuse voluntary administration of these medications.⁴⁴

The restoration process may raise issues relating to administration of psychoactive medications over the accused's objections. Because the incompetent accused has a liberty interest recognized by the Supreme Court in *Washington v. Harper*,⁴⁵ the question of whether forcible medication of an individual accused, but not yet convicted of an offense, is appropriate is a matter not always easily answered. In *Harper*, the inmate had been convicted and had consequently suffered a loss of liberty upon being incarcerated.⁴⁶ A different test for the involuntary administration of psychoactive medications applies when the individual is being evaluated and treated for restoration of fitness to stand trial; however, because such individuals have not been convicted of the offense charged, they have not forfeited any liberty interest due to the fact of their conviction and consequent incarceration.

In *Riggins v. Nevada*,⁴⁷ the Supreme Court implicitly upheld the forced medication of an accused charged with capital murder. The Court found that forced medication of an accused person did not necessarily violate due process and that his liberty interest could be overcome by an "essential" or "overriding" state interest.⁴⁸ It reversed his conviction, however, because the state trial court's medication order did not indicate that it had properly considered Riggins' liberty interests in ordering the involuntary administration of psychoactive drugs, and had not taken into consideration whether less intrusive means might be available to restore his competence for trial.⁴⁹

44. See e.g., note 58, *infra*, for cases addressing the issue of forced medication to render death row inmates competent for execution.

45. *Washington v. Harper*, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."). There, the Court upheld the authority of state corrections officials to forcibly medicate a mentally ill inmate whose dangerous behavior threatened the security of the institution upon agreement of a psychiatrist, psychologist, and institutional official who were not immediately involved in the inmate's treatment that introduction of psychoactive medication was in the inmate's medical interest.

46. *Id.* at 222 ("The extent of a prisoner's right under the Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement.").

47. *Riggins v. Nevada*, 504 U.S. 127 (1992).

48. *Id.* at 134-138.

49. *Id.*

Finally, in *Sell v. United States*,⁵⁰ the Supreme Court announced a four-part test for assessing when involuntary medication with psychoactive drugs may be appropriate in the attempt to restore an incompetent accused to fitness for trial.⁵¹ The test requires the trial court to consider: (1) whether “important governmental interests are at stake”;⁵² (2) whether “involuntary medication will significantly further those concomitant state interests”;⁵³ (3) whether “involuntary medication is necessary to further those interests”;⁵⁴ and (4) whether “administration of the drugs is medically appropriate, i.e., in the patient’s best medical interest in light of his medical condition.”⁵⁵ Only when the trial court can draw positive conclusions from the record is forced medication over the accused’s objection permissible. In *Sell*, the Court remanded for a determination of whether the evidence supported a conclusion that the governmental interests were sufficiently great in light of both his lengthy history of mental illness, apparent lack of dangerousness, and the potential adverse consequences that administration of the drugs may pose for the accused’s ability to assist counsel in presentation of his defense at trial.⁵⁶

The involuntary administration of psychoactive drugs to restore a convicted capital defendant’s competence for execution represents another significant question in the competence equation.⁵⁷ This issue is unrelated to the problems posed by the decision in *Thomas*, but remains a significant unresolved constitutional question that reflects the very difficult problem of addressing profound mental illness within the criminal justice system.⁵⁸

50. *Sell v. United States*, 539 U.S. 166 (2003).

51. *Id.* at 180–181.

52. *Id.* at 180 (emphasis in original).

53. *Id.* at 181 (emphasis in original).

54. *Id.* (emphasis in original).

55. *Id.* (emphasis in original). In *United States v. Curtis*, 749 F.3d 732, 737–38 (8th Cir. 2014), the Eighth Circuit remanded a medication order to the trial court to consider whether the medication was in the accused’s medical interests.

56. *Sell*, 539 U.S. at 184–86.

57. In *Ford v. Wainwright*, 477 U.S. 399, 410 (1986), the Court held that the Eighth Amendment barred the execution of an incompetent mentally ill inmate in a plurality opinion. Justice Powell, concurring to provide the critical fifth vote, set the standard for competence for execution in terms of the inmate’s comprehension that he would be executed and the reason for the execution. *Id.* at 421.

58. The Supreme Court has yet to determine whether the involuntary medication of an impaired inmate to restore competence for execution can be justified under Eighth Amendment and requirement for due process. Two state supreme courts have rejected forced medication as violative of their state constitutions’ protections, Louisiana, in *State v. Perry*, 610 So.2d 746, 757 (La. 1992), and South Carolina, in *Singleton v. State*, 437 S.E.2d 53, 61 (S.C. 1993). The Arkansas Supreme Court upheld involuntary medication of a mentally ill, psychotic inmate in *Singleton v. Norris*, 338 Ark. 135, 138–39, 992 S.W.2d 768, 770 (1999), concluding that the motivation for the medication was medical treatment and not restoration of competence for execution and that the latter was collateral to the justified administration of

B. The Consequence of Failed Restoration Efforts: *State v. Thomas*

When the attempt to restore the accused to a state of fitness or competence to proceed to trial is unsuccessful, the trial court is placed in the somewhat awkward position of determining what disposition of the proceedings is appropriate in light of the due process requirement that the incompetent defendant not be forced to endure trial. In cases where the disease or defect proves so substantial that restoration of competence within a reasonable period of time is not likely, indefinite confinement for treatment amounts to a deprivation of due process, as the United States Supreme Court held in *Jackson v. Indiana*.⁵⁹ At some point, dismissal of the pending criminal charges is required to permit recourse to other devices for treatment or long-term care of the mentally-impaired individual, such as civil commitment in state or private mental health facilities, or release of the individual into the community if determined to no longer be violent or a danger to himself or others.⁶⁰

In *State v. Thomas*,⁶¹ the trial court ordered the prosecution against Thomas dismissed after uncontroverted testimony at the hearing on his motion to dismiss that Thomas could not be restored to the competency, or fitness, necessary for the criminal case to proceed to trial.⁶² Under Arkansas law, a conclusion that an impaired defendant cannot be restored to fitness must be communicated to the trial court within the ten-month period of time authorized for mental health professionals to make the necessary decision that competence restoration was not possible.⁶³ The State appealed the trial

the medication and holding that the petitioner procedurally defaulted his claim of incompetence for execution. See *Singleton v. Norris*, 319 F.3d 1018, 1026 (8th Cir. 2003) (deferring to state court's reliance on *Washington v. Harper* in determining forced medication appropriate due to petitioner's dangerousness while confined and declining to order federal habeas relief).

59. *Jackson v. Indiana*, 406 U.S. 715, 738–39 (1972).

60. *Id.* at 721. The *Jackson* Court noted that federal courts had routinely held:

These decisions have imposed a 'rule of reasonableness' upon §§ 4244 and 4246. Without a finding of dangerousness, one committed thereunder can be held only for a 'reasonable period of time' necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future. If the chances are slight, or if the defendant does not in fact improve, then he must be released or granted a §§ 4247-4248 hearing.

61. *State v. Thomas*, 2014 Ark. 362, 439 S.W.3d 690.

62. *Id.* at 1–3, 439 S.W.3d at 691–92.

63. ARK. CODE ANN. § 5-2-310 (Repl. 2016) provides, in pertinent part

(b)(1) Within a reasonable period of time, but in any case within ten (10) months of a commitment pursuant to Subsection (a) of this section, the department shall

court's dismissal order and the Arkansas Supreme Court addressed the problem of irreparable impairment resulting in lack of fitness to proceed.⁶⁴

Thomas had been found unfit, or incompetent, to be tried and after extensive examination by the forensic team at the Arkansas State Hospital ("ASH"), ASH concluded that he would never be restored to competence.⁶⁵ Following the hearing, the trial court ordered the second-degree battery and second-degree assault charges dismissed.⁶⁶ Ironically, those charges arose from an incident occurring at the State Hospital while Thomas had been confined for fitness evaluation ordered in another criminal case.⁶⁷ He attacked the forensic psychiatrist conducting the evaluation.⁶⁸

The examining psychologist at ASH testified he "did not believe that Thomas could be restored to competency."⁶⁹ His testimony was supported by that of the defendant's therapist at an inpatient mental-health facility, who explained that:

Thomas was placed at Dayspring pursuant to a five-year civil commitment entered in 2009, [and] that Thomas was unfit to stand trial because he could not effectively assist his attorney with his defense. He specifically noted that Thomas was unable to consistently describe the incident that caused the charges to be filed.⁷⁰

Based on the uncontroverted evidence, the special judge ordered the case against Thomas dismissed after counsel briefed and argued the circuit court's authority to order dismissal under Section 5-2-310(c)(2).⁷¹ The State

file with the committing court a written report indicating whether the defendant is fit to proceed, or, if not, whether:

(A) The defendant's mental disease or defect is of a nature precluding restoration of fitness to proceed; and

(B) The defendant presents a danger to himself or herself or to the person or property of another.

64. The appeal in the case was brought by the State, attacking the decision of Special Judge William O. James, a highly-experienced criminal defense attorney, appointed to hear the matter at the trial court level. *Thomas*, 2014 Ark. 362, at 3, 439 S.W.3d at 692. The supreme court accepted the appeal based on its jurisdiction under Rule 3(b) of the Arkansas Rules of Appellate Procedure—Criminal, and its finding that the issue raised involved "the correct and uniform administration of the criminal law," as required by Rule 3(d). *Id.*

65. *Id.* at 1, 439 S.W.3d at 691.

66. *Id.*, 439 S.W.3d at 691.

67. *Id.*, 439 S.W.3d at 691.

68. *Id.*, 439 S.W.3d at 691.

69. *Thomas*, 2014 Ark. 362, at 2, 439 S.W.3d at 691.

70. *Id.* at 2, 439 S.W.3d at 691.

71. *Id.*, 439 S.W.3d at 691.

gave notice of appeal pursuant to Rule 3 of the criminal appellate rules⁷² authorizing appeals by the prosecution in criminal actions.⁷³

The Arkansas Supreme Court granted the State's request for review,⁷⁴ finding that the issue met the standard for disposition under Rule 3(d), which provides that review is required to ensure "the correct and uniform administration of the criminal law."⁷⁵ On appeal, the Arkansas Supreme Court reversed the trial court, holding that the applicable statute, Section 5-2-310(c)(2),⁷⁶ did *not* empower a circuit court to order dismissal of a criminal prosecution until the accused had been restored to fitness to proceed.⁷⁷ The court focused on Section 5-2-310(c), which provides:

(c)(1) On the court's own motion or upon application of the department, the prosecuting attorney, or the defendant, and after a hearing if a hearing is requested, if the court determines that the defendant has regained fitness to proceed the criminal proceeding shall be resumed.

(2) However, if the court is of the view that so much time has elapsed since the alleged commission of the offense in question that it would be unjust to resume the criminal proceeding, the court may dismiss the charge.⁷⁸

Because the testimony unquestionably showed that Thomas had not—and in the opinion of the testifying forensic experts—could not, be restored to fitness within a reasonable time, the Arkansas Supreme Court's strict application of Subsection (c)(2) proved questionable.⁷⁹ The court recognized that the parties and trial judge had erroneously focused on this Subsection, explaining: "The plain language of subparagraph (c) involves only the situa-

72. ARK. R. APP. P. CRIM. 3.

73. The rule authorizes appellate review sought by the State from a disposition entered by the trial court in two different contexts. First, Subsection (a) authorizes interlocutory appeals from trial court orders suppressing physical evidence seized pursuant to a search or the accused's confession, Subsections (1) and (2), respectively, or holds evidence of a victim's prior sexual conduct admissible pursuant to Evidence Rule 411(c).

Second, the State may seek appellate review of a trial court ruling after disposition of the pending case when the circuit court's decision implicates an interpretation of controlling law arguably undermining the uniform application of criminal law in the state's courts, pursuant to section (b) of Rule 3.

74. *Thomas*, 2014 Ark. 362, at 3, 439 S.W.3d at 692 ("This court decides appeals brought by the State in criminal cases only when the issue is "narrow in scope" and involves the interpretation of law.").

75. *E.g.*, *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995). The Arkansas Supreme Court granted appeal, holding that the trial court erred in refusing to give the lesser-included offense instruction supported by the evidence to which the defense had objected.

76. ARK. CODE ANN. § 5-2-310 (Repl. 2016).

77. *Thomas*, 2014 Ark. 362, at 4, 439 S.W.3d at 692.

78. *Id.* § 5-2-310 (Repl. 2016).

79. *Thomas*, 2014 Ark. 362, at 2, 439 S.W.3d at 691.

tion in which a criminal defendant has regained his or her fitness to stand trial.”⁸⁰

III. THE CONSTITUTIONALLY-FLAWED DECISION IN *THOMAS*

The problem posed by *State v. Thomas* lies in the court’s interpretation of Section 5-2-310(c)(2),⁸¹ which wholly failed to recognize the due process implications in cases in which criminal defendants suffer from mental impairment, compromising their fitness for trial. The special judge, considering the uncontroverted testimony of Dr. Peacock of ASH, properly found that Thomas could not be restored to competence, or fitness for trial,⁸² within a reasonable period of time. Consistent with the Supreme Court’s decision in *Jackson v. Indiana*,⁸³ the trial judge ordered the case against Thomas dismissed, opening the way for his involuntary civil commitment to treat his mental illness, without the continuing threat of criminal trial looming.

A. The Error in Focusing on Subsection 310(c)(2)

The trial court, the parties, and the Arkansas Supreme Court all misdirected their attention to the text of Section 5-2-310(c), which expressly addresses situations in which the trial court is called upon to respond to the accused’s restoration to competence or fitness for purposes of standing trial. The court focused on Subsection (c), noting that this provision only applies in cases in which restoration has followed a finding of lack of fitness. In this sense, the court compounded the error which it recognized⁸⁴ was committed by the trial court, failing to determine whether the lower court’s actions could justifiably have been salvaged. The Arkansas Supreme Court said:

80. *Id.* at 5, 439 S.W.3d at 693.

81. The state supreme court explained its approach to statutory interpretation:

On appeal, we consider statutory interpretation de novo and give no deference to the circuit court’s interpretation. *State v. Martin*, 2012 Ark. 191, 2012 WL 1548076. The first rule of statutory construction is to construe a statute just as it reads, giving the words their ordinary and usually accepted meaning. *Smith v. Simes*, 2013 Ark. 477, 430 S.W.3d 690. In construing any statute, we place it beside other statutes relevant to the subject matter in question and ascribe meaning and effect to be derived from the whole. *State v. Colvin*, 2013 Ark. 203, 427 S.W.3d 635. Statutes relating to the same subject must be construed together and in harmony, if possible. *Id.*

82. *Id.*, 439 S.W.3d at 693.

83. *Jackson v. Indiana*, 406 U.S. 715, 739 (1975).

84. *Supra* note 80; *Thomas*, 2014 Ark. 362, at 5, 439 S.W.3d at 693.

Subparagraph (c)(1) establishes the due-process requirements for restarting a criminal proceeding after a defendant has been found incompetent to stand trial. It is only after the circuit court has found that a defendant has “regained fitness” that criminal proceedings may be resumed.⁸⁵ At that point the circuit court is empowered by subparagraph (c)(2) to abort the resumption of proceedings in the interest of justice.⁸⁶

Thus, the error committed by the trial court and the parties, all of whom looked to Subsection (c) for resolution, was aggravated by the Arkansas Supreme Court’s limitation of its review of the trial court’s order dismissing the criminal prosecution. That order was specifically based on the finding that Thomas could not be restored to fitness to be tried within a reasonable time. Subsection (c), however, only addresses the situation in which the accused has, in fact, been restored to fitness.

The trial court concluded that Dr. Peacock⁸⁷ was credible in reaching his expert opinion that Thomas could not be restored to fitness. Precisely because Thomas had not regained fitness and the uncontroverted expert testimony established that he could not be “restored to competency,”⁸⁸ the parties and the trial court both relied on a wholly inapplicable statutory provision in reaching their respective conclusions about the proper remedy.⁸⁹

Subsection (2) of Section 310(c), however, does afford the trial court authority to order dismissal of pending charges if it concludes that the passage of time involved in the restoration of fitness has compromised the defendant’s ability to mount his defense, compromising his right to fair trial.

B. The Scope of Section 5-2-310(b)(2)

Instead of looking to Subsection (c)(2) in assessing the correctness of the trial court’s order dismissing the proceedings in *Thomas*, the parties, trial court, and Arkansas Supreme Court should have shifted focus to the provi-

85. *Thomas*, 2014 Ark. 362 at 6, 439 S.W.3d at 693.

86. *Id.*, 439 S.W.3d at 693.

87. Assistant Professor of Psychiatry at the University of Arkansas for Medical Sciences. Dr. Peacock is a “forensic psychologist.” The distinction between forensic psychiatrists and forensic psychologists has essentially been discounted in matters arising under the Arkansas Criminal Code. *E.g.*, *Hubbard v. State*, 306 Ark. 153, 156-57, 812 S.W.2d 107, 110 (1991) (holding admission of clinical psychologist’s opinion and report substantially complied with requirement for *psychiatric* evaluation in Section 5-2-305). *See also* ARK. CODE ANN. § 16-86-103(a)(2) (authorizing mental evaluation of criminal defendant by licensed psychologist who has “completed or is currently participating in a formal postdoctoral fellowship program in forensic psychology” or “is approved by Department of Human Services to administer forensic examinations”).

88. *Thomas*, 2014 Ark. 362, at 2, 439 S.W.3d at 691.

89. *Accord* *State v. Davis*, 898 N.E.2d 281, 288 (Ind. 2008).

sion actually addressing the factual situation before the trial court. That provision is Subsection (b), which provides:

(b)(1) Within a reasonable period of time, but in any case within ten (10) months of a commitment pursuant to Subsection (a) of this Section, the department shall file with the committing court a written report indicating whether the defendant is fit to proceed, or, if not, whether:

(A) The defendant's mental disease or defect is of a nature precluding restoration of fitness to proceed; and

(B) The defendant presents a danger to himself or herself or to the person or property of another.

(2)(A) The court shall make a determination within one (1) year of a commitment pursuant to Subsection (a) of this Section.

(B) Pursuant to the report of the department or as a result of a hearing on the report, if the court determines that the defendant is fit to proceed, prosecution in ordinary course may commence.

(C) If the defendant lacks fitness to proceed but does not present a danger to himself or herself or to the person or property of another, the court may release the defendant on conditions the court determines to be proper.

(D) If the defendant lacks fitness to proceed and presents a danger to himself or herself or the person or property of another, the court shall order the department to petition for an involuntary admission.⁹⁰

When the accused is found to lack fitness for trial or is incompetent, and restoration cannot be accomplished within a reasonable period of time, as determined within the one year period set by the General Assembly in Subsection (2)(A), the trial court's options are set out in Subsections (b)(2)(C) and (b)(2)(D).⁹¹ Otherwise, if the accused's competence or fitness, has been restored while in the custody of the state hospital, the trial court may proceed with the trial.⁹²

The statute authorizes the circuit court to act if the unfit or incompetent accused cannot be restored to fitness in the opinion of the Department of Human Services, based on its finding concerning the accused's danger to

90. ARK. CODE ANN. § 5-2-310(b) (Repl. 2016).

91. *Id.*

92. *Id.* § 5-2-310(c)(1).

himself or herself, other persons, or their property.⁹³ When the evidence results in a finding that the accused does pose a danger, the trial court should order the Department to petition for the accused's involuntary admission to the state hospital for evaluation and treatment.⁹⁴ If the court finds that the accused poses no danger, then it is authorized to order the accused's release on "conditions it finds to be proper."⁹⁵

What the statute does not authorize is the dismissal ordered by the circuit court in *Thomas*,⁹⁶ resulting in the question of statutory interpretation controlling the Arkansas Supreme Court's decision. The power to dismiss the prosecution based on the finding that continuing the case to trial would be "unjust"⁹⁷ once an impaired defendant has been restored to fitness is simply not included in the language, which addresses those situations in which the unfit accused cannot be restored to competence for trial.

The General Assembly's choice of language in Section 5-2-310 creates the irrational situation in which the trial court may conclude that the trial of an impaired defendant restored to competence may be *unjust*, warranting dismissal, while the impaired defendant who cannot be restored to competence will be left in limbo, based on the strict construction of the language. Moreover, the statute offers no guidelines as to what circumstances may render the continued prosecution of the defendant who is restored to fitness *unjust*. The only prejudice that one might generally consider based on the need for the defendant to be held for an extended period for the restoration of fitness itself would be an inability to assist counsel in preparing the defense during the period of confinement in the state hospital while the treatment designed to restore him to competence takes place. It is also possible that the ability to investigate potential defensive theories would be compromised by the delay in restoring the impaired defendant to fitness so that he could assist counsel, including the death or disappearance of necessary witnesses or other loss of evidence important in developing or supporting a theory of defense.

There is also ambiguity in the language delineating the period for restoration of competence. The question arises because while the Department of Human Services must evaluate the incompetent accused's mental disease or defect to determine if fitness is unlikely within ten months of the trial court's order finding the accused not fit for trial, the statute does not expressly provide for continued confinement in ASH for a reasonable period of time to permit restoration.⁹⁸ Instead, once the Department communicates

93. *Id.* § 5-2-310(b)(2)(C)–(D).

94. *Id.* § 5-2-310(b)(2)(D).

95. *Id.* § 5-2-310(b)(2)(C).

96. *State v. Thomas*, 2014 Ark. 362 at 5, 439 S.W.3d 690, 693.

97. ARK. CODE ANN. § 5-2-310(c)(2) (Repl. 2016).

98. *Id.* § 5-2-310(b).

the finding that restoration is unlikely, the disposition of the case must be made by the trial court within twelve months from the initial commitment for a fitness determination.⁹⁹ This requirement suggests that additional time for restoration efforts is not authorized, consistent with the statutory language arguably requiring disposition within one year of the referral, under Subsection (b)(2)(A), but not necessarily reasonable for the purpose of the restoration effort. A proper interpretation of the statute would specifically recognize that the trial court must be informed of the Department's determination with respect to whether the impaired accused can be restored to fitness within a reasonable period of time, or cannot be restored, within ten months. The actual restoration process will almost certainly require additional time beyond the one-year requirement for the trial court's determination.

The Court's decision in *Jackson*, however, set no outside time limit for confinement of an incompetent accused for restoration.¹⁰⁰ Pursuant to a decision to remand the accused for an additional period of hospitalization under Section 310(b)(2)(A), the trial court should monitor the progress of the restoration process at the state hospital to ensure that confinement of the impaired defendant continues to be warranted, based on whether the Department's assessment continues to reflect expert opinion that restoration of fitness remains a reasonable prognosis. If there is no evidence of progress, or the Department alters its initial opinion with respect to the likelihood that restoration is feasible, the trial court should take action to prevent indefinite confinement, ordering dismissal of the criminal charges and release or involuntary civil commitment, as authorized by Section 5-2-310(b)(2)(C) or (b)(2)(D).

99. In *Campbell v. State*, 265 Ark. 77, 82, 576 S.W.2d 938, 942 (1979), the defendant appealed his conviction relying on an earlier version of Section 5-2-310, Ark. Stat. Ann. s 41-607(2) (Repl. 1977). He petitioned for relief because he had been confined in the state hospital for restoration of competence for a period of five years prior to being tried and convicted on a first-degree murder charge. *Id.*, 576 S.W.2d 938, 942. The court noted that "[t]he former section provides that any detention after one year from the date of admission be under normal civil commitment procedures." *Id.*, 576 S.W.2d 938, 942. In rejecting his claim for dismissal of the criminal case, the court observed the statute under which he was actually committed some three years prior to adoption of the one-year limitation in Section 41-607(2) did not limit the period of confinement for the purpose of restoration of competence to proceed. *Id.* at 83, 576 S.W.2d 938, 942. Campbell raised a claim of reliance on Section 41-102(4), which provided that a defendant charged with an offense committed prior to the effective date of the Arkansas Criminal Code could rely "on any defense to the prosecution governed by the provisions of the code." He takes the position that his election made s 41-607(2) applicable." *Id.* 576 S.W.2d 938, 942. The court rejected this novel argument, however, holding as to Campbell's five-year confinement that "[b]y no stretch of the imagination [ould] it be said that the provisions of this section are a defense to the prosecution of appellant." *Campbell v. State*, 265 Ark. 77, 83, 576 S.W.2d 938, 942 (1979).

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

The *Thomas* court could have concluded that the language used by the General Assembly simply failed to define a set of options for Arkansas trial courts that make sense, based on the authority given to a trial court's discretion to order dismissal of the prosecution against the accused who has been restored to fitness to prevent an *unjust* disposition of the charges. For instance, the trial court has discretion under Section 5-2-310(b)(2)(C) to order the release of an accused who *cannot* be restored to fitness, if the court finds that he does not present a danger to himself or to the "person or property of another."¹⁰¹ But, while the trial court may order release on "conditions the court determines to be proper,"¹⁰² the General Assembly provided no direction with respect to the trial court's exercise of discretion with respect to the pending criminal charges when restoration of fitness is found not to be possible. Instead, the statute provides that, if the trial court finds that the defendant does present a danger, "the court shall order the department to petition for an involuntary admission."¹⁰³ The statute does not expressly address the court's discretion to order dismissal of the pending criminal charges, however, if it finds that the defendant is not subject to restoration of fitness for trial, whether it orders his release or orders the department to petition for his involuntary admission to the state hospital.

Moreover, the statute fails to define the range of conditions that might be imposed when the trial court finds that the unfit defendant does not pose a danger to himself or others and is released. It could, in theory, mean that the range of conditions that can be imposed could include dismissal of the pending charges in the trial court's discretion. The express inclusion of the dismissal option with respect only to those defendants who have been restored to fitness suggests that omission of this option with regard to defendants who remain unfit was intended by the legislature. Another possibility is that the provision could be read as authorizing dismissal in cases that would otherwise proceed to trial, recognizing dismissal as an option for everyone other than those persons restored to fitness. The legislative intent could lie in recognition that those individuals who will continue to remain unfit and, consequently, beyond a determination of factual guilt, requires a different range of options because the accused will continue to suffer from the im-

101. ARK. CODE ANN. § 5-2-310(b)(2)(C) (Repl. 2016) authorizes the trial court to order the release of an impaired defendant who does not present a threat of danger:

(C) If the defendant lacks fitness to proceed but does not present a danger to himself or herself or to the person or property of another, the court may release the defendant on conditions the court determines to be proper.

102. *Id.*

103. *Id.*

pairment of their cognitive processes resulting from the mental illness or defect that has rendered them incompetent, or unfit, for trial.

What is clearly correct is that the resolution of the trial court's authority to dismiss could not be predicated on power delegated to it under Section 5-2-310(c)(2) because Thomas could not be restored to competence, based on the expert opinion of the testifying forensic experts. The lack of any directive for the trial court once the Director reports within the ten-month timeframe that the impaired defendant cannot be restored to fitness within a reasonable period of time creates the uncertainty about unlimited jeopardy that was the focus of the United States Supreme Court's decision in *Jackson v. Indiana*. Arguably, Subsections (b)(2)(C) and (b)(2)(D) could indicate that the General Assembly deliberately intended to leave those defendants who could not be restored to fitness for trial within a reasonable period of time in jeopardy indefinitely. If restoration was achieved at some point, their criminal cases could be restored to the active docket for trial. This approach, however, would result in indefinite jeopardy for impaired defendants not susceptible to restoration within a reasonable period of time. It could well mean that an impaired individual could be confined for life without ever having been found guilty of committing any offense at all.

IV. THE CONSTITUTIONAL REQUIREMENT OF *JACKSON V. INDIANA*

Section 5-2-310 of the Arkansas Criminal Code¹⁰⁴ addresses issues that the Supreme Court considered in *Jackson v. Indiana*. Because the Supreme Court analyzed Jackson's unlimited confinement until he might regain competence as implicating issues of equal protection and due process protected by the Fourteenth Amendment, Section 5-2-310 must be considered in light of those federal constitutional protections. Unfortunately, *Jackson's* broad pronouncements condemning the practice relied on by state officials in holding an impaired accused in jeopardy indefinitely were not accompanied by specific guidelines directing states for purposes of compliance with the constitutional mandate the Court's opinion presses. Nevertheless, consideration of the constitutional protection by the Arkansas Supreme Court in *Thomas* should have led the court to apply the state statute to comply with the constitutional findings of the *Jackson* Court.

A. Indefinite Commitment for Restoration and Due Process

The problem with the alternative explanation of legislative intent, that the General Assembly actually intended to leave unrestored impaired defendants without final disposition of their criminal cases, is absolutely con-

104. *Id.*

trary to the Court's reasoning in *Jackson*. In expressly condemning an unlimited period of time in jeopardy for those impaired inmates who cannot be restored to competency within a reasonable period of time, the Court held that with respect to confinement for restoration: "[D]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."¹⁰⁵

Thus, the indefinite commitment imposed upon Jackson violated due process because it did not bear a reasonable relation to the policy permitting an attempt to restore an incompetent defendant to competency when the prospects for restoration are "slim."¹⁰⁶ The *Jackson* Court held that indefinite commitment without reasonable prospect for restoration of competence, thus, violates due process: "[W]e also hold that Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process."¹⁰⁷

B. The Unresolved Question of Remedy

Even assuming that *Jackson's* general conclusion that unlimited commitment for restoration of competence fails on constitutional grounds,¹⁰⁸ one might expect that the Court would have addressed the parameters of its poli-

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

106. *Id.* at 732. (The Court noted that federal courts had consistently concluded that indefinite commitment of defendants who could not be restored to competence would violate due process), e.g., *United States v. Curry*, 410 F.2d 1372 (4th Cir. 1969); *United States v. Walker*, 335 F.Supp. 705 (N.D. Cal. 1971); *Cook v. Ciccone*, 312 F.Supp. 822 (W.D. Mo. 1970); *United States v. Jackson*, 306 F.Supp. 4 (N.D. Cal. 1969); *Maurietta v. Ciccone*, 305 F.Supp. 775 (W.D. Mo. 1969). See *In re Harmon*, 425 F.2d 916 (1st Cir. 1970); *United States v. Klein*, 325 F.2d 283 (2d Cir. 1963); *Martin v. Settle*, 192 F.Supp. 156 (W.D. Mo. 1961); *Royal v. Settle*, 192 F.Supp. 176 (W.D. Mo. 1959).

Similarly, in *Jackson v. Indiana*, 406 U.S. 715, 735-736 (1972), the Court referenced two cases reaching the same conclusion that indefinite confinement of an unconvicted accused who cannot be restored to competence violates constitutional protections. In *United States ex rel. Wolfersdorf v. Johnston*, 317 F.Supp. 66, 68 (S.D.N.Y. 1970), the court ordered the release of an 86-year-old defendant who had been committed for twenty years without being restored to competence to stand trial on murder and kidnapping charges, finding that his confinement violated both the prohibition of cruel and unusual punishment and due process. Likewise, in *People ex rel. Myers v. Briggs*, 263 N.E.2d 109, 113 (Ill. 1970), the Illinois Supreme Court held that a profoundly deaf defendant should be released from custody unless procedures could be provided that would afford him "such opportunity as may be necessary should be allowed for communication to him of the testimony of the witnesses to insure him a full and fair exercise of his legal rights."

107. *Jackson*, 406 U.S. at 731.

108. *Id.*

cy in formulating specific rules designed to protect impaired individuals, whom restoration of competency within a reasonable period of time simply would not be a viable option. In one sense, this might have been wise because the Court might not have anticipated the development of more effective psychoactive drugs providing relief from the symptoms of major psychiatric and psychological disorders that has, in turn, offered greater hope for restoration of fitness in a reasonable period of time for many impaired defendants.¹⁰⁹

Jackson left unanswered two significant questions.¹¹⁰ First, the decision recognized the need to provide an option for restoration of competence for impaired individuals charged with criminal offenses.¹¹¹ But, the Court failed to draw a line with respect to how long this process could constitutionally take, other than to hold that for those who cannot be restored, indefinite commitment, or confinement, was not a constitutionally acceptable practice.¹¹² Instead, the Court specifically declined to adopt an arbitrary time frame, explaining: “In light of differing state facilities and procedures and a lack of evidence in this record, we do not think it appropriate for us to attempt to prescribe arbitrary time limits.”¹¹³

Second, with respect to those individuals for whom restoration of competence was not a realistic option—for whom prospects for restoration were “slim”—it did not offer a required remedy to address the constitutional concern with the ultimate disposition of their criminal cases.¹¹⁴

1. The Constitutionally-Acceptable Time Frame for Restoration

The *Jackson* Court did not provide a more specific period of time during which the impaired accused could be committed or confined for the purpose of restoration of competence, or fitness, for trial.¹¹⁵ Instead, in squarely addressing the issue of indefinite commitment, the Court held:

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 commit-

109. *See supra* Part I.A.

110. *Jackson*, 406 U.S. at 715

111. *Id.* at 735.

112. *Id.* at 731.

113. *Id.* at 738.

114. *Id.* at 715.

115. *Id.*

ment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.¹¹⁶

The opinion couches its due process concern in terms of “reasonable period,” “substantial probability,” and “foreseeable future.”¹¹⁷ None of these terms are sufficiently precise to provide definitive rules regarding the authority of the state to detain the accused and deprive him of liberty, making it difficult for the state to vindicate its valid interest in resolving the issue of the accused’s guilt on the pending charges.¹¹⁸

The imprecision of the holding in *Jackson* is evident in *State v. Davis*,¹¹⁹ an Indiana Supreme Court decision rendered in 2008, where the impaired inmate had spent four years in confinement without being restored to competence for trial.¹²⁰ She had been confined for a period of time longer than the maximum sentence of imprisonment that could have been imposed had she been convicted on the charge of criminal recklessness, based on her act of waving a knife in a bank after demanding that she be allowed to close her account.¹²¹ She apparently believed that her account was still active and grew agitated when told that it had been closed.¹²²

The *Davis* court did not rule that the four-year delay in proceedings while the defendant remained incompetent and could not be restored violated the requirement for a “reasonable period” of time for restoration, however.¹²³ Instead, it held that it was unfair to hold the impaired defendant for a period far longer than the potential period of incarceration upon a conviction.¹²⁴ The decision provides little guidance in applying *Jackson*’s time limit, other than in circumstances in which the sentencing options upon conviction are relatively short.¹²⁵

a. The restoration time-frame period under Section 5-2-310

A superficial reading of Arkansas law appears to address the first problem left open in *Jackson*¹²⁶ by arguably authorizing restoration efforts for

116. *Jackson*, 406 U.S. at 715 (emphasis added).

117. *Id.*

118. *See, e.g.*, *State v. Davis*, 898 N.E.2d 281 (Ind. 2008).

119. *State v. Davis*, 898 N.E.2d 281 (Ind. 2008).

120. *Id.*

121. *Id.* at 289.

122. *Id.* at 283.

123. *Id.* at 287 (stating, “[t]here is no relevant precedent in this state of whether there is an inherent denial of due process in holding pending criminal charges indefinitely over the head of one who will never have a chance to prove her innocence.”).

124. *Id.* at 289.

125. *See Davis*, 898 N.E.2d at 281.

126. *Jackson v. Indiana*, 406 U.S. 715, 735–736 (1972).

only a one-year period in Section 5-2-310(b)(2)(A).¹²⁷ The determination that must be made by the trial court within one year, however, involves only the following findings set out in Subsections (b)(1)(A) and (B):

(A) The defendant's mental disease or defect is of a nature precluding restoration of fitness to proceed; and

(B) The defendant presents a danger to himself or herself or to the person or property of another.¹²⁸

Two possible misinterpretations of the statutory scheme might flow from the language. First, one might conclude that the findings address only the process to be followed when ASH concludes that the impaired defendant cannot be restored to fitness and reports this conclusion to the trial court within the ten-month period provided by Subsection (b)(1). Subsection (b)(2) then requires the trial court to make a decision within a one-year period from the initial date of confinement for determination of restoration potential. Thus, the state hospital determination is apparently not binding on the trial court,¹²⁹ which, in theory, could reject that conclusion and find that the defendant's impairment does not preclude restoration—a conclusion arguably subject to the abuse of discretion standard on review. And, if there were conflicting evidence on this point, the trial court's discretionary decision would likely stand up on review.

The first unanswered question posed by a determination by the trial court not consistent with the state hospital determination is, quite literally, what happens in that event? Does the statute contemplate further confinement for purposes of restoration, or require some other action not expressly set out in Section 5-2-310?

The second possible misinterpretation involves the one-year limitation for action by the trial court. The one-year period does not expressly limit the period of time during which the impaired defendant can be treated for purposes of restoration. Rather, it merely requires that the trial court that ordered referral to the state hospital to restore competence, or to make the determination as to whether the mental disease or defect is "of a nature precluding restoration." Section 5-2-310(b)(2)(A) does not address the situation

127. *See, e.g.,* *Campbell v. State*, 265 Ark. 77, 82, 576 S.W.2d 938, 942 (1979) (holding under Ark. Stat. Ann. s 41-607, "that any detention after one year from the date of admission be under normal civil commitment procedures."); *see also* ARK. CODE ANN. § 5-2-310(b)(2)(A)—(B) (Repl. 2016).

128. *Id.* § 5-2-310(b)(2)(A)—(B) (Repl. 2016).

129. In contrast to the Arkansas statute requiring the trial court to make the decision with respect to possibility of restoration, under Indiana law, the director of the state mental hospital, not the trial court, is vested with the discretion to make the final determination that the impaired defendant cannot be restored to competence, or fitness, to proceed to trial. *State v. Coats*, 3 N.E.3d 528, 534–35 (Ind. 2014) (construing Ind. Code § 35-36-3-3).

in which the Department of Human Services advises the circuit court that the forensics experts at the state hospital believe that the impaired defendant can, in fact, be restored to fitness to proceed in a reasonable period of time.

If restoration of fitness is reasonably probable according to the expert testimony considered by the circuit court, and it makes that finding, then the only reasonable interpretation of legislative intent is that the impaired defendant can be committed for a further period of time in order to permit ASH professionals to make that attempt. But *Jackson* only permits this to happen only for a “reasonable,” yet undefined period of time. The time frames for the department’s report and circuit court’s decision provided in the statute hardly define this time frame as one year from the initial finding that the defendant is not fit to stand trial, although Arkansas decisions have held precisely that.

In *Stover v. Hamilton*,¹³⁰ the Arkansas Supreme Court explained the one-year time frame as an effort to comply with the Supreme Court’s decision in *Jackson*.¹³¹ However, *Stover* had been acquitted by the trial court by reason of insanity at the time of the offense,¹³² leading the Arkansas Supreme Court to also explain:

We hold that when the court terminated all proceedings against the appellant by its order of acquittal he was no longer subject to the sanctions of any criminal statutes. He has been effectively removed from the category of “unfit to proceed.” His status is as if he had never been charged with the crime upon which those proceedings were instituted. Therefore, confinement, after acquittal, should have been ordered pursuant to Ark.Stat. Ann. s 59-408. The trial court simply employed the wrong statute to do what it had the right to do under another statute.¹³³

The trial court’s acquittal of *Stover*, a defendant found to be unfit to proceed to trial, based on his lack of capacity,¹³⁴ or insanity, at the time of the offense was impermissible in light of Arkansas Criminal Code Section

130. *Stover v. Hamilton*, 270 Ark. 310, 604 S.W.2d 934 (1980).

131. *Id.* at 316, 604 S.W.2d at 937.

132. *Id.*, 604 S.W.2d at 937.

133. *Id.* at 315, 604 S.W.2d at 937.

134. ARK. CODE ANN. § 5-2-312 (Repl. 2013) defines the insanity defense as “lack of capacity” and provides:

(a)(1) It is an affirmative defense to a prosecution that at the time the defendant engaged in the conduct charged he or she lacked capacity as a result of mental disease or defect to:

(A) Conform his or her conduct to the requirements of law; or

(B) Appreciate the criminality of his or her conduct.

5-2-302(b). This provision bars termination of the criminal proceedings by acquittal when the accused is not competent to make a decision with respect to pleading insanity as a defense to the charge. Subsection 302(b) provides:

A court shall not enter a judgment of acquittal on the ground of mental disease or defect against a defendant who lacks the capacity to understand a proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect.¹³⁵

Thus, Arkansas decisions predicating the one-year limitation on restoration of competency on the fact that the impaired defendant has been acquitted before the commitment to the state hospital for restoration arise in the context of improper use of the trial court's acquittal authority.¹³⁶ Section 5-2-313(a), for instance, authorizes the trial court to acquit an accused based on mental illness or defect based on the reports of mental examinations by forensic experts, but limits the trial court's power to order an acquittal following a hearing on competence to cases in which the "defendant currently has the capacity to understand the proceedings against him or her and to assist effectively in his or her own defense."¹³⁷

The question of what limitation applies to the time frame for the attempt to restore the impaired defendant to fitness is not resolved by either the decision in *Jackson* or Section 5-2-310.¹³⁸ That the Arkansas statute leaves open the question of reasonableness is suggested by the decision in *Mauppin v. State*,¹³⁹ a prosecution for capital murder resulting in imposition of a death sentence. Mauppin was initially found unfit for trial in December 1985, after being evaluated by the ASH director.¹⁴⁰ The circuit court then ordered him committed to ASH for a period not to exceed one year, based on Section 41-607,¹⁴¹ the statute then in effect.¹⁴²

In December 1986, ASH reported that Mauppin remained unfit for trial, an assessment reaffirmed in February 1987.¹⁴³ After Mauppin was arrested and returned to the Arkansas Department of Correction for a parole violation, the State requested a re-evaluation in January 1988, which was grant-

135. *Id.* § 5-2-302(b) (2001). *See also infra* note 150 (discussion on impropriety of acquitting defendant whose lack of fitness compromised his ability to assert defense of insanity); *Mannix v. State*, 273 Ark. 492, 493-94, 821 S.W.2d 222, 222 (1981).

136. *Id.*

137. *Id.* § 5-2-313(a)(1) (1987).

138. *Jackson v. Indiana*, 406 U.S. 715, 721 (1972); ARK. CODE ANN. § 5-2-310. (Repl. 2016).

139. *Mauppin v. State*, 309 Ark. 235, 831 S.W.2d 104 (1992).

140. *Id.* at 235, 831 S.W.2d 104.

141. *Id.*, 831 S.W.2d 104.

142. *Id.* at 241, 831 S.W.2d at 106.

143. *Id.* at 241-42, 831 S.W.2d at 106-07.

ed.¹⁴⁴ He was not actually transported to ASH for the evaluation until nine months later, at which time ASH again concluded that Mauppin was not fit for trial.¹⁴⁵ The ASH report, however, did not indicate the forensic expert's conclusion as to whether Mauppin could be restored to fitness, or whether he posed a threat of danger to himself or others.¹⁴⁶

The State again moved for a fitness evaluation in March 1989.¹⁴⁷ Following another commitment order by the trial court, ASH concluded that Mauppin had regained competence for trial. The court set his trial date for October 1990,¹⁴⁸ just short of five years since Mauppin's original commitment for restoration of fitness.

Mauppin then argued that the circuit court had lost jurisdiction of the case when he was originally detained for thirteen months on the trial court's commitment order, from December 1985 until February 1987. In rejecting his claim for dismissal, the Arkansas Supreme Court explained that his commitment not only involved his restoration to fitness, but also was *possibly* necessitated by his need for medical treatment and recuperation because he had undergone brain surgery as a result of having shot himself in the head.¹⁴⁹

Alternatively, while expressly affirming the one-year limitation on commitment for restoration of fitness, ("the circuit court may not commit an accused for longer than one year for 'restoration of fitness to proceed'),¹⁵⁰ the Arkansas Supreme Court ruled that the extended period of confinement in the state hospital would not void a conviction based on Mauppin's illegal

144. *Id.*, 831 S.W.2d at 106-07.

145. *Mauppin*, at 242, 831 S.W.2d at 107.

146. *Id.*, 831 S.W.2d at 107.

147. *Id.*, 831 S.W.2d at 107.

148. *Id.* at 235, 831 S.W.2d 104.

149. *Id.* at 244-45, 831 S.W.2d at 108. In *Chadwell v. State*, 1985 WL 9527, *1 (Ark.), the Arkansas Supreme Court denied post-conviction relief, rejecting the petitioner's argument that the trial court lost jurisdiction once it ordered him committed to the state hospital for restoration of competence. It held that under Ark. Stat. Ann. s 41-607(3) (Repl. 1977), commitment for restoration "does not affect jurisdiction."

150. *Mauppin*, 309 at 244, 831 S.W.2d at 108. The issue of the one-year limitation on commitment for restoration of an accused's competence was addressed in other cases arising under Section 51-607, the predecessor to § 5-2-310; e.g., *Schock v. Thomas*, 274 Ark. 493, 496, 625 S.W.2d 521, 522 (1981) (the court adhered to the one-year limitation on commitment for restoration of the defendant's competency). The trial court had acquitted him prior to the order for confinement, based upon his impaired mental state. *Id.*, 625 S.W.2d at 522. The problem with the court's decision, however, is that the defendant could not have been acquitted by reason of insanity unless he had previously been competent to make a decision whether to demand jury trial and assert a mental state defense because the constitutional requirement for competence bars trial of an incompetent defendant. See ARK. CODE ANN. § 5-2-302(b), *supra* note 135 and accompanying text, and *Drope v. Missouri*, 420 U.S. at 170. See also *Stover v. Hamilton*, *supra* notes 130-133 and *Mannix v. State*, 273 Ark. 492, 493-94, 821 S.W.2d 222, 222 (1981) (following *Stover*).

detention.¹⁵¹ But the *Maupin* Court's analysis went further in explaining that the subsequent order for re-evaluation reflected a *common sense* reading of the statute by the trial court: "Common sense . . . contemplates a re-evaluation that later determines whether the defendant has regained fitness to proceed."¹⁵²

The suggestion that "common sense" can dictate an extended effort at restoration of fitness runs contrary to the one-year rule that has governed the Arkansas Supreme Court's approach to addressing the problem of lack of fitness for mentally impaired defendants.¹⁵³ However, it recognizes the difficulty in using arbitrarily-fixed limitations on mental treatment, which is often complicated by multiple and diverse symptoms, differing degrees of drug efficacy for individual patients, and necessity for gradual implementation of treatment options based on the diagnostic peculiarities presented by individual patients. In short, some impaired defendants may simply not be amenable to full restoration of fitness within the one-year framework, while a reasonable extended period for treatment would render them fit for trial. It would appear foolish to require an ultimate finding on prospects for restoration within one year, when the forensic expert responsible for treating the impaired accused opines that a reasonable additional period of time would be sufficient to complete the therapy and restore the accused's competence for trial.

The Court's pronouncements, however, have been tied to the statutory one-year limitation for the trial court's determination of whether the defendant's impairment cannot be successfully reversed.¹⁵⁴ Although this approach serves to provide a bright line boundary for commitment duration, it is a bright line that likely ignores the realities of mental health practice and requires rationalization by Arkansas courts when the boundary is breached in order to permit reasonable restoration efforts to reach a more accurate determination of whether they can succeed.

b. The "dangerousness" determination

The second question posed for the trial court necessitates only that it determine whether the impaired defendant "presents a danger to himself or herself or to the person or property of another."¹⁵⁵ An affirmative finding on that question would support involuntary commitment to the state hospital under the Arkansas statutes governing the hospitalization of mentally-

151. *Duncan v. State*, 309 Ark. 244, 831 S.W.2d at 108.

152. *Id.* at 245, 831 S.W.2d at 108–09.

153. ARK. CODE ANN. § 5-2-310(b)(2)(A) (Repl. 2016).

154. *Id.* § 5-3-310(b)(2)(A); *see supra* note 150.

155. *Id.* § 5-2-310(b)(1)(B).

impaired individuals not charged with criminal offenses.¹⁵⁶ The statutorily-defined standard for involuntary civil commitment requires a showing that the proposed patient suffers from a mental impairment and presents a threat of danger to himself or others.¹⁵⁷

Historically, the formula of proof of impairment and potentially dangerous has been consistently used for purposes of meeting constitutional requirements for depriving the impaired individual of his personal liberty.¹⁵⁸ The concern for infringement of liberty interests of those individuals *not* charged with offenses who are committed for mental health treatment has

156. *Id.* §§ 20-47-201 to 20-47-227. The involuntary commitment process is specifically set forth in Subsections 207-220. The trial court's authority to order the Department of Human Services to seek involuntary commitment of an impaired defendant not amenable to restoration efforts is set forth in Section 5-2-310(b)(2)(D), based on its finding that the accused is a danger to himself or herself or the person or property of another.

157. ARK. CODE ANN. § 20-47-207(c) provides:

(c) INVOLUNTARY ADMISSION CRITERIA. A person shall be eligible for involuntary admission if he or she is in such a mental condition as a result of mental illness, disease, or disorder that he or she poses a clear and present danger to himself or herself or others:

(2) As used in this subsection, "a clear and present danger to himself or herself" is established by demonstrating that:

(A) The person has inflicted serious bodily injury on himself or herself or has attempted suicide or serious self-injury, and there is a reasonable probability that the conduct will be repeated if admission is not ordered;

(B) The person has threatened to inflict serious bodily injury on himself or herself, and there is a reasonable probability that the conduct will occur if admission is not ordered; or

(C) The person's recent behavior or behavior history demonstrates that he or she so lacks the capacity to care for his or her own welfare that there is a reasonable probability of death, serious bodily injury, or serious physical or mental debilitation if admission is not ordered; and

(3) As used in this subsection, "a clear and present danger to others" is established by demonstrating that the person has inflicted, attempted to inflict, or threatened to inflict serious bodily harm on another, and there is a reasonable probability that the conduct will occur if admission is not ordered.

158. *See, e.g., Greenwood v. United States*, 350 U.S. 366, 370 (1956) (The Court focused only on the question of the propriety of commitment for a mentally disabled accused for purposes of restoration of competence.).

been foremost in the Supreme Court's decisions addressing this process.¹⁵⁹ For instance, in *Addington v. Texas*,¹⁶⁰ the Court found that the deprivation of liberty suffered by an involuntarily-committed individual is so substantial that the commitment decision must rest on "clear and convincing evidence," a higher standard of proof than the preponderance standard applicable in most civil actions.¹⁶¹

But, while dangerousness is a component of the formula for involuntary confinement for mental health treatment, evidence of dangerousness is not sufficient, without proof of continuing mental illness or defect, to warrant the loss of personal liberty, as the Court held in *Foucha v. Louisiana*.¹⁶² The *Foucha* Court held that an insanity acquittee could not be indefinitely held based on forensic expert opinion that he remained dangerous where state hospital officials had unsuccessfully contested the defendant's expert opinion that he was insane at the time of the offense at trial.¹⁶³ Following his acquittal by reason of insanity and return to the state mental hospital for evaluation, experts at the state hospital continued to find that Foucha did not suffer from a mental illness causing insanity.¹⁶⁴ Nevertheless, they did conclude that he would continue to constitute a threat to commit violence and sought to prevent his release.¹⁶⁵ The Court held that the threat of violence alone could not justify his continuing confinement in the state mental facility.¹⁶⁶

Ironically, in *Jones v. United States*, the Court held that post-acquittal confinement of the insane defendant for a period well in excess of the potential term of imprisonment he faced had he been convicted did not violate constitutional protections.¹⁶⁷ The majority reasoned that his acquittal based on insanity established that he had, in fact, committed a criminal offense, which demonstrated that he was both mentally ill and dangerous.¹⁶⁸ The offense upon which he had been charged and acquitted by reason of insanity

159. See, e.g., *Vitek v. Jones*, 445 U.S. 480, 491–92 (1980); *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (Commitment to a mental hospital is a "massive curtailment of liberty."); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (The "indisputable . . . social consequences . . . of involuntary commitment . . . require[] due process protection."); *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (Burger, C.J. concurring).

160. *Addington*, *supra* note 159, at 420–421, 433.

161. The *Addington* Court established the requisite burden of proof upon the State to constitutionally commit an impaired individual involuntarily for mental evaluation and treatment. *Id.* at 433. See *Jones v. United States*, 463 U.S. 354, 362 (1983) (confirming *Addington* rule).

162. *Foucha v. Louisiana*, 504 U.S. 71, 85–86 (1992).

163. *Id.* at 83.

164. *Id.* at 86.

165. *Id.* at 74–75.

166. *Id.* at 75–78.

167. *Jones v. United States*, 463 U.S. 354, 368–369 (1983).

168. *Id.* at 364.

was essentially shoplifting—he had attempted to steal a jacket from a department store.¹⁶⁹

Neither *Jones*, nor *Foucha*, directly address the issue of competence for trial.¹⁷⁰ Instead, these cases demonstrate the importance of the defendant's dangerousness as a consideration when an issue of mental impairment is raised in the context of a prosecution or, more precisely, its aftermath following conviction.¹⁷¹ The question that should be asked is why the trial court should be required under Section 5-2-310(b)(1)(B) to make a finding as to the incompetent defendant's dangerousness because dangerousness is not an element of the fitness equation under Section 5-2-302(a). The question of whether a defendant may be dangerous could be linked to an underlying mental state diagnosis, but it is not an issue with respect to the ability to understand the nature of the proceedings or to assist counsel in preparing and presenting a defense.¹⁷²

The impaired defendant's dangerousness *is* a factor in the disposition of the case once the trial court finds the defendant is unfit to proceed to trial.¹⁷³ If, in fact, he cannot be restored to competence within the one-year period suggested by a misreading of Subsection 310(b) or within a reasonable period of time, the question as to what disposition is appropriate is before the trial court.¹⁷⁴ Because involuntary commitment to ASH requires both a showing of mental impairment and dangerousness—meaning actual or threatened dangerous behavior to self or another¹⁷⁵—the obligation for the trial court to make a finding on this point could best be read as a threshold matter for involuntary civil commitment of the impaired accused, once a determination is made that restoration is not possible in the opinion of ASH forensic experts.¹⁷⁶

The restoration time frame and dangerousness issues that the trial court must consider under Section 5-2-310(b) should be considered in terms of the disposition of criminal actions when the individual charged suffers from a mental illness or defect compromising their fitness to proceed to resolution

169. *Id.* at 359.

170. *See Jones*, *supra* note 167, at 354; *see also Foucha*, *supra* note 162, at 71.

171. *Id.*

172. ARK. CODE ANN. § 5-2-302(a) (Repl. 2016).

173. *Id.* § 5-2-310(a)(1)(B) (Repl. 2016).

174. *Id.* § 5-2-310(b)(1)(B).

175. *Id.* § 20-47-207(c), *supra*, note 157, for text; also, *Jackson*, *supra* note 83, at 720–722 (Involuntary Admission Criteria).

176. *Id.* § 5-2-310(b)(2)(D). Subsection (D) provides:

If the defendant lacks fitness to proceed and presents a danger to himself or herself or the person or property of another, the court shall order the department to petition for an involuntary admission.

of the case.¹⁷⁷ Because some defendants suffer from impairment that will indefinitely, perhaps permanently, compromise the ability to proceed under the protections afforded by due process,¹⁷⁸ the significance of Section 5-2-310 lies in the criminal justice system's need to identify those individuals who are impaired and then accommodate the requirement of due process in providing for reasonable disposition of the criminal charges.

2. *The Remedy for Non-Restorable Incompetence in Light of Jackson*

Subsections 310(b)(2)(C) and (D) draw no definitive line as to disposition options afforded the circuit court, perhaps reflecting the lack of definition in the *Jackson* opinion itself. *Jackson* left open the question of how long the impaired defendant could be confined or committed for purposes of restoring him or her to competence¹⁷⁹ so that the proceedings could continue through resolution by trial or guilty plea or, in the rare case, by dismissal on motion of the prosecutor.

In *Jackson*, the Court declined to decide whether Jackson was entitled to relief from his continued confinement for restoration of competency, even though the majority noted: "Jackson has now been confined for three and one-half years on a record that sufficiently establishes the lack of a substantial probability that he will ever be able to participate fully in a trial."¹⁸⁰ Nonetheless, the Court concluded that the issue of remedy was not "ripe" for disposition because, in part, the state court had not passed on the issue of whether Jackson's criminal case should be dismissed based on the fact that restoration of his competence was improbable.¹⁸¹

Jackson argued that dismissal of the pending charges was appropriate because the evidence demonstrated that his mental impairment had effectively established a complete defense to the charges. The Court rejected his reliance on this claim in finding that the question of criminal responsibility for the offense was not resolved by proof of his incompetence to be tried, requiring remand to the Indiana courts for their application of state insanity law in the first instance.¹⁸²

The Court then noted that most claims relating to the continuing jeopardy effectively resulting from unlimited commitment for restoration of competence integrated Sixth Amendment speedy trial and Fourteenth

177. *Jackson*, 406 U.S. at 739.

178. *Id.* at 731 ("Indiana's indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process.").

179. *Jackson v. Indiana*, 406 U.S. 715, 740 (1972).

180. *Id.* at 738-739.

181. *Id.* at 739-740.

182. *Id.* at 739; *Id.* at 739 n. 26.

Amendment due process concerns, and observed that Jackson had not raised these grounds in the state courts.¹⁸³ Consequently, the case was remanded to the Indiana courts for initial consideration of Jackson's arguments.¹⁸⁴ Yet, the state courts did not provide the anticipated response after remand from the Supreme Court.

In the aftermath of *Jackson* and the lack of definitive guidance on the issue of dismissal as the remedy for unrestorable lack of fitness, the Indiana Supreme Court confronted it in *State v. Davis*.¹⁸⁵ The *Davis* court observed: "[N]early four decades after *Jackson* was decided we are squarely presented with the question the United States Supreme Court left unresolved."¹⁸⁶ It then framed the question presented and provided its answer:

Today we examine the question of whether it is a violation of fundamental fairness to hold criminal charges over the head of an incompetent defendant who will never be able to stand trial. The answer in this case is yes.¹⁸⁷

The time frame in *Davis* was particularly significant because the accused had been committed to the mental hospital for restoration of competence for a substantially longer period of time than the maximum sentence that could have been imposed upon her conviction.¹⁸⁸ Moreover, the court's answer proved to be somewhat less than definite precisely because the offense on which the defendant's fitness was necessitated was, in fact, a relatively minor offense.

The *Davis* court initially looked to the reasoning in *Jackson* that addressed the problem of delay in the competency restoration process. This problem was reflected in the Indiana Supreme Court's phrasing of the issue presented by *Davis* in contesting her continuing confinement in state mental facilities.¹⁸⁹ The *Davis* court read *Jackson* to say that once the determination has been made that there was no reasonable probability that the impaired accused can be restored to competence, the State was obligated to either proceed with involuntary civil commitment under the process applicable to individuals generally, or to dismiss the pending criminal charges.¹⁹⁰

183. *Id.* at 740.

184. *Id.* at 740-741.

185. *State v. Davis*, 898 N.E.2d 281, 287 (Ind. 2008).

186. *Id.* at 287.

187. *Id.* at 283.

188. *Id.* at 289-290, *see supra* notes 123-24.

189. *Id.* at 286-87 (citing *Jackson*, 406 U.S. at 730-731) (noting *Jackson*'s conclusion that indefinite commitment of incompetent defendant violated both due process and equal protection).

190. *Id.* at 286.

In fact, however, *Jackson* actually held that in the event the accused could not be restored to competence, “the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant,” not mentioning in this formulation any requirement that the criminal charges be dismissed.¹⁹¹ The difference in the *Davis* court’s reading of *Jackson* and the exact language in *Jackson* itself is particularly important because *Davis* addresses the prospect that the impaired defendant’s competence cannot be restored within a reasonable period of time from the perspective of the still-pending criminal prosecution.

The problem not expressly addressed in *Jackson*, but explained by the *Davis* court, lies in the greater interest the State may have in proceeding to trial when the charge is more serious, such as murder, than when the accused is charged with a less serious offense.¹⁹² *Jackson* had been charged with commission of two strong-armed robberies involving amounts of four and five dollars in the purses of the two women he robbed.¹⁹³ The State’s interest in prosecuting a robbery will likely fluctuate, depending upon the perpetrator’s actions in committing the offense—such as the degree or extent of physical force used or nature of threats made to the victim; the extent of the victim’s physical or psychic injuries; the character of the victim—such as an elderly or physically or mentally impaired victim, or the fact that the victim was a child; or evidence of the perpetrator’s character or criminal history.

The *Davis* court concluded that the appropriate remedy when the impaired accused cannot be restored to competence for purposes of proceeding with the prosecution to trial or other disposition is dismissal of the criminal charges, which could then be followed by involuntary civil commitment of the accused.¹⁹⁴ Any remedy short of dismissal would subject the accused to

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

192. *Davis*, 898 N.E.2d at 289–90. Similarly, the court noted a number of factors that might increase the State’s interest in prosecuting a case to conclusion other than the seriousness of the offense itself, typically when the evidence is necessary to establish a fact warranting enhanced punishment based on the specific nature of the offense, such as participation in a gang-related crime, use of a firearm in its commission, or subjecting the defendant to habitual punishment.

193. *Jackson*, 406 U.S. at 717. While robbery is not an insignificant felony, it is committed when the perpetrator uses any force against an individual in the process of committing a theft of their property. In the circumstance of a purse snatching it typically does not involve the same degree of personal injury to the victim as other major felonies, although the psychological impact may be significant, and infliction of physical injury is not unlikely in many instances with varying degrees of severity.

194. *Davis*, 898 N.E.2d at 289. The Arkansas statute authorizes the trial court to order the Department of Human Services to petition for the involuntary commitment of an individual whose mental disease or defect precludes restoration to fitness and who is dangerous to him-

the indefinite jeopardy that *Jackson* expressly condemned as a “denial of due process inherent in holding pending criminal charges indefinitely over the head of one who will never have a chance to prove his innocence.”¹⁹⁵

The *Davis* decision itself suggests that particular remedy when competence cannot be restored might be applicable only on the facts before the court there because the period of confinement for restoration had exceeded the potential sentence to which the accused could have been imposed upon conviction for the fourth-degree felony on which she had been charged.¹⁹⁶ In upholding the dismissal ordered by the trial court, the Indiana Supreme Court expressly ruled:

Because Davis’ pretrial confinement has extended beyond the maximum period of any sentence the trial court can impose, and because the State has advanced no argument that its interests outweigh Davis’ substantial liberty interest, we conclude it is a violation of basic notions of fundamental fairness as embodied in the Due Process Clause of the Fourteenth Amendment to hold criminal charges over the head of Davis, an incompetent defendant, when it is apparent she will never be able to stand trial.¹⁹⁷

The problem suggested by the narrow holding of the court is clear: it is far easier to consider dismissal of less serious charges than more serious ones.¹⁹⁸ Indeed, it was easier for the trial court to dismiss the charges against Davis when her confinement for restoration, of competence had already exceeded the statutory maximum to which she would have been exposed upon conviction.¹⁹⁹ It was also noted that while confined for restoration, she was entitled under state law to receive good time credits awarded while she was incarcerated.²⁰⁰

The *Davis* court’s approach reflects another problem. While the Indiana Supreme Court explained that courts have “inherent authority to dismiss criminal charges where the prosecution of such charges would violate a de-

self or herself or to the person or property of another. ARK. CODE ANN. § 5-2-310(b)(2)(D) (Repl. 2016).

195. *Jackson*, 406 U.S. at 740. The *Davis* court noted the concurrence with this reasoning by the Kentucky court in *Commonwealth v. Miles*, 816 S.W.2d 657, 659–660 (Ky. Ct. App.1991) (agreeing with the “implication” of *Jackson*, “that it would be a denial of due process to maintain criminal charges indefinitely against a defendant who never has a chance, because of his incompetency, to establish his innocence through a trial”) while noting that the court there also found that the facts in the case did not warrant application of this principle. *Davis*, 898 N.E.2d at 287, n.5 (Ind. 2008).

196. *Davis*, 898 N.E.2d at 289–290.

197. *Id.* at 290.

198. *Id.* at 289–290.

199. *Id.*

200. *Id.* at 289.

defendant's constitutional rights,"²⁰¹ it also noted that most courts ordering dismissal in instances of unrestorable incompetence have done so based on statutory or "court rule" authority.²⁰² Ironically, the Indiana court construed Section 5-2-310(c) of the Arkansas Criminal Code to give the trial court discretion to dismiss the pending criminal charges when the evidence supports its finding that the impaired defendant cannot be restored to fitness to proceed to trial.²⁰³ The court misread the statute, as the parties and trial court did in *Thomas*, because the statute actually only authorizes dismissal in cases in which the impaired defendant has been restored to fitness.

V. THE STATUTORY "GAP"

Not only did the *Thomas* court rest its holding on the incorrect reliance by the trial court and parties on Section 5-2-310(c)(2), it expressly found that Section 5-2-310 did not authorize the trial court to dismiss the pending criminal charges, stating: "[N]owhere in this Section is a circuit court given the authority to dismiss charges against an unfit defendant."²⁰⁴ Thus, in con-

201. *Id.* at 285.

202. *Davis*, 898 N.E.2d at 287–88. The court cited the operative statutes in Missouri, MO. ANN. STAT. § 552.020.11 (West 2002), and Montana, MONT. CODE ANN. § 46-14-221 (West 2007). The Missouri statute was amended effective in 2011 and the current section is 2; the statute provides for dismissal without prejudice to re-filing of charges in the event the impaired defendant regains competence. MO. ANN. STAT. § 552.020.11(6) (West 2002). The Montana statute, MONT. CODE ANN. § 46-14-221(3)(a) (West 2007), provides:

(3)(a) The committing court shall, within 90 days of commitment, review the defendant's fitness to proceed. If the court finds that the defendant is still unfit to proceed and that it does not appear that the defendant will become fit to proceed within the reasonably foreseeable future, the proceeding against the defendant must be dismissed, except as provided in subsection (4).

Subsection (4) refers only to disposition of motions that can be determined without the accused's participation, such as a plea of prior jeopardy. Tit. 46, ch. 14, § 221(4); This provision is comparable to ARK. CODE ANN. § 5-2-311 "Incapacitated defendants. Motions." Subsection 311(1)(C) permits the litigation of a prior jeopardy claim even though the accused is unfit for trial, for example. ARK. CODE ANN. § 5-2-311(1)(C); The Montana statute requires the determination of probable inability to restore competence within 90 days, in contrast to the 10-month period afforded ASH to report in Section 5-2-310 of the Arkansas Criminal Code. MONT. CODE ANN. § 46-14-221(3)(a) (West 2007).

203. ARK. CODE ANN. § 5-2-310(b)(1) (Repl. 2016); In *State v. Yarnall*, 2004 MT 333, ¶¶20-34, 102 P.3d 34, 38-40, the trial court's decision to extend the 90-day period to permit further effort at restoration of competence was upheld on appeal where evidence before the trial court supported its conclusion that there was a probability that competence could be restored within a reasonable period of time. Unlike the Missouri provision, the Montana Code does not indicate that the dismissal of the criminal charges be made *without* prejudice. MONT. CODE ANN. § 46-14-221(3)(a) (West 2007).

204. *State v. Thomas*, 2014 Ark. 362 at 5, 439 S.W.3d 690, 693.

trast to the *Davis* court's recognition that Indiana trial courts are authorized to dismiss charges to prevent violations of due process,²⁰⁵ the *Thomas* court either failed to consider the consequences of its strict reading of the applicable statute, or expressly accepted the State's argument on appeal that the dismissal violated the Arkansas separation of powers doctrine.²⁰⁶

A. The Model Penal Code's Influence on the Arkansas Criminal Code

The focus on the precise language used by the General Assembly could support an inference that the statutory language accurately reflected legislative intent in adopting Section 5-2-310.²⁰⁷ The Arkansas Criminal Code, which was adopted by the General Assembly in 1975,²⁰⁸ was influenced significantly by the Model Penal Code,²⁰⁹ published by the American Law Institute in 1962.²¹⁰ That influence is reflected in Arkansas appellate deci-

205. See *supra* note 202.

206. *Thomas*, 2014 Ark. at 3–4, 439 S.W.3d at 692.

207. See *infra* 208-224.

208. See Arkansas Code Revision Commission Preface, Vol. B (Michie, 1995) (“When the Arkansas General Assembly enacted the Arkansas Criminal Code of 1975, it considered the official commentary by the Criminal Code Revision Commission along with the text of the then-proposed Criminal Code. Since adoption of the Criminal Code in 1975, Frank Newell, one of the original drafters of the Arkansas Criminal Code, has prepared and published commentaries to the Criminal Code explaining changes made to the Criminal Code by the Arkansas General Assembly since its adoption and court decisions interpreting the Criminal Code. The commentaries by Frank Newell, although not official, have been included and may be helpful to practitioners in Arkansas.”).

For an informative history of the developments in the Arkansas Criminal Code and Arkansas Mental Health Acts, see *Coley v. Clinton*, 635 F.2d 1364, 1367–70 (8th Cir. 1980) (Eighth Circuit declined to rule on merits of civil rights action that challenged “the state’s procedures for commitment and release of criminal defendants and to halt the practice of automatically confining all such inmates under the restrictive conditions in Rogers Hall” on abstention doctrine based on the fact that state courts had not previously been afforded opportunity to consider Section 1983 plaintiff’s claims. *Id.* at 1371).

209. See Paul H. Robinson & Markus Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (explaining the influence of the Model Penal Code on state legislative action, including the adoption of the Arkansas Criminal Code by the Arkansas General Assembly in 197[6]). Note: there is a discrepancy in the actual date for adoption of the Code. The Eighth Circuit, in *Coley*, 635 F.2d at 1367 refers to the “1975 Arkansas Criminal Code.”

For a focused discussion of the influence of the Model Penal Code on issues relating to mental state and substantive defenses based on impairment, see Ellen Byers, *Mentally Ill Offenders: Is there Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?* 57 ARK. L. REV. 447, 482–84 (2004).

210. See, e.g., American Law Institute, *Model Penal Code*, <https://www.ali.org/publications/show/model-penal-code/> (statement regarding withdrawal of Section 210.6 from Model Penal Code relating to capital punishment based on conclusion to discontinue recognition of capital sentencing as acceptable punishment alternative because of “intractable institu-

sions, often in opinions in which Model Penal Code provisions or language are compared or contrasted with parallel provisions in the Arkansas Criminal Code.²¹¹ In *Cate v. State*,²¹² for instance, the Arkansas Court of Appeals explained that much of the Arkansas Criminal Code had been developed based on the Model Penal Code.²¹³ The Arkansas Supreme Court also relied on Model Penal Code policy analysis in support of its decision in *Jegley v. Picado*,²¹⁴ striking down the state's sodomy statute.²¹⁵

tional and structural obstacles to ensuring a minimally adequate system for administering capital punishment.”)

211. *E.g.*, *Koonce v. State*, 269 Ark. 96, 101–02 598 S.W.2d 741, 744 (1980) (relying on MPC analysis for discussion of limitations implicit in Arkansas code provision defining defense of necessity or choice of evils); *Stultz v. State*, 20 Ark. App. 90, 93, 724 S.W.2d 189, 191 (1987) (relying on MPC analysis for limitations on use of defense of justification under Arkansas law); *Parnell v. State*, 323 Ark. 34, 38, 912 S.W.2d 422, 424 (1996) (comparing Arkansas provision on accomplice liability favorably with MPC provision); *Lipscomb v. State*, 271 Ark. 337, 340, 609 S.W.2d 15, 17–18 (1980) (relying on MPC insanity defense provision to explain Arkansas insanity defense statute as change from former law); *Bankston v. State*, 361 Ark. 123, 128–29, 205 S.W.3d 138, 142–43 (2005) (referencing MPC policy regarding “extreme emotional disturbance” theory of manslaughter based on earlier concept of “heat of passion” in justifying limited approach to use of manslaughter as defense to murder charge under Arkansas law); *Harshaw v. State*, 344 Ark. 129, 134, 39 S.W.3d 753, 756 (2001) (relying on MPC to support Arkansas imperfect self-defense theory of manslaughter based on actor's error in forming belief use of force justified); *Dougan v. State*, 322 Ark. 384, 390–92, 912 S.W.2d 400, 402–04 (1995) (relying on MPC analysis in rejecting vagueness challenge to Arkansas statute defining misdemeanor of abuse of corpse); *McClish v. State*, 331 Ark. 295, 300, 962 S.W.2d 332, 336 (1998) (finding support for Arkansas sentencing policy governing trial court's discretion in imposing probated sentence in MPC provisions and analysis); *Marx v. State*, 291 Ark. 325, 330–31, 724 S.W.2d 456, 459–60 (1987) (looking to MPC for guidance in limiting evidence admissible to show defendant's mental state when claiming affirmative defense of duress in light of objective test for applying duress theory to defendant's claim).

Similarly, the Model Penal Code has also been argued in dissenting opinions challenging majority analysis of meaning or effect of Arkansas statutes. *See, e.g.*, *State v. Setzer*, 302 Ark. 593, 596–97, 791 S.W.2d 365, 367 (1990), (Hays, J., dissenting) (arguing in favor of MPC view that carrying prohibited weapon constitutes strict liability offense not requiring proof of criminal intent); and *Davidson v. State*, 305 Ark. 592, 598, 810 S.W.2d 327, 330 (1991), (Hays, J., dissenting) (arguing Arkansas fraudulent use of credit card provision comparable to MPC provision).

212. *Cate v. State*, 607 S.W.2d 63 (Ark. Ct. App. 1980).

213. *Id.* at 66–67.

214. *Jegley v. Picado*, 349 Ark. 600, 80 S.W.3d 332 (2002).

215. *Id.* at 636, 80 S.W.3d at 352. The court explained:

Several of our sister states, when striking down analogous sodomy statutes, have looked to the American Law Institute's Model Penal Code and Commentaries, which state in relevant part:

The usual justification for laws against such conduct is that, even though it does not injure any identifiable victim, it contributes to moral deterioration of socie-

The Model Penal Code had particularly significant influence on the development of the Arkansas lack of capacity,²¹⁶ or insanity, affirmative defense.²¹⁷ Not only is this evident with respect to the substantive defense, but with the development of procedure surrounding assertion of the defense,²¹⁸ pre-trial process,²¹⁹ trial process,²²⁰ and post-trial consequences of successful reliance on the defense.²²¹ The importance of the strong relationship between provisions of the Arkansas Criminal Code governing mental impairment of criminal defendants and comparable provisions of the Model Penal Code may afford some insight into the *Thomas* court's refusal to uphold the trial court's order, which dismissed the criminal charges based on the unlikelihood that the defendant could be restored to fitness for purposes of proceeding to trial.²²²

ty. One need not endorse wholesale repeal of all "victimless" crimes in order to recognize that legislating penal sanctions solely to maintain widely held concepts of morality and aesthetics is a costly enterprise. It sacrifices personal liberty, not because the actor's conduct results in harm to another citizen but only because it is inconsistent with the majoritarian notion of acceptable behavior. (Quoting MODEL PENAL CODE, Part II, 1980 Ed., pp. 362-63).

216. ARK. CODE ANN. § 5-2-312 (Repl. 2013); *Lipscomb v. State*, 271 Ark. 337, 340, 609 S.W.2d 15, 17-18 (1980) (affirming Arkansas Code's reliance on Model Penal Code insanity defense in explaining change from prior law of "insane delusions."); *c.f.* ALI Model Penal Code §§ 4.01 Mental Disease or Defect Excluding Responsibility.

217. ARK. CODE ANN. § 5-1-111(d)(1) (Repl. 2016) (an affirmative defense is a defensive theory designated in the Criminal Code or by statute as an "affirmative defense," requiring the defendant to prove all elements of the defensive theory by a preponderance of the evidence); *Davis v. State*, 368 Ark. 401, 406, 246 S.W.3d 862, 867 (2007) ("A defendant bears the burden of proving his affirmative defense of insanity by a preponderance of the evidence.") (Quoting: *Morgan v. State*, 333 Ark. 294, 302, 971 S.W.2d 219 233 (1998)); *see* MODEL PENAL CODE § 4.03(1) (insanity is an affirmative defense).

218. *See* ARK. CODE ANN. § 5-2-304(a) (requiring defendant to give notice of intent to rely on insanity defense, or assert lack of fitness to proceed); *see also* MODEL PENAL CODE § 4.03(a) (requiring defense to file written notice of intent to use insanity defense).

219. *See* ARK. CODE ANN. § 5-2-305(c)(1) (requiring mental examination of defendant upon notice of intent to rely on mental state and procedures for conducting examination by forensic experts); MODEL PENAL CODE § 4.05 (same); *see also* ARK. CODE ANN. § 5-2-309 (determination of accused's fitness to proceed).

220. *See, e.g.*, ARK. CODE ANN. § 5-2-306 (defendant's right to call expert witnesses); *Id.* § 5-2-307 (admissibility or exclusion of defendant's statements during court-ordered psychiatric examination); *Id.* § 5-2-308 (admission of expert testimony); and *see also* MODEL PENAL CODE § 4.07(2)-(4) (experts) and § 4.09 (limitation on use of defendant's statements during examination).

221. *See* ARK. CODE ANN. §§ 5-2-313-316 (effect of acquittal and subsequent proceedings, including hospitalization); MODEL PENAL CODE § 4.08 (same, generally).

222. *State v. Thomas*, 2014 Ark. 362, at 5, 439 S.W.3d 690, 693.

B. Model Penal Code § 4.06 and Competence for Trial

The Model Penal Code provision dealing with mental impairment of defendants rendering them unfit for trial is found in Section 4.06.²²³ Subsection (2) addresses the problem of restoration briefly:

If the Court determines that the defendant lacks fitness to proceed, the proceeding against him shall be suspended, except as provided in Subsection (3) [Subsections (3) and (4)] of this Section, and the Court shall commit him to the custody of the Commissioner of Mental Hygiene [Public Health or Correction] to be placed in an appropriate institution of the Department of Mental Hygiene [Public Health or Correction] *for so long as such unfitness shall endure*.²²⁴

This part of Subsection (2) makes no reference to length of time permitted for restoration and, in fact, provides for unlimited confinement pending restoration of fitness or competence.

1. *Alternative Provisions for § 4.06*

An alternative to Subsection (3) included in the Code affords the defendant, or counsel, the option of petitioning the trial court within ninety days of the commitment order for restoration of competence to consider the existence of any defense to the offense charged not resting on proof of mental state impairment. This alternative provides for an additional Subsection, (4), in the event the alternative provision is adopted, which provides for a hearing on the existence of the factual defense to the charge before the court, without a jury, and then directs:

After the hearing, the Court may in an appropriate case quash the indictment or other charge, or find it to be defective or insufficient, or determine that it is not proved beyond a reasonable doubt by the evidence, or otherwise terminate the proceedings on the evidence or the law. In any such case, unless all defects in the proceedings are promptly cured, the Court shall terminate the commitment ordered under Subsection (2) of this section and order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from mental disease or defect, order the defendant to be committed to an appropriate institution of the Department of Mental Hygiene [Public Health].²²⁵

The alternative provisions included in Section 4.06 were not adopted or reflected in Section 5-2-310 of the Arkansas Criminal Code. Thus, under

223. MODEL PENAL CODE § 4.06.

224. *Id.* § 4.06(2) (emphasis added).

225. *Id.* § (4).

state law, the only authority afforded the circuit court to consider matters that could result in termination of jeopardy are those included in Section 5-2-311. These include an attack on sufficiency of the charging instrument, violation of the statute of limitations, or prior jeopardy, as expressly recognized in Subsections (1)(A), (B), and (C), respectively.²²⁶ Section 5-2-311(2), however, affords the trial court discretion to rule on “[a]ny other ground that the court deems susceptible of fair determination prior to trial.”²²⁷ Arguably, this might authorize consideration of meritorious defenses not grounded in claims of mental disease or defect, similar to the alternative Section (4) in Model Penal Code § 4.06. However, resolution on the question of factual guilt by the trial court, sitting without a jury, would necessarily compromise the prosecution’s right under Arkansas law to refuse to agree to the waiver of the defendant’s jury trial right.²²⁸ Ark. R. Crim. P. 31.1, provides: “No defendant in any criminal case may waive a trial by jury unless the waiver is approved by the court.” If the prosecutor does not object to the defendant’s waiver, the State’s right to demand jury trial is itself deemed waived, by implication.²²⁹

Like Section 4.06(2) of the Model Penal Code, Section 5-2-310(b)(2), Subsections (C) and (D) do not include any definite provision for disposition of the pending criminal proceedings, when the circuit court does not find the impaired defendant fit to proceed within the one-year commitment order entered after the initial finding that the defendant is unfit to proceed to trial. More significantly, the MPC provision would expressly authorize indefinite commitment for those impaired defendants who cannot be restored to competency.

2. Jackson, MPC § 4.06 and the Arkansas Response

The decision in *Jackson* clearly conflicts with the indefinite jeopardy circumstance resulting when an impaired accused is subjected to unlimited confinement because restoration efforts would prove unsuccessful.²³⁰ The

226. ARK. CODE ANN. § 5-2-311(1) (Repl. 2016).

227. *Id.* § 5-2-311(2).

228. *Id.* § 16-89-108 provides, in pertinent part:

(a) In all criminal cases, except where a sentence of death may be imposed, trial by a jury may be waived by the defendant, provided the prosecuting attorney gives his or her assent to the waiver. The waiver and the assent thereto shall be made in open court and entered of record. In the event of waiver, the trial judge shall pass both upon the law and the facts.

229. *Scates v. State*, 244 Ark. 333, 424 S.W.2d 876 (1968).

230. See Justine A. Dunlap, *What’s Competence Got to Do With It? The Right Not to Be Acquitted by Reason of Insanity*, 50 OKLA. L. REV. 495 (1997) (A thorough scholarly treat-

commentary to Section 4.06(2) addressed this situation in the aftermath of the issuance of *Jackson*:

Jackson v. Indiana, 406 U.S. 715 (1972), decided a decade after approval of the Model Code, indicates that a defendant deemed unfit for trial cannot constitutionally be held indefinitely on the basis of pending charges and his own unfitness. Insofar as Subsection (2) permits indefinite commitment without the necessity for the sort of finding that would be required for someone to be civilly committed, it does not meet the constitutional requirements prescribed by *Jackson* and other Supreme Court decisions.²³¹

The explanatory note also addressed the trial court's authority to dismiss pending criminal charges when the trial of a defendant who has regained competence is determined to be unfair, specifically noting the language in Section 4.06(2)²³² that parallels the Section 5-2-310(c)(2) language incorrectly relied upon by the trial court and parties in *Thomas*. For whatever reason, the drafters of the Arkansas Criminal Code adopted in 1975²³³ did not factor in *Jackson* when drafting Section 5-2-310(b).

In *Baird v. State*,²³⁴ the Arkansas Supreme Court considered the trial court's order discharging the impaired defendant from custody following entry of a judgment of acquittal based upon evidence of her mental state.²³⁵ The court, working within the structural framework provided by the Arkansas Criminal Code, reversed the order releasing Baird, directing the trial court to commit her to the custody of the state hospital, ironically, the relief she had expressly sought on appeal.²³⁶

ment of problems posed by the inability to restore some impaired defendants to fitness for trial and misuse of the insanity acquittal for incompetent defendants.)

231. EXPLANATORY NOTE TO MODEL PENAL CODE § 4.06. Determination of Fitness to Proceed; Effect of Finding of Unfitness; Proceedings if Fitness Is Regained [Post-Commitment Hearing]. (2001).

232. *Id.* The explanatory note initially reads:

Subsection (2) provides that a defendant unfit to proceed is to be committed to a mental health facility so long as the unfitness endures, while the proceedings against him are suspended for that period. The proceedings against the defendant can be resumed if the court determines that fitness has been regained. The court may, however, dismiss the charge if it believes that it would be unjust to resume the criminal proceedings because so much time has lapsed since the original commitment.

See supra note 78 and accompanying text for statutory text of Section 5-2-310(c)(2).

233. *Supra* note 209 (referencing Robinson and Dubber).

234. *Baird v. State*, 266 Ark. 250, 583 S.W.2d 60 (1979).

235. *Id.* at 251, 583 S.W.2d at 61.

236. *Id.* at 253, 583 S.W.2d at 62.

The decision in *Baird* illustrates three important points characterizing early decisions under the provisions of the 1975 criminal code: (1) the trial court ordered Baird released from custody after acquitting her based on mental disease or defect;²³⁷ (2) the court did not order a dismissal of the specific criminal charge in the case; and (3) the resolution ordered to address her mental impairment was commitment to the state hospital. This scenario would be repeated in subsequent decisions arising under Section 5-2-310.

In *Stover v. Hamilton*,²³⁸ the majority explained the process approved in *Baird* as an effort to comply with *Jackson*, writing:

The Commentary following Ark.Stat. Ann. § 41-607 indicates the holding in *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), is to the effect that a person may not be held in confinement for a period in excess of one year on an incompetency commitment in a criminal proceeding. The Commentary indicates the Commission felt the state should not incarcerate a person, who has never been tried for or convicted of a criminal offense, for a period in excess of one year. The Commission felt that confinement for longer periods should be by traditional civil commitment. We think this is sound logic. *We must necessarily read into Ark.Stat. Ann. § 41-612 a limitation which prevents a person from being held indefinitely to the extent he is deprived of due process of law.* The present law relating to involuntary civil commitment is Ark.Stat. Ann. § 59-1401 et seq.²³⁹

Chief Justice Fogelman concurred with the majority's disposition, but objected to its approval of the process in which commitment follows the acquittal of an accused not fit for trial by the trial court.²⁴⁰ Dissenting with respect to the majority's reasoning, he argued that the trial court could not properly have acquitted the accused on the basis of mental state impairment:

Appellant is not barred from questioning the court's action in "acquitting" him, if that action is detrimental to him, unless it can be said that he has either waived the right through his attorney's action or he is estopped by it. But neither waiver nor estoppel should be applied if Stover did not have a rational and factual understanding of the proceedings or the ability to consult with his attorney in a meaningful manner.²⁴¹

237. *Id.* at 251, 583 S.W.2d at 60–61 (the defendant was initially taken into custody of the sheriff because there were other pending warrants for her apart from the charge on which she was acquitted).

238. *Stover v. Hamilton*, 270 Ark. 310, 604 S.W.2d 934 (discussed in detail on pages 130–133 of this article).

239. *Id.* at 316, 604 S.W.2d at 937 (emphasis added).

240. *Id.* at 317, 604 S.W.2d at 938 (Fogelman, C. J., concurring in part and dissenting in part).

241. *Id.* at 319

Justice Stroud, joined by Justice Hickman, also concurred in part and dissented in part.²⁴² However, they took the position that there was no conflict between the predecessor provisions to Section 5-2-313, which authorized the entry of acquittal by reason of insanity, and Section 5-2-302(b), barring entry of a disposition unless the impaired accused has been restored to fitness. Instead, Justice Stroud explained:

I find no conflict between this provision and Ark.Stat.Ann. s 41-603 (Repl.1977) which prohibits a trial, conviction, or sentence so long as an accused lacks the capacity to understand the proceedings against him or to assist effectively in his own defense. The two statutes are part of the same act and were adopted simultaneously. In such instances, we always try to give effect to both statutes rather than to declare one void. Furthermore, *an acquittal without a trial is simply not a trial, conviction or sentence.*²⁴³

Justice Stroud's reasoning can only be viewed as flawed because an acquittal is a judgment on the merits of a criminal proceeding.²⁴⁴ It is not a "conviction or sentence," as he argues, but is an alternative verdict that follows a trial.²⁴⁵ To argue that the process by which the trial court enters the judgment of "acquittal without a trial is simply not a trial" distorts the concept of an acquittal. For instance, Section 5-2-312(c) of the Arkansas Criminal Code provides: "When a defendant is acquitted on a ground of mental disease or defect, the verdict and judgment shall state that the defendant was acquitted on a ground of mental disease or defect."²⁴⁶

Justice Stroud ignored the clear holding of *Dusky* barring the trial of an incompetent defendant²⁴⁷ when he attempted to rationalize the inconsistent Code provisions reflected not only in Section 5-2-302(b), but also by Section 5-2-313(a). Chief Justice Fogelman correctly identified the problem, by stating: "No judgment, even of acquittal, could be entered without a resumption of the criminal proceedings."²⁴⁸

242. *Id.* at 321, 604 S.W.2d at 940.

243. *Id.*, 604 S.W.2d at 940 (emphasis added).

244. *E.g.*, ARK. CODE ANN. § 16-89-125(b) (Repl. 2005) ("When the evidence is concluded, the court shall, on motion of either party, instruct the jury on the law applicable to the case. If the defense is the insanity of the defendant, the jury must be instructed to state that fact in their verdict if they acquit him or her on that ground.")

245. When the defendant is acquitted by reason of insanity, the verdict must specifically indicate that the basis for the acquittal is mental disease or defect, pursuant to Ark. Code Ann. § 5-2-312(c).

246. ARK. CODE ANN. § 5-2-312(c) (Repl. 2013) (when the defendant is acquitted by reason of insanity, the verdict must specifically indicate that the basis for the acquittal is mental disease or defect).

247. *Dusky v. U.S.*, 362 U.S. 402, 402 (1960) (pre-dating both the Model Penal Code published in 1962 and the 1975 Arkansas Criminal Code).

248. *Stover*, 270 Ark. at 319, 604 S.W.2d at 938-39.

The process authorized in Section 5-2-313(b), permitting the trial court to enter an insanity acquittal even when the impaired accused has not elected to rely on the affirmative defense while fit, follows the approach taken by Section 4.07 of the Model Penal Code.²⁴⁹ However, the Code affirms the *Dusky* principle: “No person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted or sentenced for the commission of an offense so long as such incapacity endures.”²⁵⁰

The same internal inconsistency present in Model Penal Code Sections 4.04 and 4.07(1) persists in Section 5-2-313, Subsections (a) and (b). Subsection (a) requires acquittal based on mental state only if the defendant is fit in terms of understanding the nature of the proceedings and assisting counsel, and there is evidence meeting the statutory definition of lack of criminal responsibility, under the amended statute, or insanity. Yet, 5-2-313(b) expressly authorizes the trial court to acquit an accused based on evidence of lack of capacity, or insanity, at the time of the offense, when the accused has not asserted the affirmative defense. It does not expressly provide for entry of the acquittal if the accused is not fit for trial, but does not preclude the court from ordering acquittal based on the report of the mental examination, even if the defendant remains unfit. This Subsection provides:

(b) If the defendant did not raise the issue of mental disease or defect as an affirmative defense pursuant to § 5-2-305, then the court is required to make a factual determination that the defendant committed the offense and that he or she was suffering from a mental disease or defect at the time of the commission of the offense.²⁵¹

Reliance on this provision resulted in the approach in *Baird*,²⁵² *Stover*,²⁵³ and later decisions²⁵⁴ in which the commitment for restoration of the

249. MODEL PENAL CODE § 4.07(1) (AM. LAW INST. 1981) provides, in pertinent part:

(1) If the report filed pursuant to Section 4.05 finds that the defendant at the time of the criminal conduct charged suffered from a mental disease or defect that substantially impaired his capacity to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law, and the Court, after a hearing if a hearing is requested by the prosecuting attorney or the defendant, is satisfied that such impairment was sufficient to exclude responsibility, the Court on motion of the defendant shall enter judgment of acquittal on the ground of mental disease or defect excluding responsibility.

250. MODEL PENAL CODE § 4.04 (AM. LAW INST. 1981).

251. ARK. CODE ANN. § 5-2-305 (Repl. 2016).

252. *Baird v. State*, 266 Ark. 250, 251, 583 S.W.2d 60, 60 (1979).

253. *Stover*, 270 Ark. at 312, 604 S.W.2d at 935.

254. *E.g.*, *Schock v. Thomas*, 274 Ark. 493, 497, 625 S.W.2d 521, 523 (1981); *Mannix v. State*, 273 Ark. 492, 493, 821 S.W.2d 222, 222 (1981) (following *Stover*).

defendant's competence followed an acquittal on the pending charge based on mental state. The suggestion that this acquittal did not have the consequences of a trial verdict made by the *Stover* court is simply wrong. There, the court explained:

We hold that when the court terminated all proceedings against the appellant by its order of acquittal he was no longer subject to the sanctions of any criminal statutes. He has been effectively removed from the category of "unfit to proceed." *His status is as if he had never been charged with the crime upon which those proceedings were instituted.*²⁵⁵

This statement was quickly repudiated by the supreme court in *Schock v. Thomas*,²⁵⁶ issued a year later, in 1981, when it explained: "[A]n acquittal due to an inability to assist in one's defense does not carry an inference of exoneration and does not imply that no offense has occurred."²⁵⁷ It clarified the significance of the insanity acquittal:

A literal interpretation of the words, "it is as if no crime has been committed," was not intended by *Stover*. Such a conclusion would give undue weight to appellant's right to liberty at the expense of society's right to be secure. To equate an acquittal because of mental illness with a presumptive right to identical treatment with those whose mental illness produces no criminal manifestations fails to give due regard to the protection of society.²⁵⁸

The clarification offered by the court in *Schock* is reflected in other contexts. For example, in *Arkansas Department of Correction v. Bailey*,²⁵⁹ the court held that the acquittal of an accused based on mental disease or defect did not preclude his mandatory registration as a sex offender, observing: "[A]n acquittal entered on the basis of mental disease or defect is not the same as an acquittal occasioned by the failure of proof."²⁶⁰ There, the court relied on *Jones v. United States*,²⁶¹ noting that the United States Su-

255. *Stover*, 270 Ark. at 315, 604 S.W.2d at 937 (emphasis added).

256. *Schock*, 274 Ark. 493, 625 S.W.2d 521.

257. *Id.* at 503, 625 S.W.2d at 526.

258. *Id.* at 503, 625 S.W.2d at 526. Conversely, Professor Dunlap points out that the insanity acquittal entails significant adverse consequences for the acquitted accused, including loss of personal liberty because of continuing commitment in mental facilities and stigma from being found to be mentally ill, still a significant source of negative response in society. See Dunlap, *supra* note 230 at 512-14, esp. n.150 (citing *Vitek v. Jones*, 445 U.S. 480, 492-93 (1980) for the proposition that "being placed in a mental health facility is worse than being placed in a prison.").

259. *Arkansas Department of Corrections v. Bailey*, 368 Ark. 518, 247 S.W.3d 851 (2007).

260. *Id.* at 526, 247 S.W.3d at 856.

261. *Jones v. United States*, 463 U.S. at 364 (1983).

preme Court had held that an insanity acquittal established two important facts—that the accused was factually guilty, and that the evidence established that he suffered from mental illness at the time of the offense. The decision in *Jones* also upheld the post-acquittal commitment to a mental institution *indefinitely*, until such time as he is able to demonstrate that he has regained sanity or no longer represents a “danger to himself or society.”²⁶²

Similarly, Sections 5-2-314 and 315 of the Arkansas Criminal Code provide that upon acquittal based on mental disease or defect, the trial court initially makes a determination following evaluation as to whether the acquitted defendant continues to manifest symptoms of the underlying mental impairment,²⁶³ and whether the acquitted defendant constitutes a danger to inflict bodily injury on others or damage to property. If so, the court is to commit the acquittee to the state hospital for further confinement under its direction, with the acquittee forced to prove either that his mental impairment has abated, or that he no longer poses a danger to others by clear and convincing evidence.²⁶⁴ While the entire range of post-acquittal confinement options is far more complex than described here, the fact is that the acquittal by reason of mental disease or defect entails further loss of liberty in many situations, rather than immediate discharge.²⁶⁵

Upon acquittal based on mental disease or defect, the acquittee may petition for release but must meet the showing required by Section 5-2-314(e)(1), which provides:

A person found not guilty on the ground of mental disease or defect of an offense involving bodily injury to another person or serious damage to the property of another person or involving a substantial risk of bodily injury to another person or serious damage to the property of another person has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to

262. *Bailey*, 368 Ark. at 527, 247 S.W.3d at 857-58 (citing *Jones*, 463 U.S. at 370).

263. ARK. CODE ANN. § 5-2-314(a)(1) and (a)(3) require determination of whether the acquittee remains mentally impaired and the offense charged either did or did not involve an act endangering others or property, respectively. If the acquitted defendant is found to remain mentally impaired and presents a danger to others or to property, the trial court is directed to commit the defendant to the state hospital under Subsection (b)(1) for further evaluation. If the trial court finds the defendant continues to manifest the mental impairment, but poses no threat of danger to others or property, the trial court is directed to order the acquitted defendant's release.

264. *Id.* § 5-2-314(e)(1) (Repl. 2016).

265. In fact, it is almost certain that successful use of the insanity defense in any felony involving assaultive behavior or threat of loss of property will result in post-acquittal confinement in ASH or other options under the direction of the Department of Human Services, such as conditional release under a regimen including significant limitations on acquitted defendant's liberty. *Id.* § 5-2-315(c) (Repl. 2016).

another person or serious damage to property of another person due to a present mental disease or defect.²⁶⁶

If unsuccessful, the acquittee may eventually be discharged from further confinement in the Arkansas State Hospital if the Director determines that the acquittee has progressed and “no longer create a substantial risk of bodily injury to another person or serious damage to the property of another person.”²⁶⁷ Alternatively, the Director may apply to the trial court for an order for the acquittee’s “conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment,”²⁶⁸ exercising continuing supervision of the acquittee for five year, renewable periods.²⁶⁹

In contrast, the individual who is involuntarily civilly committed is confined for an initial period of no more than 45 days,²⁷⁰ extended by maximum periods of 180 days,²⁷¹ renewable only upon a showing by the State—again, by clear and convincing evidence²⁷²—that the committed individual continues to suffer from the mental impairment and continues to be a threat to his own safety or that of others. The civilly committed individual, moreover, is afforded representation by counsel in all stages of the involuntary commitment process, including proceedings to continue the commitment for another maximum period of 180 days.²⁷³

3. *Misuse of the Insanity Acquittal for Competent Defendants:* *Hughes v. State*

The continued reliance on the insanity acquittal process under Section 5-2-313(b) presents continuing questions of constitutional due process in authorizing the trial court to enter judgment when the defendant did not plead not guilty by reason of mental disease or defect. In *Hughes v. State*,²⁷⁴ the defendant was ordered acquitted based on mental disease or defect over his objection.²⁷⁵ The State had filed for mental evaluation of the defendant

266. *Id.* § 5-2-314(e)(1) (Repl. 2016).

267. *Id.* § 5-2-315(a)(1)(A) (Repl. 2016).

268. *Id.* § 5-2-315(a)(1)(A).

269. ARK. CODE ANN. § 5-2-315(c)(2)(B)(iv) (Repl. 2016).

270. *Id.* § 20-47-214(b)(3) (Repl. 2016).

271. *Id.* § 20-47-215(a) (Repl. 2016).

272. *Id.* § 20-47-215(c)(3).

273. *Id.* § 20-47-211(1) (Repl. 2016).

274. *Hughes v. State*, 2011 Ark. 147, at 2, 2011 WL 1319851, at *1.

275. *Id.* at 4–5, 2011 WL 1319851, at *2–*3. The supreme court noted:

On April 21, 2010, appellant filed a motion in limine, a demand for a jury trial, and a motion for a determination that Ark. Code Ann. § 5–2–313 was unconstitutional as applied to him. He sought to preclude evidence of his mental disease or defect, arguing that he waived this affirmative defense. Appellant also argued

based on concern that he lacked fitness to proceed.²⁷⁶ The defendant, who was found fit for trial, brought an appeal based on his objection to the trial court's action in ordering an acquittal based on mental state over his objection.²⁷⁷ The psychiatric evaluation ordered by the trial court resulted in a finding that Hughes was fit to proceed to trial,²⁷⁸ but that he could not conform his behavior to the requirements of law at the time of the offense.²⁷⁹ Contrary to the Arkansas Supreme Court's implicit conclusion that the prosecution could rely on the psychiatric examination requested because of concern for the defendant's fitness when it ordered an acquittal not urged by the defendant,²⁸⁰ Section 5-2-305 does not authorize either the State or the trial court, *sua sponte*, to rely on the affirmative defense.²⁸¹ Subsection

that to the extent Ark. Code Ann. § 5-2-313 does not require a trial by jury on the underlying offense when the defense of mental disease or defect is waived, the statute violated his rights under article 2, sections 7 and 23 of the Arkansas Constitution and the Sixth and Fourteenth Amendments to the United States Constitution. By order entered on May 26, 2010, the trial court denied the motion in limine, the demand for a jury trial, and the request to find Ark. Code Ann. § 5-2-313 unconstitutional.

Id. at 2, 2011 WL 1319851, at *1.

276. "Any party or the court" [may raise] the issue of the defendant's fitness to proceed." ARK. CODE ANN. § 5-2-305(a)(1)(B)(i) (Repl. 2016).

277. *Hughes*, 2011 Ark. 147, at 2 n.1, 2011 WL 1319851, at *1 n.1.

278. *Id.* at 4 n.1, 2011 WL 1319851, at *2 n.1.

279. *Id.*, 2011 WL 1319851, at *2 n.1. (the finding that Hughes could not conform his behavior to the requirements of law as a result of mental disease or defect meets the test for insanity under Section 5-2-312(a)(1)(2)).

280. See Louis A. Laski, *Comment: Compelled Acquittal by Reason of Mental Disease or Defect in Arkansas*, 65 ARK. L. REV. 899, 908 n.60 (2012). The author quotes from MODEL PENAL CODE § 4.07, authorizing acquittal on motion of prosecution or defense based on forensic expert's report mental evaluation, but not requiring defendant to be restored to competence and capable of making decision to plead not guilty based on mental impairment. *Id.* at 907 n.60. The author argues that use of the acquittal when the defendant does not plead the affirmative defense is "procedurally permissible," tracing the statutory history of Ark. Code Ann. § 5-2-313(b), while cautioning that Arkansas courts should refrain from using the compelled-insanity acquittal process." *Id.* at 899, 907-08. However, MODEL PENAL CODE § 4.07 provides that if:

the Court, after a hearing if a hearing is requested by the prosecuting attorney or the defendant, is satisfied that such impairment was sufficient to exclude responsibility, the Court *on motion of the defendant* shall enter judgment of acquittal on the ground of mental disease or defect excluding responsibility.

MODEL PENAL CODE, § 4.07(1) (AM. LAW INST. 1981) (emphasis added). This provision does not authorize a forced acquittal of a competent defendant not asserting reliance on the defense of insanity. *Id.* § 4.07(1) Only if the competent defendant moves for judgment of acquittal would the Model Penal Code provision authorize the acquittal. *Id.* § 4.07(1)

281. ARK. CODE ANN. § 5-2-305(a)(1)(A) (Repl. 2016).

(a)(1)(A)(1) authorizes the trial court to suspend the proceedings when the accused gives notice of intent to rely on a defense based on mental disease or defect.²⁸²

Subsection (a)(1)(A)(ii) does authorize the prosecution to seek an examination for purposes of determining sanity at the time of the offense, but only if the defendant has filed notice of intent to rely on the insanity defense.²⁸³ A strict reading of the statutory language leads only to the conclusion that the prosecution may not benefit from a verdict based on a defense never asserted by the defendant, when the defendant is competent to make a decision about the proper—or preferred—course of action in the case.²⁸⁴

Of course, the trial court's authority to usurp the defendant's right to determine whether to assert a mental state defense lies in Section 5-2-313(b).²⁸⁵ As Hughes argued, this use of that provision effectively violated his right to jury trial under the Sixth Amendment, a right personal to the accused.²⁸⁶ Hughes sought to appeal from the acquittal ordered by the trial court, but the Arkansas Supreme Court held that it did not have jurisdiction over appeal because right of appeal extended only to defendants convicted at trial.²⁸⁷ Hughes was acquitted by action of the trial court.²⁸⁸

282. *Id.* § 5-2-305(a)(1)(A)(i).

283. *Id.* § 5-2-305(a)(1)(A)(ii) provides:

(ii) After the notice of intent to raise the defense of not guilty for reason of mental disease or defect is filed, any party may petition the court for a criminal responsibility examination and opinion.

284. *See, e.g., Jones v. United States*, 463 U.S. 354, 366 (1983), (holding that due process not violated when insanity acquittee confined to mental hospital confined for period longer than the sentence that could have been imposed upon conviction); *see supra* notes 124–126 and 280 and accompanying text. A competent defendant might elect not to pursue an insanity defense, particularly when the punishment range upon conviction for the offense is not particularly lengthy in order to avoid the potentially lengthier period of confinement in the state mental health system if the insanity defense were successful.

285. ARK. CODE ANN. § 5-2-305(b) (Repl. 2016).

286. *Hughes v. State*, 2011 Ark. 147, at 2, 2011 WL 1319851, at *1; *see Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“The accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.”); *see also* ARK. R. CRIM. P. 24.3(a) (requiring that defendant personally enter a plea of guilty in open court except when the charge is a misdemeanor punishable only by fine).

287. *Hughes*, 2011 Ark. at 1, 5, 2011 WL 1319851, at *1–2.

288. *Id.* at 4, 2011 WL 1319851, at *2. (finding that because Hughes was not convicted in circuit court, he had no remedy to attack his “acquittal” in a state post-conviction action brought under Rules 37.1(a)(1) and 37.2(a) of the Arkansas Rules of Criminal Procedure). For additional discussion of the litigation consequences of the insanity “acquittal” ordered over Hughes’ objection, *see infra* notes 299–320 and accompanying text.

The use of a “forced” insanity plea upon a fit defendant over his objection was addressed by the Supreme Court in *Lynch v. Overholser*,²⁸⁹ a decision predating *Jackson* by ten years.²⁹⁰ There, the Court considered the propriety of the defendant’s commitment to St. Elizabeth’s Hospital pursuant to a provision of the District of Columbia Code.²⁹¹ This provision resulted in the entry of an acquittal by reason of insanity when the defendant, who was competent, had not relied on the defense and unsuccessfully sought to plead guilty to the pending charges of cashing worthless checks.²⁹² While Lynch challenged the process by which he had been convicted on constitutional grounds, the Court ruled narrowly, holding that the commitment ordered by the trial court could only apply to a defendant pleading insanity under the controlling statute, and ordered his discharge.²⁹³

In a situation comparable to the factual scenario in Lynch, the District of Columbia Court of Appeals held that the defendant’s decision to forego reliance on insanity is binding on a trial court, provided that the trial court is convinced that the defendant is competent to make the decision, in *Frendak v. United States*.²⁹⁴ The court elaborated on the numerous adverse consequences to the competent accused flowing from an insanity acquittal in explaining why deference to the competent defendant’s personal decision with respect to the choice of defenses is required.²⁹⁵ Subsequently, the United States Court of Appeals reached the same conclusion in *Marble v. United States*²⁹⁶ as the D.C. appellate court had in *Frendak*.²⁹⁷

The United States Supreme Court has not ruled on whether a state may authorize acquittal by reason of insanity when the accused is either incompetent and unable to make a decision as to whether to assert the defense, or competent and expressly opposes the trial court’s imposition of an acquittal over his objection, as in *Hughes*. Jurisdictions appear to remain split over

289. *Lynch v. Overholser*, 369 U.S. 705 (1962).

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

291. *Lynch*, 369 U.S. at 708–09 (considering D.C. Code § 24-301(d)).

292. *Id.* at 707.

293. *Id.* at 709–10. The *Lynch* Court, however, conceded that even a defendant not claiming the defense of insanity could be acquitted on this ground based on evidence of his impairment at the time of the offense. In that circumstance, however, the trial court would be required to proceed under the civil commitment statute if the defendant remained impaired following his acquittal. *Id.* at 718.

294. 408 A.2d 364 (D.C. 1979).

295. *Id.* at 380.

296. 940 F.2d 1543 (D.C. Cir. 1991).

297. Professor Dunlap noted that despite the attempt to lessen the consequences for the those adjudged mentally ill, there remained considerable distinction between those adjudged mentally ill in civil matters from those acquitted by reason of insanity at the time of her article. See note 230, *supra*, *What’s Competence Got to Do With It?*, 50 OKLA. L. REV. at 509.

this practice, with some seventeen states permitting trial courts to impose insanity acquittals, according to a 2002 study.²⁹⁸

Chief Justice Hannah dissented in *Hughes*, arguing that the majority improperly dismissed the appeal for lack of jurisdiction:

It is only after the State meets its burden of proving the charged crime beyond a reasonable doubt that acquittal based on insanity is considered. This is because insanity is not an element of the charged crime, but instead is a defense, making the standard of proof for insanity distinct from that required for the charged crime. "If the state meets its traditional burden of proof beyond a reasonable doubt, the defendant then bears the burden of establishing that he was insane at the time of the offense and, therefore, exempt from criminal responsibility." . . .

Before a criminal defendant can be acquitted as a consequence of a mental defect, there must be a judicial determination that, based on proof beyond a reasonable doubt, the criminal defendant committed the underlying crime.²⁹⁹

Chief Justice Hannah's analysis is, again, consistent with the court's holding in *Gruzen v. State*.³⁰⁰ There, the court affirmed that entry of a plea of not guilty by reason of insanity does not relieve the prosecution of proving each element of the offense charged, including that the offense was committed by the defendant.³⁰¹

The majority's disposition in *Hughes* reflects the same narrow exercise of its jurisdiction that characterized its decision in *State v. Thomas*.³⁰² Instead of confronting the constitutional issues implicit in the forced acquittal

298. See Roger Miller, Hendricks v. Miller: *Forcing an Insanity Defense on an Unwilling Defendant*, 30 J. AMER. ACAD. PSYCHIATRY & LAW 295, 296 (2002). The author observed:

More than a third of jurisdictions that have an insanity defense permit its imposition against a defendant's wishes. Our study⁶ revealed that neither state mental health forensic program directors nor state attorneys general were even familiar with the enabling statutes or case law, much less with their implementation in practice. Who can enter the defense varies considerably. Four jurisdictions reported that the defense could be imposed only on competent defendants, five that it could be imposed only on incompetent defendants, and five that it could be imposed on either. Judges can impose insanity defenses in eight jurisdictions, defense attorneys in 11 jurisdictions, and prosecutors in five. The director of an institution to which a defendant is committed can raise the defense in one jurisdiction.

299. *Hughes v. State*, 2011 Ark. 147, at 5, 2011 WL 1319851, at *3 (Hannah, C.J., dissenting).

300. *Gruzen v. State*, 276 Ark. 149, 634 S.W.2d 92 (1982).

301. *Id.* at 153, 634 S.W.2d at 95.

302. *State v. Thomas*, 2014 Ark. 362, 439 S.W.3d 690.

based on insanity on competent defendants not asserting reliance on the defense, the court simply declined to rule on the merits, dismissing the appeal based on its strict interpretation of its own rule authorizing appeal only upon conviction.³⁰³ This disposition reflected a literal application of Rule 1 of the Arkansas Appellate Criminal Procedure defining the defendant's right to appeal:

(a) Right of Appeal. Any person *convicted of a misdemeanor or a felony by virtue of trial in any circuit court of this state* has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of Arkansas.³⁰⁴

The rule was thus adopted by the Arkansas Supreme Court itself, pursuant to its authority under the Arkansas Constitution, which provides:

There shall be a right of appeal to an appellate court from the Circuit Courts and other rights of appeal as may be provided by Supreme Court rule or by law.³⁰⁵

In other situations, the court has reinterpreted rules it previously adopted to address unanticipated problems in the exercise of its jurisdiction. For instance, Rule 1 of the Arkansas Appellate Criminal Procedure expressly precludes appeal from a conviction obtained on the defendant's plea of guilty: "Except as provided by A.R.Cr.P. 24.3(b) [conditional plea of guilty reserving appellate review by defendant of adverse trial court rulings on motions to suppress evidence] there shall be no appeal from a plea of guilty or nolo contendere."³⁰⁶ But, in *Bradford v. State*,³⁰⁷ the majority explained that the court had recognized two exceptions to this limitation,³⁰⁸ effectively expanding its discretion to review issues related to sentencing following conviction on a plea of guilty, over a pointed dissent.³⁰⁹

The *Hughes*³¹⁰ court's refusal to announce an exception to the general rule governing standing of competent defendants acquitted by reason of insanity over their objection effectively avoided the discussion of the constitutional issues raised by the process.³¹¹ It declined to do so, even though its

303. *Hughes*, 2011 Ark. 147, at 4, 2011 WL 1319851, at *2.

304. ARK. R. APP. P. CRIM. 1(a) (emphasis added).

305. ARK. CONST. amend. LXXX, § 11.

306. ARK. R. APP. P. CRIM. 1(a).

307. *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003).

308. *Id.* at 399, 94 S.W.3d at 907. In *Bradford*, the supreme court permitted an appeal where the trial court had *sua sponte* ordered a resentencing of the defendant, increasing his sentence from three 5-year terms to be served concurrently to consecutive service of the three 5-year sentences for a total of 15 years.

309. *Id.* at 405, 94 S.W.3d at 910–11, (Glaze, J., dissenting).

310. *Hughes v. State*, 2011 Ark. 147, 2011 WL 1319851.

311. *Id.* at 4–5, 2011 WL 1319851, at *2.

interpretation would have involved the application of a rule that the court, itself, had promulgated, rather than construction of a statute, as in *State v. Thomas*.³¹² In both instances, however, the court's action in avoiding constitutional issues reflects a willingness to subordinate due process rights of criminal defendants to protection of its own jurisdiction.³¹³

The court's decision in *Hughes* not only insulated the trial court's ruling from attack in the direct appeal process, but in theory has frustrated efforts for similarly situated insanity acquittees from regaining freedom. For instance, the post-conviction process under Rule 37 of the Arkansas Rules of Criminal Procedure³¹⁴ will not be available to him for review of the trial court's action, because he was not "convicted" in circuit court,³¹⁵ nor in custody pursuant to a conviction when filing for post-conviction relief.³¹⁶

The writ of habeas corpus under Arkansas law³¹⁷ that permits challenges to the authority of the trial court also appears to provide no recourse for individuals, like Hughes, who have been remanded to the custody of ASH as insanity acquittees.³¹⁸ Although the writ arguably would address an illegal detention, as the Arkansas Supreme Court explained in *Flowers v. Norris*,³¹⁹ a leading case, the typical theory for relief involves facial invalidity of the judgment and sentence rendered by the circuit court. The court explained:

It is well settled that a writ of habeas corpus will only be issued if the commitment was invalid on its face, or the sentencing court lacked jurisdiction. Thus, in order to obtain habeas relief, a petitioner must plead either the facial invalidity *or the lack of jurisdiction* and make a "showing,

312. 2014 Ark. 362, at * 439 S.W.3d at 693. For the court's approach to statutory construction, generally, see note 81, *supra*.

313. *Hughes*, 2011 Ark. at 4–5, 2011 WL 1319851, at *2.

314. ARK. R. CRIM. P. 37.1, *et seq.*

315. *E.g.*, ARK. R. CRIM. P. 37.2(a) refers to the "conviction in the original case."

316. *Coplen v. State*, 298 Ark. 272, 273, 766 S.W.2d 612, 613 (1989). *Scott v. State*, 2006 WL 302351, *1 (Ark. 2006); *Bohannon v. State*, 336 Ark. 367, 372, 985 S.W.2d 708, 710 (1999). In *Scott and Bohannon*, the Arkansas Supreme Court held that to pursue relief pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure—the primary route for collateral attack on a conviction under Arkansas law—the petitioner must be incarcerated at the time of filing the petition. *Scott*, 2006 WL 302351 at *2; *Bohanan*, 336 Ark. at 370–72, 985 S.W.2d at 709–11. The state court has expressly rejected reliance on the more expansive understanding and treatment of the "in custody" requirement applied by federal courts in post-conviction proceedings. *Bohanan*, 336 Ark. at 372, 985 S.W.2d at 710 (parolee not "in custody" for purposes of post-conviction litigation under Rule 37); *Kemp v. State*, 330 Ark. 757, 758, 956 S.W.2d 860, 861 (1997) (defendant sentenced only to pay fine not eligible for post-conviction relief).

317. *See* ARK. CODE ANN. § 16–112–103 (1987).

318. *Hughes v. State*, 2011 Ark. 147, 2011 WL 1319851.

319. *Flowers v. Norris*, 347 Ark. 760, 68 S.W.3d 289 (2002).

by affidavit or other evidence, [of] probable cause to believe” he is so detained.³²⁰

4. *Frustration of Habeas Corpus Review for Insanity Acquittees: Cleveland v. Frazier*

The alternative ground for relief relating to the circuit court’s jurisdiction in ordering an insanity acquittal for an unfit defendant would arguably be habeas corpus,³²¹ affording insanity acquittees who were not fit at the time of the acquittal by the trial court a basis for challenging their acquittals. However, in *Cleveland v. Frazier*,³²² relied on by the *Flowers* court in explaining the scope of habeas corpus under the statute, the Arkansas Supreme Court rejected a jurisdiction-based challenge where the petitioner argued that the order was invalid because the trial court made no factual finding determination, required by Section 5-2-313, that the “defendant committed the offense and that he or she was suffering from a mental disease or defect at the time of the commission of the offense.”³²³ The court found that Cleveland conceded the issue of the trial court’s jurisdiction under Section 5-2-314, in acquitting him and ordering him committed to the state hospital, focusing only on the lack of a determination that he committed the offense.³²⁴

The *Cleveland* court rejected the argument that the order committing Cleveland to the state hospital was invalid because it found no facial irregularity in the trial court’s written order,³²⁵ explaining the petitioner’s position: “Mr. Cleveland urges the court to look beyond the face of the order, and to consider the record as a whole.”³²⁶

In light of the argument before the court, in which Cleveland did not challenge the trial court’s authority to proceed with adjudication based on a finding of his incompetence for trial, the decision upholding the trial court’s action may well have been proper, in a technical sense.³²⁷ The court found that there was no reference to whether Cleveland or the State urged the trial

320. *Id.* at 763–64, 68 S.W.3d at 291.

321. The writ of habeas corpus is statutorily recognized for individuals challenging an illegal sentence, ARK. CODE ANN. § 13-112-103, and for individuals challenging the legality of their confinement in the Arkansas State Hospital. ARK. CODE ANN. § 20-64-804.

322. *Cleveland v. Frazier*, 338 Ark. 581, 999 S.W.2d 188 (1999).

323. *Id.* at 587, 999 S.W.2d at 191 (interpreting Ark. Code Ann. § 5-2-313).

324. *Id.* at 585, 999 S.W.2d at 191. The petitioner was represented before the trial court and Arkansas Supreme Court by the Legal Clinic at the University of Arkansas at Little Rock School of Law. *Id.* at 582, 999 S.W.2d at 189.

325. *Id.* at 587, 999 S.W.2d at 191–92.

326. *Id.*, 999 S.W.2d at 192.

327. *Cleveland*, 338 Ark. at 588, 999 S.W.2d at 192.

court to acquit him based on mental disease or defect.³²⁸ The controlling statute required the trial court to make a factual determination that the evidence was sufficient to show that an accused committed the offense only if he did not assert insanity as a defense.³²⁹ The omission of any finding on the face of the commitment order showing that Cleveland did not, himself, assert an insanity defense was not facially invalid; the order was not facially invalid, according to the Arkansas Supreme Court, because the order did not show that Cleveland had not claimed insanity.³³⁰ Section 5-2-313(b) only requires the trial court to determine that the evidence would prove that the impaired accused actually committed the offense charged.³³¹ Subsection (b) requires this affirmative finding only in cases in which the defendant has not moved for acquittal based on mental disease or defect.³³² Because the basis for the statutory claim was that the commitment order did not include the finding required by Section 5-2-313, the court held that the order was not invalid on its face because the record did not show that Cleveland himself did not move for the acquittal.³³³ Subsection (b) requires this affirmative finding only in cases in which the defendant has not moved for acquittal based on mental disease or defect. The court relied on this language, distinguishing cases in which the accused pleads insanity from those in which the defense of insanity is not asserted by the defendant, finding that the lack of a reference as to which party urged the acquittal did not result in a fatally flawed judgment.³³⁴

Arguably, a much stronger attack on the practice used by the circuit court in Lambert's case could be pressed, based on the premise that a court lacks jurisdiction to enter an order finding the impaired defendant not guilty by reason of insanity, unless or until the impaired defendant is fit to proceed to trial in accordance with Section 5-2-302(b).³³⁵ The *Flowers* court recognized an alternative basis for habeas relief than that based on examination of the commitment order on its face.³³⁶ As in *Cleveland*,³³⁷ the court explained that the habeas challenge could be based on the fact that "the sentencing court lacked jurisdiction."³³⁸ However, the Arkansas Supreme Court's stated basis for upholding the trial court order in *Cleveland* was less promising with respect to reliance on the *lack of jurisdiction* theory:

328. *Id.*, 999 S.W.2d at 192.

329. *Id.* at 586, 999 S.W.2d at 191.

330. *Id.* at 587-88, 999 S.W.2d at 191.

331. *Id.*, 999 S.W.2d at 191.

332. ARK. CODE ANN. § 5-2-313(b) (1987).

333. *Id.* at 587-88, 999 S.W.2d at 192.

334. *Id.* at 587, 999 S.W.2d at 192.

335. *See supra* note 135 and accompanying text for text of statute.

336. *Flowers v. Norris*, 347 Ark. 760, 763, 68 S.W.3d 289, 291 (2002).

337. *Cleveland*, 338 Ark. 581, 999 S.W.2d 188.

338. *Flowers*, 347 Ark. at 763, 68 S.W.3d at 291.

We, therefore, hold that this court will not go beyond the face of a criminal commitment order to determine its validity. We shall continue to adhere to the well-established principle that a writ of habeas corpus will issue only if the criminal commitment order was invalid on its face.³³⁹

This rather final statement regarding the alternative grounds for habeas relief would indicate that the court will not go behind the face of the order to determine whether the trial court had jurisdiction to proceed with “sentencing.”³⁴⁰ What is evident from the *Cleveland* opinion is that the Arkansas Supreme Court’s review of the trial court record showed that Cleveland had been ordered to the state hospital for restoration of competence,³⁴¹ indicating that he had initially been found unfit to proceed to trial. Subsequently, in its findings, the trial court noted:

That based on the evaluation of the Department of Mental Health Services the State of Arkansas agrees that it would be in the best interest of justice that the Defendant be acquitted.³⁴²

By limiting its review to the examination of the commitment order and observing that the record was silent as to whether the defense requested the insanity acquittal, the *Cleveland* court considered its affirmance of the trial court’s action proper. It could have remanded to the trial court for compliance with the strict requirement of Section 5-2-313(b),³⁴³ that it make the

339. *Cleveland*, 338 Ark. at 587, 999 S.W.2d at 192.

340. In *Flowers*, one issue regarding the authority of the sentencing court was explicit; the commitment order recited a sentence imposed by the court that exceeded the sentencing range under the statute. *Flowers*, 347 Ark. at 768, 68 S.W.3d at 293. The trial court imposed a sentence of 40 years for the Class A felony of attempted capital murder when the sentencing ranged authorized for this offense was capped at 30 years, requiring the court to modify the greater term to the 30-year maximum permitted under the statute. *Id.*, 68 S.W.3d at 293.

The other issue regarded the imposition of sentences for both the attempted capital felony murder and the underlying felony offense upon which it was based, aggravated robbery. The court held that two convictions and sentences could not be imposed for both an attempted felony murder and the underlying felony supporting the felony murder charge, requiring that these offenses be merged because the General Assembly had not authorized imposition of separate convictions and sentences for an *attempt* to commit a felony murder. *Id.* at 765–66, 68 S.W.3d at 292–93, construing Ark. Code Ann. § 5-1-110(d).

341. *Cleveland*, 338 Ark. at 583, 999 S.W.2d at 189.

342. *Id.* at 584, 999 S.W.2d at 190.

343. The *Flowers* court noted the general rule that criminal statutes are to be strictly construed, with any doubts as to meaning to be resolved in favor of the defendant. *Flowers*, 347 Ark. at 765, 68 S.W.3d at 292. This approach comports with the general doctrine of lenity, or the resolution of doubt as to the meaning of a statute in favor of the defendant. *United States v. Lanier*, 520 U.S. 259, 266–67 (1997); *accord Sansevero v. State*, 345 Ark. 307, 45 S.W.3d 840 (2001); *Hagar v. State*, 341 Ark. 633, 19 S.W.3d 16 (2000). The question of whether the defendant moved for acquittal does not involve interpretation of Section 5-2-313(b); the statute is clear in its wording, if violative of due process. The principle of lenity, however, arguably would dictate remand to the trial court to ensure compliance with the

finding required for entry of the acquittal on the basis of mental disease or defect that Cleveland was factually guilty of the robbery with which he had been charged.

The court elected to proceed from the premise that the record was silent as to the motion for acquittal, despite evidence of Cleveland's impairment and the apparently unsuccessful efforts of the state hospital staff to restore him to fitness.³⁴⁴ As in *Hughes*, the court's action in *Cleveland* reflected a lack of regard for federal due process protections for mentally impaired criminal defendants,³⁴⁵ and the statutory requirement imposed by Section 5-2-302(b). The *Thomas* decision reflects a continuing posture in which individual rights are disregarded, or subordinated, to expedience.

The situation faced by an accused acquitted based on mental disease or defect also may result in a complex procedural morass that may effectively result in continuing—perhaps lifetime—confinement in the state mental health system, particularly for indigent acquittees lacking the resources to contest their acquittals. This situation would theoretically apply regardless of whether the competent defendant objected to the trial court's action in acquitting him, as in *Hughes*'s case, or whether the trial court orders acquittal by reason of mental disease or defect when the accused is not fit to make any decision regarding the exercise of his jury trial right or as to what defense, including insanity, he could assert.

VI. "COMMON SENSE" AND STATUTORY CONSTRUCTION

The Arkansas Supreme Court's suggestion in *Mauppin* that "common sense"³⁴⁶ might well dictate a result not contemplated by a strict reading of the Section governing restoration of fitness is worth considering in reviewing its more recent decision in *Thomas*. The trial court's order dismissing pending charges against Thomas was *not* authorized by Section 310(c)(2), as

requirements of this section where the record is ambiguous on the question of which party moved for the insanity acquittal.

344. See *Cleveland*, 338 Ark. 581, 999 S.W.2d 188.

345. *Id.*, 999 S.W.2d 188. Whether federal habeas relief would be available for acquitted defendants who will remain in the custody of ASH and Department of Human Services is not clear. Under 28 U.S.C. § 2254(a), the federal habeas remedy for petitioners claiming violations of federally-protected constitutional rights convicted in state court proceedings, it is possible that the "custody" requirement for those petitioners would be met by insanity acquittees under state law. This is arguably because they remain *in custody* if their criminal charges have involved acts of violence or dangerous behavior until such time as they are able to prove their eligibility for release pursuant to Ark. Code Ann. § 5-2-314(e)(1). See *Felker v. Turpin*, 518 U.S. 651, 658 (1996) (holding procedural limitations imposed on actions brought pursuant to Section 2254 do "not deprive this Court of jurisdiction to entertain original habeas petitions.").

346. *Mauppin*, 309 Ark. 235, 245, 831 S.W.2d 104, 108–09 (1992).

the supreme court found on the State's appeal from the order. But, the trial court's action clearly did embrace the constitutional problem of due process addressed by the *Jackson* Court when it held that confining an impaired defendant indefinitely "solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment's guarantee of due process."³⁴⁷ Because there was no evidence that Thomas could be restored to fitness within a reasonable period of time, if ever, the trial court's dismissal served to prevent the due process violation that *Jackson* explained is inherent in indefinite confinement for purposes of restoration. However, on remand from the Arkansas Supreme Court, the trial court acquitted Thomas based on mental disease or defect.³⁴⁸

A. The "Common Sense" of the Trial Court's Dismissal Order

*[N]owhere in this Section [5-2-310(c)(2)] is a circuit court given the authority to dismiss charges against an unfit defendant.*³⁴⁹

The *Thomas* court rejected the trial court's order dismissing the charges pending against an impaired accused who could not be expected to regain fitness to proceed with trial based on its narrow reading of Section 5-2-310(c)(2). The fact that Subsection (c)(2) expressly authorizes dismissal only if the impaired defendant has regained competence for trial cannot be disputed.

The Indiana Supreme Court, in *Davis*, recognized the "inherent authority to dismiss criminal charges where the prosecution of such charges would violate a defendant's constitutional rights."³⁵⁰ The *Thomas* court's approach appears far more restricted, perhaps to the point of admitting of no "inherent authority" at all, with an Arkansas trial court's power totally restricted by legislative delegation. But such a limited approach would almost certainly conflict with the Arkansas Supreme Court's protection of its own authority to regulate practice in the state court system, as evidenced by its stated view of the "separation of powers doctrine" emanating from the Arkansas constitution.³⁵¹

347. *Jackson v. Indiana*, 406 U.S. 715, 731 (1972).

348. *State v. Thomas*, No. 60-CR-11-1505, *Judgment of Acquittal by Reason of Mental Disease/Defect*, PULASKI COUNTY CIRCUIT COURT, SIXTH JUDICIAL DISTRICT/7TH DIVISION (June 8, 2015) https://caseinfo.aoc.arkansas.gov/cconnect/PROD/public/ck_public_qry_doct.cp_dktrpt_frames?backto=P&case_id=60CR-11-1505&begin_date=&end_date=.

349. *Thomas*, 214 Ark. 362, at 5, 439 S.W.3d at 693.

350. *State v. Davis*, 898 N.E.2d 281, 285 (Ind. 2008).

351. See Section IV.B, *infra*, which follows next, and accompanying notes, discussing the Arkansas Supreme Court's explanation of limitations on powers of the legislative, executive and judicial branches of state government pursuant to Ark. Const. art. 4, §§ 1, and 2.

Still, the Arkansas Supreme Court did not address the trial court's action in terms of *Jackson v. Indiana*, or the gap in legislatively-prescribed authority for dealing with the unrestorable, unfit criminal defendant. The failure to do so, limiting its review to the text of Section 5-2-310's provisions, rejects "common sense" in arriving at its decision to reverse the dismissal ordered by the trial court.

In assessing the application of "common sense" to the circumstances presented in Thomas, one could readily conclude, as the trial court did, that in light of the uncontroverted expert opinion offered at the hearing on the motion to dismiss, there was not a substantial probability that Thomas could be restored to fitness within a reasonable period of time. But, the evidence also warranted the trial court ordering the Department of Human Services to petition for his involuntary commitment to ASH, as provided in Subsection 310(b)(2)(D), a process that would be consistent with *Jackson*, provided that the commitment does not include a state of continuing jeopardy for Thomas.

Moreover, the constitutional quandary created by *Thomas* in failing to squarely address the problem of indefinite jeopardy for impaired defendants who cannot be restored to fitness is illustrated by the underlying facts of the pending criminal charges. Thomas was charged with the offenses of battery in the second-degree,³⁵² a Class D felony,³⁵³ and assault in the second-degree,³⁵⁴ a Class B misdemeanor.³⁵⁵ As in the *Jackson and Davis* cases, the offenses with which Thomas was charged were lower grade felonies, with statutory penalties that carried potential imprisonment upon conviction likely shorter in duration, particularly in practice, than the time required for a successful restoration of competence for them to proceed to trial.

In the Arkansas cases in which extended confinement of impaired defendants was upheld, Darrell Davis, Rickey Dale Newman, and Gary Mauppin, the defendants initially found unfit for trial were charged with capital murder, the highest degree of offense in the Criminal Code.³⁵⁶ In these cases, delay in trying the cases was attributable to the length of time

352. ARK. CODE ANN. § 5-13-202 (Repl. 2016).

353. *Id.* § 5-13-202(b). A Class D felony carries a potential maximum sentence of six years, with no statutory minimum sentence of imprisonment. *Id.* § 5-1-401(a)(5) (Repl. 2016).

354. *Id.* § 5-13-206 (Repl. 2016). A Class B misdemeanor carries a maximum punishment of confinement in jail for a period not to exceed 90 days. *Id.* § 5-1-401(b)(2).

355. *Id.* § 5-13-206(b).

356. Moreover, under Arkansas law, as is common, there is no statute of limitations for murder offenses. ARK. CODE ANN. § 5-1-109(a)(1)(A), (B), and (C), (no limitations for capital murder, first degree murder or second-degree murder, respectively). Consequently, the delay in proceeding to trial occasioned by the time involved in the restoration of fitness to proceed to trial does not, in itself, suggest any particular prejudice to these defendants in the delay itself, as the requirement for speedy trial would be excused during any period in which a defendant's impairment would prevent him from being tried more expeditiously.

required for restoration of the defendants' competence for trial, not implicating the problem posed in *Thomas* of unrestorable fitness. But, the problem of restoration is a common factor in the eventual disposition of the criminal charges. The situations presented in these cases demonstrate the need for flexibility in the criminal justice system's response to dealing with mental illness or defect that impairs an individual's ability to comprehend the nature of the proceedings, or to assist counsel in presenting a defense to the charges.

The need for flexibility in response is illustrated by the Supreme Court's decisions in *Riggins v. Nevada*³⁵⁷ and *Sell v. United States*,³⁵⁸ addressing the problem of restoration of competence of the impaired accused with psychoactive drugs designed to repair mental state necessary for restoration. While the *Riggins* Court recognized the appropriateness of forced medication for the purpose of restoring competence for trial on the capital charge in that case,³⁵⁹ the decision in *Sell* sets the parameters for use of psychoactive drugs to restore competence when the defendant objects to their administration.³⁶⁰ The critical factor in the four-part test set by the *Sell* Court requires consideration of the importance of the State interest in prosecuting the accused through trial in order to ascertain guilt,³⁶¹ or culpability in the commission of the offense.³⁶²

357. *Riggins v. Nevada*, 504 U.S. 127 (1992). See *supra* notes 47–49 and accompanying text.

358. *Sell v. United States*, 539 U.S. 166 (2003). See *supra* notes 50–56 and accompanying text.

359. *Riggins*, 504 U.S. at 134–35.

360. *Sell*, 539 U.S. at 181–82. See *supra* notes 50–56 and accompanying text.

361. *Id.* at 180 (requiring trial court to determine whether “important governmental interests are at stake”). Although a defendant may be acquitted by reason of insanity, the acquittal does not establish that the defendant did not commit the offense charged, or that the evidence produced by the prosecution was insufficient to establish that the defendant committed the offense. The prosecution retains the burden of proving that the defendant committed the offense charged; the insanity defense may then be asserted to excuse criminal liability for the commission of the offense based on impaired mental state at the time of the crime. *Jones v. United States*, 463 U.S. 354, 363 (1983); *Foucha v. Louisiana*, 504 U.S. 71 (1992), see *supra* notes 162–166 and accompanying text; see also *Ark. Dept. of Correction v. Bailey*, 368 Ark. 518, 526, 247 S.W.3d 851, 857 (2007) (citing *Jones* and *Foucha*).

362. Even when an accused is acquitted on the basis of insanity, the basis for the acquittal itself indicates that the evidence adduced at trial, or the defendant's admission in the event the acquittal results from entry of a guilty plea, the entry of the plea will establish the necessary basis for a legal conclusion that the accused, in fact, committed the offense. See *supra* note 4. The trial court is authorized by Ark. Code Ann. § 5-2-313(c) to acquit an accused based on the expert evaluations that the accused lacked capacity, or was insane, at the time of the offense, providing that if the accused did not plead not guilty by reason of insanity, the court must make a “factual determination that the defendant committed the offense.” It is, however, doubtful that the trial court should be able to essentially rely on the affirmative defense of lack of capacity, or insanity, when a fit, or competent, defendant does not assert

The *Sell* factors relate directly to the restoration process, specifically as they address the forced administration of psychotropic medications on the unwilling, impaired defendant. A similar approach serves the overall problem of addressing restoration, including the problem posed by impairment that cannot be successfully redressed. Consequently, the time frame for restoration efforts can rationally fluctuate based upon the severity of the offense charged, because the State's interests in final determination that the accused actually committed the offense is arguably greater than with respect to a lesser charge.

The extended periods of time devoted to restoration in Darrell Davis, Rickey Dale Newman, Gary Mauppin, and Ronald Jack Campbell³⁶³ reflect the seriousness of the charges in each case, capital murder. In contrast, the one-year rule for restoration relied upon in *Stover v. Hamilton*,³⁶⁴ *Schock v. Thomas*,³⁶⁵ and *Mannix v. State*,³⁶⁶ all involved less serious charges where defendants were acquitted on the pending charges on the basis of insanity before being committed to the state hospital. However, the trial court's entry of an acquittal based on mental impairment of an accused who is not competent to make the decision as to whether to plead not guilty by reason of mental disease or defect is inconsistent with Section 4.06(2) of the Model Penal Code.³⁶⁷

1. *The Trial Court's "Inherent" Authority to Dismiss the Criminal Charges*

The *Thomas* court's observation that Section 5-2-310 does not authorize dismissal of criminal charges for an unfit defendant might suggest agreement with the State's separation of powers argument. However, in fo-

the defense. But, the entry of a plea of not guilty by reason of insanity does not relieve the prosecution of proving each element of the offense charged, including that the offense was committed by the defendant. *Gruzen v. State*, 276 Ark. 149 153, 634 S.W.2d 95 (1982).

363. *See supra* notes 356.

364. *See supra* notes 130-133 and accompanying text.

365. Schock was acquitted on the basis of insanity contemporaneously with being found unable to assist counsel in his defense and then committed to the state hospital for restoration of competence. *See Schock v. Thomas*, 274 Ark. at 496, 625 S.W.2d at 522 (1981); *see also supra* notes 135, 150, and 254.

366. The defendant had been acquitted on the murder charge based lack of capacity at the time of the offense, and then committed to the state hospital for restoration of competence. The trial court's action in proceeding to enter a judgment on the defendant's guilt before her restoration to fitness to enter a plea likely violated her right to due process. *See Mannix v. State*, 273 Ark. 492, 493, 624 S.W.2d 222, 222 (1981); *see also supra* notes 135, 150, and 254.

367. MODEL PENAL CODE § 4.06(2) (Am. Law Inst. 1981) (requiring suspension of proceedings when the accused is found to be incompetent and resumed only when the defendant regains competence).

curring its holding only on the incorrect reliance on Subsection (c)(2) as the basis for the trial court's dismissal of the criminal charges against an accused who has not been restored to competence, the *Thomas* court avoided the State's argument that the dismissal order under review violated the separation of powers doctrine under Arkansas law.³⁶⁸

At the same time, the court's holding on this limited ground of statutory construction leaves open the failure of the General Assembly to address the constitutional problem of indefinite jeopardy for impaired defendants who cannot be restored to fitness for purposes of trial. What is clear is that *Thomas* arose in a factual context implicating federal and state constitutional authority, as well as proper exercise of judicial discretion in light of the legislative failure to contemplate, or address, the problem of unrestorable impairment.

The *Thomas* court's specific reference to the lack of statutory authority for a trial court to order dismissal of pending criminal charges when the impaired accused cannot be restored to fitness within a reasonable amount of time reflects the narrowest reading of Section 5-2-310 as an alternative basis for decision. This approach to statutory construction leaves unanswered the underlying constitutional question as to how the *Jackson* Court's concern for indefinite jeopardy should be addressed by the reviewing court in a case squarely resting on Section 5-2-310(b)(1)(A), the situation posed by the impaired defendant who cannot be restored to fitness to proceed to trial.

Regardless of any potential limitations under the state constitution for the trial court's exercise of "inherent authority" to dismiss criminal charges generally, there remains the constitutional principle that state courts are bound to enforce federal constitutional protections.³⁶⁹

In *Williams v. State*,³⁷⁰ the Arkansas Supreme Court affirmed this responsibility for the state's courts:

There can be no question that this court, *as well as the trial courts of this state*, is bound by the decisions of the United States Supreme Court concerning rights and prohibitions under the provisions of the United States Constitution and, there is no question that the United States Supreme Court has spoken clearly, and more than once, on the question of racial discrimination in the selection of juries in criminal cases.³⁷¹

368. See *Schock v. Thomas*, 2014 Ark. 362, 439 S.W.3d 690, 692; see also *supra* note 206.

369. See, e.g., *Michigan v. Long*, 463 U.S. 1032, 1042 n.8 (1983) (resolving questions arising under federal constitutional protections "state courts are required to apply federal constitutional standards").

370. *Williams v. State*, 254 Ark. 799, 496 S.W.2d 395 (1973).

371. *Id.*, 496 S.W.2d at 395.

In fact, the Arkansas Supreme Court recognized the authority of the state's courts to enforce various protections afforded by both federal and state constitutional provisions, in addition to protecting judicial authority from encroachment by the legislative and executive branches. For instance, the supreme court promulgated the state speedy trial rules³⁷² that provide for dismissal with prejudice by the circuit court as the remedy for violation³⁷³ of the time limits imposed under the rules.³⁷⁴ In so doing, the court assumed authority for enforcement of the speedy trial requirement that both protects the individual defendant's rights and serves the public's interest in formal solution of criminal charges, to the state's trial courts without relying on any grant of authority by the legislature.

Similarly, the Arkansas Supreme Court recognized the right to interlocutory appeal when the trial court rejects a colorable claim of prior, or double jeopardy, in *Edwards v. State*.³⁷⁵ The *Edwards* court rejected the accused's creative claim³⁷⁶ that his involuntary civil commitment estopped a subsequent criminal prosecution based upon the same crime upon which his commitment had been based. These acts involved the abduction of and terroristic threats directed toward his attorney.³⁷⁷ In so doing, it relied on the decision in *Abney v. United States*,³⁷⁸ in which the Court found that the protection afforded by the Double Jeopardy Clause would be frustrated if the accused pleading prior jeopardy were required to endure trial and preserve his claim for review on appeal in the event of conviction.³⁷⁹ As in the case of a speedy trial violation, a double jeopardy violation requires a remedy that does not require the aggrieved defendant to proceed to trial that would otherwise have been prohibited in order to vindicate his claim.³⁸⁰

372. See *Weaver v. State*, 313 Ark. 55, 58–59, 852 S.W.2d 130, 132 (1993). The court referred to the history of Arkansas Speedy Trial Rule tracing it to American Bar Association Standards Relating to Speedy Trial issued in 197; the commentary to the Standards written by Professor Wayne R. LaFave; and the decision in *Barker v. Wingo*, 407 U.S. 514 (1972) in which the Supreme Court applied a four-part test for assessing when delay in trial would result in a violation of the speedy trial protection afforded by the Sixth Amendment).

373. ARK. R. CRIM. P. 30.1(a) (authorizing dismissal with prejudice—absolute discharge—for failure to bring accused to trial within specific time limits). In *Strunk v. United States*, the unanimous Court explained that any remedy short of dismissal with prejudice for a violation of the accused's right to speedy trial would fail to promote the policies of the constitutional protection. 412 U.S. 434, 439–40 (1973) (citing *Barker v. Wingo*).

374. ARK. R. CRIM. P. 28.1(b) (requiring defendant to be brought to trial within 12 (twelve) months of arrest or service of summons, excepting periods of time deemed “excludable” under Rule 28.3).

375. *Edwards v. State*, 328 Ark. 394, 398, 943 S.W.2d 600, 602 (1997).

376. *Id.* at 401, 943 S.W.2d at 603.

377. *Id.* at 397–98, 943 S.W.2d at 600–601.

378. *Abney v. United States*, 431 U.S. 651, 661–662 (1977).

379. *Id.* at 660–61.

380. *Id.* at 659.

The court's recognition of the authority of Arkansas trial courts to order dismissal to enforce federal constitutional protections, and parallel state constitutional and statutory protections of individual rights, demonstrates an approach similar in concept to the position taken by the Indiana Supreme Court in *Davis*. This general reservation of judicial authority was affirmed by the Arkansas Supreme Court in *Williams*,³⁸¹ but missing from the court's analysis in *State v. Thomas*, where the disposition reflects total deference to legislative authority.³⁸²

2. *The State's Separation of Powers Claim*

The argument avoided by the *Thomas* court,³⁸³ the State's claim that the trial court's dismissal of the charges pending against the impaired defendant violated the separation of powers doctrine, has been vigorously argued in Arkansas cases.³⁸⁴ The protection of the powers of the executive, legislative, and judicial branches of state government can be traced to the Arkansas Constitution.³⁸⁵ Perhaps ironically, resolution of separation of powers issues is traditionally the subject of litigation for determination by one branch of government, the judiciary.

381. ARK. CODE ANN. § 5-2-302(b) (1975) (amended 2001); *Cleveland*, 338 Ark. at 587, 999 S.W.2d at 191.

382. *State v. Davis*, 898 N.E.2d 281, 284 (Ind. 2008).

383. *State v. Thomas*, 2014 Ark. 362, at 5–6, 439 S.W.3d at 692–93.

384. See, e.g., Courtney A. Nelson, *To Truly Reform We Must Be Informed: Davis v. Parham, The Separation of Powers Doctrine, and the Constitutionality of Tort Reform in Arkansas*, 59 ARK. L. REV. 781, 782 (2006) (evaluating legislative adoption of two-year statute of limitations in medical malpractice actions); Stephanie Khouri, *The Arkansas Supreme Court Declares the Nonparty-Fault Provision and the Medical Costs Provision of the Civil Justice Reform Act of 2003 Unconstitutional, Annual Survey of Case Law; Tort Law*, 32 U. ARK. LITTLE ROCK L. REV. 427, 428 (2010) (reviewing supreme court's action in holding provision limiting recovery for medical expenses incurred by injured employee against third-parties in *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 6, 348 S.W.3d 135, at 140 and referencing court's explanation of its authority: "The court noted that the Arkansas Constitution recognizes the importance of separation of powers among the different branches, noting specifically that amendment 80, section 3 'instructs that the Arkansas Supreme Court "shall prescribe the rules of pleading, practice and procedure for all courts."'").

385. ARK. CONST. art. 4, §§ 1, 2:

§ 1. The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.

§ 2. No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

With respect to the issue of control over litigation in the state's courts, the state courts have been particularly protective of the authority claimed by the judiciary. This surfaced in litigation involving the adoption of evidentiary rules for practice in the courts. In *Ricarte v. State*,³⁸⁶ the Arkansas Supreme Court held that the adoption of the Uniform Rules of Evidence by the General Assembly was invalid, and in voiding the legislature's evidence code, supplanted it by promulgating its own Rules of Evidence.³⁸⁷

The State's separation of powers theory could likely be traced to potential conflict between the executive and judicial branches over the authority of trial courts to order dismissal of pending criminal prosecutions.³⁸⁸ In *State v. Murphy*,³⁸⁹ the trial court dismissed an enhancement allegation *sua sponte*, reading the statute authorizing extended punishment as permissive, rather than mandatory.³⁹⁰ The court explained the limitation on the judiciary imposed by the state constitution:

386. *Ricarte v. State*, 290 Ark. 100, 717 S.W.2d 488 (1986).

387. *Id.* at 104–05; 717 S.W.2d at 489–90. The court explained that the authority to promulgate rules of evidence for practice in the state's courts was “inherent,” referring to Ark. Stat. Ann. s 22–242 (Supp. 1985), which provided: “The Supreme Court of the state of Arkansas shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings in criminal cases,” in support of its conclusion. Subsequent attempts by the General Assembly to adopt evidentiary rules arguably intruding on the authority of the judicial branch were addressed in *State v. Sypult*, 304 Ark. 5, 7, 800 S.W.2d 402, 404 (1990) where the court considered the scope of the patient/psychotherapist patient privilege in preserving patient confidences in cases involving child abuse, while permitting questioning eliciting the fact that an accused had sought therapeutic counseling for sexual abuse. *Id.* at 8, 800 S.W.2d at 404. In limiting the scope of admissible evidence to exclude the content of confidential communications, the court recognized the balancing process essential to accommodate important public policy concerns in the interpretation or application of court-promulgated evidentiary rules, noting:

In *Curtis v. State*, 301 Ark. 208, 783 S.W.2d 47 (1990), and *St. Clair v. State*, 301 Ark. 223, 783 S.W.2d 835 (1990) we reaffirmed our inherent rule-making power as identified in *Ricarte*, *supra*; however, we went on to say that we share this power with the General Assembly and that we will defer to its authority where legislation involving matters of public policy conflicts with court rules.

Id. at 7, 800 S.W.3d at 404.

388. In *Hobbs v. Jones*, 2012 Ark. 293, at 1, 412 S.W.3d 844, 847, which involved a challenge to the delegation of authority to the Arkansas Department of Correction in developing the protocol for execution of capital defendants sentenced to death, the court explained, simply, the separation of powers among the legislative, judicial and executive branches of Arkansas state government, noting: “The executive branch has the power and responsibility to enforce the laws as enacted and interpreted by the other two branches.” *Id.* at 9, 412 S.W.3d at 851.

389. *State v. Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993).

390. *Id.* at 70–71, 864 S.W.2d at 843.

Our state constitution reserves the duty of charging an accused to the prosecutor or to the grand jury. Ark. Const. amend. 21, § 1. This court has preserved the separation of powers between the executive branch and the judicial branch by holding that when the trial court amends an information over the state's objection, the trial court has encroached upon the prosecutor's constitutional duties and breached the separation of powers.³⁹¹

Thus, the specific issue raised in *Murphy* involved the decision regarding charging of criminal offenses which is committed to the prosecutor and not subject to exercise of discretion by the trial court.³⁹² The court did not address the authority of the trial court to order dismissal of charges generally, but rather, narrowly held that the trial court "usurped" the prosecutor's authority in interfering with the charging process committed to the prosecution in violation of the separation of powers.³⁹³

Similarly, in *State v. Hill*,³⁹⁴ the Arkansas Supreme Court granted the State's petition for writ of certiorari³⁹⁵ to consider whether the trial court exceeded the scope of its authority in reducing the offense alleged in the charging instrument from a felony, theft of property,³⁹⁶ to a misdemeanor, theft of a trade secret.³⁹⁷ The supreme court granted the State's petition, affirming that the authority to charge a criminal offense lies with the prosecution³⁹⁸ and further, that the amendment of a pending charge by the trial court invades the province of the constitutional duty of the prosecutor and violates the separation of powers doctrine.³⁹⁹ The State's separation of powers argument would likely fail with regard to the trial court's general authority under Section 5-2-310, precisely because the General Assembly did authorize exercise of the power to dismiss with respect to those defendants who have been restored to fitness in Subsection (c)(2).⁴⁰⁰

The *Thomas* court clearly read Subsection (c)(2) to authorize dismissal by the trial court when an impaired defendant had been restored to fitness, based on the broad ground that "it would be unjust to resume the criminal proceeding."⁴⁰¹ While the statute specifies that the triggering factor in assessing whether continuation of the proceedings is the passage of time—"so

391. *Id.* at 72, 864 S.W.2d at 844.

392. *Id.*, 864 S.W.2d at 844.

393. *Id.*, 864 S.W.2d at 844.

394. *State v. Hill*, 306 Ark. 375, 811 S.W.2d 323 (1991).

395. The court explained that the writ of certiorari lies when the trial court exercises power that it is not authorized to do. *Id.* at 376, 811 S.W.2d at 323.

396. ARK. CODE ANN. § 5-36-103 (1987).

397. ARK. CODE ANN. § 5-36-107 (1987).

398. *Id.*, citing *State v. Brooks*, 301 Ark. 257, 783 S.W.2d at 368 (1990).

399. *Hill*, 306 Ark. at 376, 811 S.W.2d at 323.

400. ARK. CODE ANN. § 5-2-310(c)(2) (Repl. 2016).

401. *Thomas v. State*, 2014 Ark. 362, at 5, 439 S.W.3d at 693 (2014).

much time has elapsed since the alleged commission of the offense”⁴⁰²—there is no requirement that the trial court make evidentiary findings identifying the specific circumstances, or facts, warranting the trial court’s finding that continuation of the proceedings would be *unjust*.

The injustice that compromises the right to fair trial may flow from the lost opportunity to investigate a case in timely fashion, faded memories, or the disappearance of witnesses necessary to present an effective defense. Injustice also results from the emotional trauma of delay for the individual who remains in jeopardy until criminal charges are finally resolved. While this delay may serve the strategic interests of some defendants, the majority of them will encounter the unsettling life experience caused by uncertainty as to their eventual fate. This personal consequence of jeopardy was aptly described by Justice Hugo Black in explaining the protection afforded by the double jeopardy principle in *Green v. United States*:⁴⁰³

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.⁴⁰⁴

Although one might posit, cynically, that some impaired defendants would be less likely to suffer the emotional experience described by Justice Black and later referenced by the Court in *Abney v. United States*,⁴⁰⁵ the impaired defendant who cannot be restored to fitness also suffers a curtailment of liberty⁴⁰⁶ and the consequences of confinement in a mental institution, often under medication.⁴⁰⁷

A reasonable inference from the legislature’s specific grant of authority to dismiss if proceeding to trial would be unjust for a previously impaired defendant, who has been restored to fitness, would be that the trial court is authorized to address the unrestorable defendant’s situation in a way that addresses the concerns of justice. In fact, Section 5-2-310(a)(1)(B) expressly authorizes the trial court to release an impaired defendant who is not dangerous on “conditions the court deems necessary.”⁴⁰⁸ Standing alone, the

402. *Id.* § 5-2-310(c)(2) (Repl. 2016).

403. *Green v. United States*, 355 U.S. 184 (1957).

404. *Id.* at 187–88.

405. *Abney v. United States*, 431 U.S. 651 (1977).

406. *See supra* note 159; *Vitek v. Jones*, 445 U.S. 480 (1980).

407. *See Riggins v. Nevada*, 504 U.S. 127 (1992) (describing the consequences of psychiatric medication).

408. ARK. CODE ANN. §5-2-310(a)(1) (Repl. 2016) provides:

proper inference to be drawn from this specific language could be that the General Assembly did not intend to afford the trial court any authority to dismiss pending charges in the event restoration of competence is not possible or efforts have failed. However, in light of the express power to dismiss charges when required by concerns for fairness when a defendant has been restored to fitness, such a limited grant of authority in dealing with those impaired defendants who cannot be restored to fitness is simply not consistent in terms of legislative intent.

The reasonableness of the inference that the trial court's exercise of discretion to dismiss pending charges in order to comply with *Jackson's* requirement that the impaired defendant not be subjected to unending jeopardy is not based solely on the authority expressly granted by Section 5-2-310(c)(2). Subsection 5-2-311 of the Criminal Code authorizes the trial court to consider a number of issues that may be resolved in the defendant's favor, even when the accused himself is not fit for trial. The statute provides:

The fact that the defendant lacks fitness to proceed does not preclude through counsel and without the personal participation of the defendant any motion upon:

- (1) A ground that the:
 - (A) Indictment is insufficient;
 - (B) Statute of limitations has run; or
 - (C) Prosecution is barred by a former prosecution;
or
- (2) Any other ground that the court deems susceptible of fair determination prior to trial.⁴⁰⁹

A determination that the indictment is insufficient under Subsection (1)(A) would not entail a dismissal with jeopardy because the State could re-indict or charge the offense by information following dismissal for a matter of form. However, the dismissal that would follow a finding that the statute of limitations had run, under Subsection (1)(B), or that the prosecution is barred by prior prosecution, under Subsection (1)(C) would be with preju-

(B) However, if the court is satisfied that the defendant may be released without danger to himself or herself or to the person or property of another, the court may order the defendant's release and the release shall continue at the discretion of the court on conditions the court determines necessary.

409. *Id.* § 5-2-311 (Repl. 2016).

dice and bar further proceedings. The catch-all provision, Subsection (2), entails a broad grant of authority to Arkansas trial courts to resolve any outstanding issue that the trial court “deems susceptible to fair resolution prior to trial.”

The broad grant of authority to the trial court in Section 5-2-311(2) would clearly encompass the issue raised by a finding that an impaired defendant cannot be restored to fitness for trial. Moreover, there is no limitation on the trial court’s authority to order dismissal of charges for unrestored and unrestorable impaired criminal defendants when supported by the evidence in either Section 5-2-310(a)(1)(B) or Section 5-2-311(2) of the Criminal Code. Based on the Court’s holding in *Jackson*, dismissal was the proper action to have been taken by the trial court in *State v. Thomas*.

3. Application of the “Right for Any Reason” Rule

The *Thomas* court’s disposition, vacating the dismissal order entered by the trial court, rested on the narrow view of statutory construction in which the reliance by the court and parties on the wrong statutory provision controlled the court’s view of the trial court’s exercise of discretion.⁴¹⁰ Reliance on an incorrect statute, rule, or basis for a trial court’s exercise of discretion is not an unknown problem in Arkansas law. A commonly recognized response to the problem is the application of the “right for any reason” rule,⁴¹¹ as explained by the Georgia Supreme Court in the review of a civil case, *City of Gainesville v. Dodd*,⁴¹² where the court wrote:

Under the “right for any reason” rule, an appellate court will affirm a judgment if it is correct for any reason, even if that reason is different than the reason upon which the trial court relied.⁴¹³

410. *State v. Thomas*, 2014 Ark. 362 (2014).

411. See, e.g., Thomas G. Saylor, *Right for Any Reason: An Unsettled Doctrine at the Supreme Court Level and An Anecdotal Experience with Former Chief Justice Cappy*, 47 Duq. L. Rev. 489 (2009) (noting common use of doctrine by appellate courts, at 491 n.5); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937) (“In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason.”). *Community Redevelopment Agency v. Abrams*, 543 P.2d 905, 921 (Cal. 1975), (en banc) (citing *Davey v. Southern Pacific Co.*, 48 Pac. 117, 118 (Cal. 1897)) (“No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.”).

412. *City of Gainesville v. Dodd*, 573 S.E.2d 369 (Ga. 2002).

413. *Id.* at 370. The court declined to apply the “right for any reason” rule to uphold the trial court’s decision in *Dodd*, however, finding that this default rationale for decision does

Some appellate courts also apply this rule in criminal cases. For example, the New Mexico Supreme Court applied the rule in *State v. Ruiz*,⁴¹⁴ but cautioned that the court should not use the rule when the parties had not argued the correct ground for the decision to the trial court thus making application of the rule unfair to the appellant.⁴¹⁵ In *Thomas*, there was no unfairness to the appellant, the State; however, the factual basis for the “right” disposition—dismissal of the criminal charge—had been established by expert testimony during the hearing in the trial court.⁴¹⁶

Arkansas courts have adopted and relied on the “right for any reason” rule. In *Chisum v. State*,⁴¹⁷ a decision often cited for application of this rule,⁴¹⁸ the Arkansas Supreme Court considered the trial court’s ruling admitting testimony as an exception to the hearsay rule.⁴¹⁹ A witness reviewed a prior statement she had given regarding the circumstances surrounding a killing, which resulted in the defendant’s conviction for manslaughter.⁴²⁰ The State offered testimony concerning her statements through other witnesses under the recorded recollection exception, and the trial court admitted the evidence on this theory.⁴²¹ On appeal, the court held the trial court incorrectly relied on this theory.⁴²² However, the Arkansas Supreme Court also found that the witness’s statement was admissible on a different theory, impeachment evidence under Evidence Rule 613.⁴²³ The court declined to find

not apply when the trial court’s disposition is based on an “erroneous legal theory.” *Id.* at 370–73. It cautioned against a mechanistic application of this rule:

[T]his case illustrates one of the major dangers of blind, rote application of the “right-for-any reason” rule without the appellate court’s discretion; automatic application of the rule would have resulted in a decision on the merits of the arguments advanced by the City, but without those arguments being properly briefed by all parties on appeal.

Id. at 373.

414. *State v. Ruiz*, 150 P.3d 1003, 1011 (N.M. 2006).

415. *See also State v. Franks*, 889 P.2d 209, 212 (N.M. Ct. App. 1994) (“Although we may affirm a district court ruling on a ground not relied upon by the district court . . . we will not do so if reliance on the new ground would be unfair to the appellant.”); *see Naranjo v. Paul*, 803 P.2d 254, 259 (N.M. Ct. App. 1990).

416. *See Thomas v. State*, 2014 Ark. 362, 439 S.W.3d 690 (2014).

417. *Chisum v. State*, 273 Ark. 1, 616 S.W.2d 728 (1981).

418. *E.g., Warren v. State*, 314 Ark. 192, 198, 862 S.W.2d 222, 225 (1993) (upholding trial court’s discretion in limiting cross-examination to matters not inquired into on direct examination).

419. *Id.*

420. *See Chisum*, 273 Ark. 1, 616 S.W.2d 728.

421. *Id.* at 6, 616 S.W.2d at 730 (referencing Uniform Evidence Rule 803(5) (now Ark. R. Evid. 803(5))).

422. *Id.*, 616 S.W.2d at 731–32.

423. *Id.* at 6–7, 616 S.W.2d at 731–32.

reversible error in the trial court's erroneous basis for admitting the statement, instead explaining: "[W]e will not reverse a trial judge's ruling, even though he gave the wrong reason, if the ruling was right."⁴²⁴

Chisum remains sound authority for application of the "right for any reason" rule in Arkansas criminal appellate decisions, and is often cited in subsequent cases.⁴²⁵

In *Thomas*, the appellate court's basis for reversing the trial court rested on the misidentification of the authority to dismiss the pending criminal charges based on an incorrect statutory provision. But, because the trial court's dismissal order was consistent with the *Jackson* requirement that the impaired defendant who cannot be restored to fitness must be relieved of the burden of indefinite jeopardy, the court could have readily upheld the dismissal order as necessary to protect the constitutional rights of the impaired defendant. This approach would have been consistent with the Arkansas Supreme Court's affirmation of the duty of Arkansas courts in *Williams v. State*⁴²⁶ to enforce federal constitutional protections, but the *Thomas* court declined to exercise this option.

B. Statutory Construction Designed to Implement Legislative Intent

The goal of an appellate court reviewing legislation is two-fold: (1) to construe the statute to reach an understanding of its scope consistent with constitutional values; and (2) to give effect to the legislative intent implicit in the language of the statute and the purpose of the statute. In a thorough and straightforward explanation of the duties of the reviewing court, the Arkansas Supreme Court, in *Hobbs v. Jones*,⁴²⁷ wrote:

424. *Id.* at 6, 616 S.W.2d at 731.

425. *E.g.*, *Jones v. State*, 347 Ark. 409, 422, 64 S.W.3d 728, 737 (2002) ("Although the judge based her decision on the "fighting words" doctrine, we can still affirm her decision because she reached the right result, albeit for the wrong reason."); *Harris v. State*, 339 Ark. 35, 40, 2 S.W.3d 768, 770 (1999) ("[W]e will not reverse a trial judge who uses the wrong reason but reaches the right result."); *McDaniel v. State*, 291 Ark. 596, 599, 726 S.W.2d 679, 681 (1987) (incorrect reference to evidence Rule 803 did not require reversal where impeachment evidence admissible under Rule 613); *McGee v. State*, 280 Ark. 347, 352, 658 S.W.2d 376, 379 (1983) (improper theory of admissibility of defendant's non-*Mirandized* statement did not require reversal where it was admissible to rebut alibi defense); *Renfrow v. State*, Not Reported in S.W.2d, 1990 WL 27396, *1 (Ark. Ct. App. 1990) (trial court's imposition of consecutive sentence proper under incorrect statute did not require relief where proper basis afforded by another statute); and *Bitner v. State*, Not Reported in S.W.2d, 1990 WL 4852, *1 (Ark. Ct. App. 1990) (trial court's incorrect reference to basis for evidentiary ruling not reversible if supported by another ground).

426. *Williams v. State*, 354 Ark. at 801, 496 S.W.2d at 397; *see supra* notes 370–71 and accompanying text.

427. *Hobbs v. Jones*, 2012 Ark. 293, 412 S.W.3d 844 (2012).

Statutes are presumed constitutional, and the burden of proving otherwise is on the challenger of the statute. If it is possible to construe a statute as constitutional, we must do so. Because statutes are presumed to be framed in accordance with the Constitution, they should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable. Moreover, when interpreting statutes, we make a *de novo* review, as it is for this court to decide what a statute means. Thus, although we are not bound by the trial court's interpretation, in the absence of a showing that the trial court erred, its interpretation will be accepted as correct on appeal. The basic rule of statutory construction is to give effect to the intent of the legislature. Where the language of a statute is plain and unambiguous, we determine legislative intent from the ordinary meaning of the language used. In considering the meaning of a statute, we construe it just as it reads, giving the words their ordinary and usually accepted meaning in common language. We construe the statute so that no word is left void, superfluous or insignificant, and we give meaning and effect to every word in the statute, if possible.⁴²⁸

I. The Thomas Court's Failure to Apply a "Common Sense" Construction Protocol

The court's opinion in *Thomas* hardly reflects any attempt to reconcile the lack of direction in Section 5-2-310(b)(2)(A). In the case, the trial court must consider disposition when the expert opinion supports a finding that the impaired accused cannot be restored to fitness within the constitutional requirements for due process under *Jackson*. The *Thomas* court failed to construe this lack of direction regarding authority of the trial court to order dismissal of the pending criminal charges as inherent in its authority to enforce federal constitutional protections, as implied in the grant of legislative authority to order dismissal to avoid an unjust continued prosecution pursuant to Subsection 310(c)(2), or within the scope of authority for disposition of issues not requiring fitness, pursuant to Section 5-2-311(2).

In short, the *Thomas* court failed to address the lack of express authority for dismissal of pending criminal charges when inability to restore the impaired accused to fitness leaves the accused, the prosecution, and the trial court in limbo with respect to the accused's future. *Thomas*, like *Hughes*, reflects a virtual inability to respond creatively to this significant problem posed by mental disease and defect that compromises the constitutional integrity of the State's criminal justice system. Instead, the court took the course of least initiative.

The need to affirmatively engage in meaningful appellate review designed to address flaws in legislative language is imperative when: (1) a

428. *Id.* at 8–9, 412 S.W.3d at 850–51 (internal citations omitted) (emphasis added).

statutory scheme fails to provide for resolution of problems inherent in the work of the judicial system in operation; or (2) when the statutory scheme, as designed, fails to address constitutional considerations arising after its adoption that are themselves designed to promote and ensure due process for the individual in that system. Courts confronting statutory schemes that are flawed or suffer from language inconsistencies that result in constitutional deprivations or threaten the success of the statutory scheme involved, must be prepared to correct the errors judicially until such time as the legislature takes up the problems identified by the courts in the course of judicial review. In *Lynch v. Overholser*, the Court observed:

The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, for ‘literalness may strangle meaning.’⁴²⁹

The observation is illustrated by the approach taken in *Thomas*.

2. *The United States Supreme Court’s Approach to Obamacare*

An example of the United States Supreme Court itself struggling with flaws in the language or direction of a statutory scheme, and resolving the problems created by flawed legislation, is illustrated by the majority’s response to a serious challenge raised by legislative inconsistency in *King v. Burwell*.⁴³⁰ There, in what might have been a rather unexpected stroke, Chief Justice Roberts saved a key provision of the Patient Protection and Affordable Care Act⁴³¹ (often referred to as “Obamacare”) from one line of political attack by construing poorly drafted language to give effect to Congressional intent designed to address a “long history of failed health insurance reform.”⁴³² Rather than applying a more literal reading of the language to reach the contrary result that would have undermined the perception of fairness in the major health policy-based legislative initiative of President Obama’s Administration,⁴³³ the Court’s resort to its admittedly limited au-

429. *Lynch v. Overholser*, 369 U.S. 705, 710 (1962) (citations omitted); *Id.* at 720 (Clark, J., dissenting) (arguing against the assertive posture taken by the majority) (“Eighty-seven years ago, Chief Justice Waite in speaking of the function of this Court said ‘Our province is to decide what the law is, not to declare what it should be . . . If the law is wrong, it ought to be changed; but the power for that is not with us.’”).

430. *King v. Burwell*, 135 S. Ct. 2480 (2015).

431. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

432. *King*, 135 S. Ct. at 2485.

433. *Id.* at 2494 (“It is implausible that Congress meant the Act to operate in this manner.”).

thority to interpret statutory language⁴³⁴ served to advance the legislative goal in addressing that long history.

The issue before the Court involved the construction given an essential provision of the Act by the Internal Revenue Service, relating to the authorized creation of insurance “exchanges” by the states or the federal government that would afford subscribers a means of obtaining insurance coverage mandated by statute.⁴³⁵ The precise question was directed to an IRS ruling that subscribers to an exchange created by a state would only qualify for the tax credits available for subscribers to an exchange maintained by a state government, but not by the federal government.⁴³⁶ The IRS rule, as construed, described the Virginia exchange as a “federal exchange,” thus requiring the plaintiffs to purchase insurance through an exchange which would not permit them to obtain the benefit of the tax credit.⁴³⁷

Chief Justice Roberts noted the problem in the wording of the statute upon which the IRS had relied in issuing its interpretation denying credits to subscribers of exchanges maintained by the federal government, but resolved the problem in favor of a construction, avoiding the discrepancy implicit in the IRS rule.⁴³⁸ His opinion, for the majority, rejected the argument that the IRS rule was entitled to deference because Congress intended to delegate authority to interpret the application of the statute to an agency of the federal government, while accepting that deference to agency interpretation is generally a controlling principle for judicial review.⁴³⁹ He wrote:

“In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.”

This is one of those cases. The tax credits are among the Act’s key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep “economic and political significance” that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.⁴⁴⁰

434. *Id.* at 2492 (“[O]ur preference for avoiding surplusage constructions is not absolute.”) (citing *Lamie v. United States Trustee*, 540 U.S. 526, 536 (2004)).

435. *Id.* at 2487.

436. *Id.*

437. *Id.* at 2488 (“The IRS Rule therefore requires petitioners to either buy health insurance they do not want, or make a payment to the IRS.”).

438. *King*, 135 S. Ct. at 2489.

439. *Id.* at 2485.

440. *Id.* at 2488–89 (citing *FDA v. Brown and Williamson Tobacco Company*, 520 U.S. 120, 159 (2000)).

The majority's decision to seek a rational understanding of Congressional intent and to harmonize that intent with imprecise language it has used in the statute ultimately served to avoid a troubling flaw in the newly-adopted legislative response to significant health care problems facing the nation.

The Court's disposition in *King v. Burwell* reflects the cautious use of its authority to accommodate flawed statutory language and the clear legislative goal intended in the statutory scheme to achieve a rationale result in the administration of the law. Regrettably, appellate courts faced with the necessity for construing language or wording used by the legislature do not always exercise the option of finding a rational accommodation for drafting failures.

VII. CONCLUSION

The dilemma created by the Court's decision in *Jackson v. Indiana* arises from the difficulty in addressing the temporally indeterminate circumstances surrounding the diagnosis and treatment of mental impairment and the legal system's need to address issues in the contexts of procedural rules that are, at least initially, dictated by fixed time frames. *Jackson* recognizes the threat to due process by unlimited restriction on personal liberty attributable to unresolved mental illness or defect when the individual suffering from the impairment is charged with a criminal offense. But in recognizing the threat, the Court declined to provide a specific set of rules, or fixed timeframe, that would govern how trial courts should navigate the uncertainty in determining when an accused's mental impairment has ceased to compromise their fitness, or competence, to proceed to trial or disposition of the case by plea of guilty, *nolo contendere*, or other procedural option.

When an accused does manifest symptoms consistent with impairment, it is clear that the duty of the trial court, and counsel, requires expert evaluation to determine whether the impairment prevents the accused from understanding the proceedings or ability to assist counsel in their own defense. Once the evaluation results in a finding that the accused's fitness is sufficiently impaired to preclude further proceedings in the trial court, the court may direct that additional measures be undertaken to restore the accused to fitness for trial. Part of that directive will necessarily require the forensic expert to reach an opinion as to whether there is a reasonable prospect that restoration efforts can succeed.

The difficulty of diagnosing some mental disorders, as well as the difficulty in many cases in reaching a successful therapy for addressing the disorder once diagnosed, does not fit within the competency and restoration of competency frameworks dictated by due process. Compounding the evaluation process in some cases are factors that may bear on the outcome of

restoration, particularly when the offense charged involves very serious offenses or those that have generated particular notoriety or publicity, which may itself reflect aberrant behavior that may be attributable to the mental state of the perpetrator.

These concerns are reflected in a recent story⁴⁴¹ reported by the Arkansas Democrat-Gazette involving Gary Eugene Holmes, charged with first degree murder and terroristic act in what the police described as a “road rage” killing of a three-year old child. The story reports that doctors at the Arkansas State Hospital have had difficulty in performing a mental examination on Holmes because of his refusal to cooperate during an examination, comprising forensic experts’ ability to reach a diagnosis with respect to possible mental illness that could be leaving him unfit to proceed with trial. The article noted that in successive mental evaluations in January and September, 2015, Holmes was diagnosed initially with “schizophrenia, post-traumatic stress disorder and suffering from an earlier head injury,” but subsequently with “depressive disorder, antisocial personality disorder, and the effects of the head injury.”⁴⁴² Holmes underwent counseling for his various diagnoses through 2016 after being placed on probation in October 2015 following his plea of guilty to domestic battery and terroristic threatening when threatening to kill his girlfriend in 2014.⁴⁴³

Concerned about the “complexities” of diagnosis and “seriousness of his charges,” the lead ASH forensic psychologist petitioned the trial court to order Holmes committed for a further period of evaluation as an ASH inpatient.⁴⁴⁴ Because he was evasive in responding to many questions posed during the evaluation conducted for the purpose of assessing his competence, there was, of course, the possibility that apart from any of the numerous impairments reflected in previous diagnoses, his non-compliance might also demonstrate malingering, or faking, in an effort to avoid trial on the first degree charges arising from the killing of the child.

The Democrat-Gazette report reflects the often difficult problems faced by forensic experts attempting to determine whether a criminal defendant lacks fitness to proceed to trial as a result of a statutorily-recognized mental disease or defect, or is resorting to feigned symptoms of impairment out of fear of trial or as a deliberate effort to use mental impairment to avoid conviction and punishment, particularly when the offenses charged are serious and threaten significantly long terms of imprisonment, or death.

441. John Lynch, *Kid-Slaying Suspect Put in Hospital*, ARKANSAS DEMOCRAT-GAZETTE, May 9, 2017, at sec. B, pp. 1, 8.

442. *Id.* at 8.

443. *Id.*

444. *Id.*

The situation involving Gary Holmes, much like other murder defendants manifesting symptoms that could indicate presence of a mental disorder compromising their ability to comprehend the trial process or assist counsel in presenting a defense, suggests three reforms that could serve to advance compliance with the constitutional requirement of *Jackson v. Indiana*.

Of course, the most obvious change that could be taken to address the specific constitutional holding of *Jackson* would lie in legislative action to engraft onto the existing Section 5-2-310(b)(2)(D)⁴⁴⁵ language authorizing the trial court to order dismissal of pending criminal charges when the accused cannot be restored to fitness as a result of the nature of their mental illness or defect, and then order the filing of a petition for involuntary commitment of the accused to the department. The revised statutory section might simply read:

(D) If the defendant lacks fitness to proceed and presents a danger to himself or herself or the person or property of another, the court shall *order the pending criminal charge(s) to be dismissed and direct* the department to petition for an involuntary admission.

While the trial court's inherent authority to dismiss pending criminal charges for the impaired defendant who cannot be restored to competence should be sufficient to have warranted a different decision in *Thomas*, amendment of subsection (b)(2)(D) would expressly address the problem of the missing language.

Second, when restoration efforts will take a significant period of time before a final conclusion can be drawn by forensic experts with respect to the possibility of restoration of fitness, the extended period of confinement in the state hospital for diagnosis and treatment should require regular reporting by ASH officials concerning progress that may have been made in restoring the impaired defendant to competence for trial. This approach would reflect, in a sense, the requirement that an extended involuntary civil commitment be limited to 180-day periods.⁴⁴⁶ In the civil commitment con-

445. ARK. CODE ANN. § 5-2-310(b)(2)(D) (Repl. 2016).

446. See ARK. CODE ANN. § 20-47-215. Additional involuntary admission period. This provision of the involuntary civil commitment statute provides for additional periods of hospitalization, as follows:

(a) GENERALLY. (1) Additional one hundred eighty-day involuntary admission orders may be requested if, in the opinion of the treatment staff, a person involuntarily admitted continues to meet the criteria for involuntary admission.

(2) Additional one hundred eighty-day involuntary admission periods may be requested by the treatment staff of the hospital or receiving facility or program when it is its opinion that the person needs continued treatment and supervision without which the person poses

text, the burden falls to the State to justify further confinement expressly meeting the test for the initial involuntary commitment.⁴⁴⁷

A third “reform,” designed to clarify operation of existing trial provisions that govern the operation of the Arkansas speedy trial right, would address the effect of a trial court dismissal of pending charges when the impaired accused cannot be restored to competence for trial. The current rules address the situation in two ways. Rule 28.3(a) excludes any period of time during which the accused is being evaluated for fitness for trial⁴⁴⁸ from the one-year time frame for bringing a case to trial.⁴⁴⁹ Rule 28.2 specifically addresses situations in which pending criminal charges are dismissed on motion of the defendant, providing that the speedy trial obligation to try the defendant within one year commences when previously dismissed charges are reinstated.⁴⁵⁰ Although not necessary, the rule governing commencement of speedy trial time limits could be clarified with language expressly including dismissals ordered based on a determination that the accused could not be restored to fitness, but subsequent events demonstrate recovery rendering the accused competent to proceed with trial. In such event, of course, the trial court would presumably still be authorized to dismiss the reinstated charges under Section 5-2-310(c)(2) in the interest of justice.⁴⁵¹

What is clear is that the process typically used in Arkansas cases, particular those involving less severe offenses, of simply resolving impairment

a likelihood of danger to himself or herself or to others as defined in § 20-47-207 if discharged.

(3) The treatment staff of the hospital or of the receiving facility or program may request additional involuntary admission orders as they are deemed necessary.

447. *E.g.*, *Black v. State*, 52 Ark. App. 140, 915 S.W.2d 300, 302 (1996) (vacating commitment order extending involuntary committee’s confinement for additional 180-day period based only on testimony that additional period of hospitalization would benefit petitioner).

448. ARK. R. CRIM. P. 28.3. The exclusion is phrased as follows, in pertinent part:

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trials of other charges against the defendant. . . .

449. ARK. R. CRIM. P. 28.1(b).

450. ARK. R. CRIM. P. 28.2(b).

451. ARK. CODE ANN. § 5-2-310(c)(2) (Repl. 2016) provides:

(2) However, if the court is of the view that so much time has elapsed since the alleged commission of the offense in question that it would be unjust to resume the criminal proceeding, the court may dismiss the charge.

questions by ordering acquittal based on mental defect, fails to meet the constitutional requirement of *Jackson v. Virginia*. The reason is that the acquittal not only indicates that there has been sufficient evidence adduced to show that the insanity acquitee committed the offense, but also results in significant impairment in terms of loss of liberty. An involuntary civil commitment cannot be extended without proof that the requirements for the initial commitment continue with the State carrying the burden of proof to extend the committee's confinement.⁴⁵² But an insanity acquitee must carry the burden of proving that continued confinement is no longer authorized by law by clear and convincing evidence. The statute controlling an acquitee's burden in challenging continued confinement provides:

(e)(1) A person found not guilty on the ground of mental disease or defect of an offense involving bodily injury to another person or serious damage to the property of another person or involving a substantial risk of bodily injury to another person or serious damage to the property of another person has the burden of proving by clear and convincing evidence that his or her release would not create a substantial risk of bodily injury to another person or serious damage to property of another person due to a present mental disease or defect.

(2) With respect to any other offense, the person has the burden of proof by a preponderance of the evidence.⁴⁵³

The oft-used tactic of finding the unrestorable, impaired defendant not guilty by reason of mental defect will result in at least some criminal defendants being held in a permanent state of confinement, effectively resulting in the warehousing of the mentally-impaired contrary to the *Jackson* Court's finding with respect to constitutional requirements of due process.

Arguably, the practice of using the insanity acquittal as an expedient means of addressing the problems posed by mentally impaired defendants who cannot be restored to competence, or fitness, for trial will be addressed by the General Assembly's repeal of Section 5-2-305 to truly separate the mental evaluation for competence to proceed to trial from the evaluation that focuses on the accused's sanity at the time of the offense. Section 5-2-327 of the revised statute specifically addresses the evaluation of the accused for fitness to proceed to trial.⁴⁵⁴ Its predecessor, Section 5-2-305, had been amended to achieve the result of differentiating the two exams explicitly,

452. See *Black*, *supra* note 447.

453. ARK. CODE ANN. § 5-2-314(e) (Repl. 2016).

454. *Id.* § 5-2-327, as adopted by Act 472, 91st General Assemb., Reg. Session 2017. SECTION 14. Arkansas Code Title 5, Chapter 2, Subchapter 3, is amended 14 to add an additional section to read as follows: 15 § 5-2-327. Examination of defendant — Fitness to proceed.

but did so with the exception of authorizing a request that the two examinations be conducted simultaneously.⁴⁵⁵ Section 5-2-328, as adopted in Act 972, authorizes the trial court to order a forensic examination for the purpose of determining the accused's insanity, or for determining whether the accused lacked criminal responsibility, as re-defined in Section 5-2-312⁴⁵⁶ and referenced in Section 5-2-304(a).⁴⁵⁷

It is not clear why the *Thomas* court demonstrated such reluctance to look beyond the error made by the trial court and parties when framing its arguments in terms of Section 5-2-310(c)(2). This section was clearly inapplicable to the trial court's action in dismissing the pending charges on finding that Thomas could not be restored to fitness for trial, based on uncontroverted expert testimony regarding his mental impairment. What is clear is that Section 5-2-310(b) provides the threshold framework, although incomplete, for dealing with the unrestorable and impaired accused in the prosecution process. Once expert evaluation establishes that the impaired defendant cannot be restored to competence, or fitness, within a reasonable period of time, the statute should follow *Jackson's* due process formula. The statute authorizes the accused's release, under appropriate conditions, provided he does not constitute a threat to himself or others.⁴⁵⁸ If the accused does present a danger based on the forensic evaluation, the trial court is directed to "order the department to petition for an involuntary admission."⁴⁵⁹ The only element of authority for the trial court missing from the statute involves the correct action for the trial court to take with respect to the pending criminal

455. *Id.* § 5-2-327, now repealed by Act 472, provided:

(2)(A) The fitness-to-proceed examination, and the criminal responsibility examination and request for an opinion on the defendant's criminal responsibility, are two distinctly different examinations.

(B) The fitness-to-proceed examination and the criminal responsibility examination may be done at the same time only if the defendant simultaneously raises the issue of the defendant's fitness to proceed and files notice that he or she intends to rely upon the defense of mental disease or defect.

(C) In all other cases the process is bifurcated.

456. *Id.* § 5-2-312(a) (Repl. 2016).

457. *Id.* § 5-2-304(a), as amended by Act 472, provides:

When a defendant intends to raise mental *disease or defect lack of criminal responsibility as a defense in a prosecution* or put in issue his or her fitness to proceed, the defendant shall notify the prosecutor and the court at the earliest practicable time. (emphasis added).

458. *Id.* § 5-2-310(b)(2)(C) (2007).

459. ARK. CODE ANN. § 5-2-310(b)(2)(D) (2007). (The statutory language is mandatory in that the trial court shall order the department to take action committing the defendant civilly).

charges. Dismissal is the proper action in this circumstance, consistent with *Jackson*.

The lengthy delays characterizing the Darrell Davis and Ricky Dale Newman cases discussed in the introduction to this article raise an important question about how dismissal of pending charges for the impaired defendant⁴⁶⁰ would affect prospects for prosecution if, after lengthy hospitalization in a mental hospital, the accused is ultimately restored to fitness. Although the expert psychiatric opinion that restoration is precluded by the nature of the impairment triggers action under Section 5-2-310(b)(2) of the Criminal Code, it is clear from the Arkansas decisions in capital cases that lengthy hospitalization may eventually result in recovery of competence. The initial opinion as to restoration serves to facilitate proper disposition in these cases, but should not be taken as beyond revision, depending upon circumstances involving individual defendants.

The speedy trial guarantee, both grounded in the Sixth Amendment protection and Arkansas Speedy Trial Rule, may complicate the process in some cases in which the most serious offenses, capital and first-degree murders, have been charged. But the Arkansas rule, which requires trial within 12 months of arrest or charging, already provides that the period of time spent while a defendant is unfit to proceed is excluded from that fixed period of time. Rule 28.2 already excepts application of the rule under specific circumstances, such as dismissal on motion of the defendant, or reversal and remand for new trial after appeal.⁴⁶¹ It could be amended to provide that when an impaired individual is hospitalized because of continuing threat of danger, a dismissal of the pending charge would not bar reinstatement of the former charge in the event the defendant is thereafter restored to fitness. At that point, the trial court would be authorized to consider, pursuant to Section 5-2-310(c)(2), whether it would be unjust to proceed further on the criminal charges.

The Arkansas Supreme Court should not hesitate to assert its authority to bring trial courts into compliance with the holding in *Jackson v. Indiana*, without relying on the insanity acquittal of an unfit defendant to dispose of the case. The Arkansas Democrat-Gazette reported in January 2017:

James Earl Lambert has been jailed since his May 2015 arrest at west Little Rock apartment, where his cousin lived, by police investigating complaints by neighbors about a man with a gun in the area. Police reports show Lambert lived in an apartment across the street.

460. *See supra* notes 13 & 14.

461. ARK. R. CRIM. P. 28.2. §§ (b) and (e), respectively.

He was charged with attempted first-degree murder, criminal use of prohibited weapons, possession of a defaced firearm and terroristic threatening, felony charges that carry up to 48 years in prison.

But a state doctor and one hired by the defense have since diagnosed Lambert with schizophrenia, and court records show that prosecutors and defense attorneys agreed that Lambert is not competent to stand trial.

Based on their recommendation, Pulaski County Circuit Judge Leon Johnson found Lambert innocent by reason of mental disease Wednesday.

The judge also ruled that Lambert continues to present a danger to the community, a finding that transfers custody of Lambert to the state Department of Human Services.⁴⁶²

This disposition, while agreed upon by the parties and trial judge, served to remove the pending criminal charges from the active docket,⁴⁶³ but it cannot be reconciled with the unambiguous language of the Arkansas Criminal Code, which provides:

A court shall not enter a judgment of acquittal on the ground of mental disease or defect against a defendant who lacks the capacity to understand a proceeding against him or her or to assist effectively in his or her own defense as a result of mental disease or defect.⁴⁶⁴

Lambert apparently has no remedy under Arkansas law for the violation of his right to due process. Not only can the trial court's insanity acquittal in Lambert's case not be squared with the express prohibition in Section 5-2-302(b) of the Arkansas Criminal Code, precluding trial of an incompetent defendant, neither can the observation in the Democrat-Gazette newspaper article that "Lambert can be kept in state custody indefinitely"⁴⁶⁵ be squared with the Supreme Court's decision in *Jackson*.

There remains, of course, at least one unexplored alternative to the continuing due process considerations addressed by the *Jackson* Court. The United States Supreme Court could overrule *Jackson* based on a conclusion that public safety considerations simply outweigh the *Jackson* Court's due process concerns, rejecting the lower court's analysis in *Frendak*.⁴⁶⁶ In that event, the Court's rationale might reflect a view that the imposition of an

462. John Lynch, *Mental Disease of Gun Suspect Exonerates Him; Man Placed in DHS Custody*, ARKANSAS DEMOCRAT-GAZETTE, Jan. 13, 2017, at 2B.

463. *State v. James Earl Lambert*, No. 60CR-15-1937, Pulaski Co. [Ark.] Circuit Court (Jan. 11, 2017) (Acquittal based on mental defect).

464. ARK. CODE ANN. § 5-2-302(b) (2001).

465. *See supra* note 462.

466. *Supra* notes 294-95 and accompanying text.

insanity acquittal to prevent release of an offender into the community would be justified, particularly if the mental disease or defect contributing to an offense involved injury to another cannot be successfully addressed by mental health professionals attempting to restore the impaired defendant to fitness to proceed to trial.⁴⁶⁷

467. The Court has also upheld confinement of convicted sex offenders who continue to pose a threat to other potential victims because of continuing influence of the disorder underlying the commission of the offense upon which they have been convicted and discharged the sentence imposed. *See, e.g., Kansas v. Hendricks*, 521 U.S. 346, 370-71 (1997) (Kansas statutory scheme for continuing confinement of convicted sex offender for treatment for “abnormality” following completion of sentence does not violate due process or ex post facto protections afforded by Constitution).