

**600 INTRODUCTORY COMMENT: NOT GUILTY BY REASON OF  
MENTAL DISEASE OR DEFECT: INSTRUCTIONS FOR THE  
“BIFURCATED” TRIAL AND REEXAMINATION**

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## Scope

Wis JI-Criminal 601-662 provide a series of recommended instructions for use in the “bifurcated” trial, which is held when a criminal defendant enters pleas of not guilty and not guilty by reason of mental disease or defect. Section 971.165 requires that the issues of guilt and responsibility be heard separately “with a sequential order of proof in a continuous trial.”

This Introductory Comment outlines the phases of the trial and reexamination by identifying the issue to be determined and the burden of proof at each phase and by briefly summarizing the suggested instructions. There is a “preliminary” and a “final” instruction for each stage. The “preliminary” instruction is to be read to the jury before evidence is received. The “final” instruction is to be used after the evidence has been received, along with any other general instructions that may be appropriate. This Comment also outlines the court’s authority and responsibility with respect to commitment, conditional release, and termination of the commitment.

## I. First Phase

### A. Issue To Be Determined

The issue at the first phase is “guilt”: Did the defendant commit all the required elements of the offense charged? Expert opinion testimony on the defendant’s capacity to form a mental element required as an element of the crime (e.g., intent to kill) is not admissible at the first phase of the trial. Steele v. State, 97 Wis.2d 72, 97 98, 294 N.W.2d 2 (1980). Caution should be exercised in trying to apply a flat rule of exclusion to evidence that is offered by a criminal defendant. Cases decided after Steele have made it clear that the rule excluding expert testimony on intent is limited to expert opinion testimony on the capacity to form intent based on mental health history. See State v. Flattum, 122 Wis.2d 282, 361 N.W.2d 705 (1985), and State v. Repp, 122 Wis.2d 246, 362 N.W.2d 415 (1985). For a helpful description of what the current rule is and how it developed, see Haas v. Abrahamson, 910 F.2d 384 (7th Cir. 1990).

A defendant may join a plea of guilty with a plea of not guilty by reason of mental disease or defect, see § 971.06(1)(d). The first phase is not necessary in these cases, but the

usual guilty plea acceptance procedures must be followed to establish that the plea is voluntarily entered and that a factual basis for the plea exists. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986). It is not error to allow a defendant to combine a no contest plea with a plea of not guilty by reason of mental disease or defect. State v. VanderLinden, 141 Wis.2d 155, 414 N.W.2d 72 (Ct. App. 1987).

## **B. Burden Of Proof**

The burden of proof at the first phase is on the State to prove all elements of the offense beyond a reasonable doubt. The first phase of the “bifurcated” trial is essentially the same as a regular criminal trial held where no special plea is entered.

## **C. Jury Instructions**

### **1. JI-Criminal 601**

JI-601 is the preliminary instruction to be read to the jury before the beginning of the trial where the defendant has entered pleas of not guilty and not guilty by reason of mental disease or defect. It tells the jury that there will be two phases to the trial: the first dealing with “guilt”; the second dealing with “responsibility.”

### **2. JI-Criminal 602**

JI-602 provides a paragraph that is to be added to the general instructions which follow the first phase of the trial. It emphasizes that a second phase of the trial will follow a finding that the defendant is guilty. It should be followed by the standard instruction for the offense charged.

## **II. Second Phase**

### **A. Issue To Be Determined**

The issue at the second phase of the trial is whether the defendant is to be relieved of responsibility for his criminal act because he suffered from mental disease or defect at the time of the offense. The standard is identified in § 971.15(1) as follows:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he or she lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.

The instructions split this standard into two questions, one asking if the mental disease or defect was present and the other asking if it had the required effect on the defendant.

A defendant's proffered jury waiver at the second phase is subject to the usual requirement that the jury may only be waived with the consent of the state, per § 972.02(1). State v. Murdock, 2000 WI App 170, 238 Wis.2d 301, 617 N.W.2d 175.

## **B. Burden Of Proof**

The burden of proof is established by § 971.15(3): The defendant must establish the presence of the mental disease or defect “defense” “to a reasonable certainty by the greater weight of the credible evidence.”

1987 Wisconsin Act 86 (effective date: November 28, 1987) created § 971.165(2) which provides that a five-sixths verdict applies at the second phase. State v. Koput, 142 Wis.2d 370, 418 N.W.2d 804 (1988), held that a five-sixths verdict applied even before the statute was changed.

## **C. Jury Instructions**

### **1. JI-Criminal 603**

JI-603 is the preliminary instruction to be read to the jury before the second phase of the trial begins. It can be used if the first phase was tried to a jury, or if the first phase was tried to the court, or if the defendant entered a guilty plea and joined it with a plea of not guilty by reason of mental disease or defect. If a guilty plea is entered at the guilt phase, the usual plea acceptance procedures must be followed to assure that the plea was voluntarily entered and to establish that there is a factual basis for it. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986).

JI-603 explains that the second phase will be concerned with whether the defendant is “responsible” or “not responsible” for his criminal conduct. The Committee determined that phrasing the issue in terms of “responsibility” was preferable to the statutory terms “guilty but not guilty by reason of . . . .” The instruction emphasizes that the second phase is concerned with the defendant’s mental condition at the time of the offense and informs the jury that if the defendant is found to be “not responsible,” he or she will be committed to the custody of the Department of Health Services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court.

## 2. JI-Criminal 605

JI-605 is the final instruction for the second phase of the trial. It is drafted for use where the plea is based on the presence of a mental disease or mental defect. Former Wis JI-Criminal 605A which provided a separate instruction for cases involving “mental defect” was withdrawn in 2003 and combined with this instruction. If a case involves a claim that the combined effect of a “mental disease,” and a “mental defect” is involved, the term “mental disease and defect” should be used throughout. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986), dealt with that situation. The court held that it was not error to phrase the jury instructions in the conjunctive – mental disease and defect – since the theory of defense was that the defendant suffered from both a disease and a defect, the combined effect of which was the lack of substantial capacity to appreciate the wrongfulness of his conduct. The court noted that to use “or” would have frustrated the proffered defense. And to use “and/or” would not have been desirable.

JI-605 divides the responsibility issue into two questions. The first question asks if the defendant had a “mental disease or defect” at the time the offense was committed. “Mental disease or defect” is broadly defined but is limited by the second question which asks if the mental disease or defect had the required effect on the defendant: As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law?

In State v. Leach, 124 Wis.2d 648, 370 N.W.2d 240 (1985), reversing (as to this issue) 122 Wis.2d 339, 363 N.W.2d 234 (Ct. App. 1984), the Wisconsin Supreme Court held that the defendant may be held to a burden of producing sufficient evidence on the responsibility issue before it need be submitted to the jury:

The constitution does not require that a defendant be allowed to present the affirmative defense of not guilty by reason of mental disease or defect to the jury when he has failed to produce sufficient evidence to raise a jury question . . . . A criminally charged defendant has no entitlement to the luck of a lawless decision maker . . . . He has no right to insist that the jury be given a special opportunity to acquit him on the basis of nothing more than speculation, conjecture or compromise concerning a defense to the crime with which he is charged . . . . The trial court should be permitted to withhold defense of not guilty by reason of mental disease or defect, like other defenses, from the consideration of the jury when there is no evidence presented or there is insufficient evidence to present a jury question on the defense. It should be permitted to direct a verdict against the defendant if the judge finds there is no credible probative evidence toward meeting the burden of establishing the defense of not guilty by reason of mental disease or

defect by a preponderance of the evidence after giving the evidence the most favorable interpretation in favor of the accused asserting the defense.

124 Wis.2d 648, 662 63.

### **III. Abolition Of The Third Phase; Automatic Commitment To The Department of Health Services**

#### **A. Overruling Of Kovach**

Until 1984, the instructions included a preliminary and a final instruction for the third phase of the so called “trifurcated trial.” The third phase dealt with the present mental condition and the need for institutionalized care of a person who had been found not responsible by reason of mental disease or defect. The third phase was abolished by State v. Field, 118 Wis.2d 269, 347 N.W.2d 365 (1984). Field overruled State ex rel. Kovach v. Schubert, 64 Wis.2d 612, 219 N.W.2d 341 (1974), by holding that automatic commitment following a finding of not guilty by reason of mental disease or defect does not violate constitutional principles of due process or equal protection. The commitment is “to the department of health services for a specified period not exceeding the maximum term of confinement in prison that could be imposed on an offender convicted of the same felony . . .” § 971.17(1)(b).

#### **B. Commitment To An Institution Or Release On Conditions**

1989 Wisconsin Act 334, made further changes in the procedures relating to commitment. For offenses committed after January 1, 1991, commitment to an institution is no longer automatic. Rather, § 971.17(3) provides that the court must determine whether there shall be institutional care or conditional release. Conditional release shall be ordered unless the court “finds by clear and convincing evidence that conditional release of the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage.” A series of factors are listed that the court may consider “without limitation because of enumeration”:

- the nature and circumstances of the crime;
- the person’s mental history and present mental condition;
- where the person will live;
- how the person will support himself or herself;
- what arrangements are available to ensure that the person has access to and will take necessary medication; and
- what arrangements are possible for treatment beyond medication.

The meaning of “serious property damage” was discussed in State v. Brown, 2010 WI App 113, 328 Wis.2d 241, 789 N.W.2d 102. Pursuant to a plea agreement, Brown was found not guilty by reason of mental disease or defect on one charge of identity theft. She appealed her commitment for institutional care on the ground that “a significant risk of serious property damage” under § 971.17(3)(a) requires physical harm to an object. The court of appeals disagreed, holding that “property damage” is not limited to physical property damage:

We discern no reason why the statute would seek to protect the public from physical injury or destruction of property, while subjecting it to the risk of the complete loss of goods, cash, or other assets. The injury suffered by a loss of property may be equal to or greater than that incurred from physical property damage, which may not completely devalue an item. ¶15.

The court agreed with the trial court’s conclusion that Brown’s extensive history of property crimes posed a significant risk of serious property damage if she would be conditionally released.

The commitment decision is to be made “pursuant to a hearing held as soon as practicable” after the second phase verdict is received. § 971.17(2)(a). If the court “lacks sufficient information to make the determination,” a presentence report under § 972.15 or a supplementary mental examination, or both, may be ordered. § 971.17 (2)(a). Subsections (b) through (g) of § 971.17(2) outline the procedure for the supplementary mental examination.

If institutional care is ordered, the department places the person in either the Mendota or Winnebago Mental Health Institute.

### **C. Duration Of The Commitment**

Whether the disposition is institutional care or conditional release, the commitment is to the Department of Health Services for “a specified period.” Wis. Stat. § 971.17(1)(a), (b), and (d). The reference to “a specified period,” added by 1989 Wisconsin Act 334 [applicable to offenses committed after January 1, 1991] was a significant change from prior law. It allows the court to set a maximum period for the commitment that is less than the statutory maximum prison sentence for the offense. Further, it allows the court to exercise discretion in the multiple-count case or multiple cases. Under prior law, multiple counts automatically resulted in consecutive commitments for the maximum term authorized for each count. State v. C.A.J., 148 Wis.2d 137, 434 N.W.2d 800 (Ct. App. 1988) (interpreting Wis. Stat. § 971.17 (1987-88)).

When specifying the commitment period under current law, the court may exercise its discretion and impose concurrent or consecutive commitment periods on multiple counts and cases. State v. Yakich, 2022 WI 8, ¶¶17-22, 400 Wis.2d 549, 970 N.W.2d 12. If the crime involved carries a life term, the commitment period may be life, subject to the person's right to petition for release on conditions. Wis. Stat. § 971.17(1)(c).

The maximum commitment period varies depending on the time the offense was committed. For crimes committed before July 30, 2002, the specified period of the commitment shall not exceed two-thirds of the sentence that could have been imposed for the crime committed. § 971.17(1)(a). For crimes committed on or after July 30, 2002, the specified period of the commitment shall not exceed the maximum term of confinement of a bifurcated sentence that could be imposed for the crime committed. § 971.17(1)(b). Both maximum terms are subject to increases under applicable penalty enhancement statutes and reduction for sentence credit under § 973.155.

#### **D. Commitment And Criminal Sentences**

What to do when a person committed under § 971.17 is convicted for a new crime was addressed in State v. Szulczewski, 216 Wis.2d 494, 574 N.W. 660 (1998). The supreme court held that the § 971.17 commitment provides "legal cause" for possible stay of execution of sentence under § 973.15(8)(a). The sentencing court may exercise discretion in determining whether to stay execution of the new prison sentence, balancing the purposes of the commitment with the traditional purposes of criminal sentencing: deterrence, rehabilitation, retribution, and segregation.

A criminal sentence for a defendant in this situation cannot be ordered to run consecutively to the Chapter 971 commitment, because the commitment is not a "sentence." State v. Harr, 211 Wis.2d 584, 568 N.W.2d 307 (Ct. App. 1997). Thus, the judge sentencing in the new criminal case apparently has two options: impose sentence that will begin immediately, requiring that the defendant be transferred from the mental hospital to prison; or, stay the execution of the new criminal sentence in the exercise of discretion as suggested in Szulczewski.

#### **IV. The Right Of A Committed Person To Refuse Medication**

The Wisconsin Supreme Court has held that all involuntarily committed persons have the right to refuse psychotropic medication. State ex rel. Jones v. Gerhardstein, 141 Wis.2d 710, 416 N.W.2d 883 (1987). This includes persons committed under § 971.17 as not guilty by reason of mental disease or defect. Persons can be compelled to submit to medication if the committing court issues an order which specifically permits it.



1989 Wisconsin Act 31 revised §§ 971.16 and 971.17 to provide for the findings required by the Jones decision. (See sections 2854d, 2854h, and 2856 of 1989 Wisconsin Act 31, effective date: August 9, 1989.) These revisions were reenacted by 1989 Wisconsin Act 334. The other changes require the examiners to include findings regarding the medication issue in their reports, require the court to make a determination on the issue at the time of commitment, and establish a procedure for returning to court after commitment for a determination of competence to refuse medication.

The standard for evaluating competence to refuse medication is set forth in § 971.16(3):

. . . The defendant is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the defendant, one of the following is true:

(a) The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.

(b) The defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

In State v. Wood, 2010 WI 17, 323 Wis.2d 321, 780 N.W.2d 63, the Wisconsin Supreme Court rejected due process based challenges to the involuntary medication procedures in § 971.17 and an administrative directive (AD-11-97) the Department of Health Services had adopted relating to seeking involuntary medication orders:

¶4 We are satisfied that Wis. Stat. § 971.17(3)(c) and AD-11-97 comport with the due process provisions of the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution for two reasons. First, we conclude that due process does not require a finding of dangerousness to issue an order compelling involuntary medication of a person committed under Wis. Stat. Ch. 971. Even if due process required such a finding, there would be no violation because the statutory language of Wis. Stat. § 971.17(3)(c), along with AD-11-97, effectively provide for such a finding. Second, we conclude that due process requires periodic review of the compelled

involuntary medication order, and that Wis. Stat. § 971.17(3)(c) and AD-11-97 satisfy that requirement as well.

Findings regarding refusal of medication may be necessary at the time the commitment decision is made (§ 971.17(3)(b)) or upon petition by the department regarding persons placed in institutional care who are not subject to an order relating to refusal of medication (§ 971.17(3)(c)).

However, the relevant statutory provisions (§ 971.17(3)(e) and (4)) do not authorize the department to petition for a medication order regarding persons placed in conditional release who are not subject to a medication order issued under § 971.17(3)(b) when the commitment decision was made.

The committee believes the statute does not authorize the department to seek medication orders for persons on conditional release because such persons will be required to comply with recommended medication and treatment as a condition of release, and their failure to do so would result in revocation of conditional release and placement in institutional care, at which point the department could petition under § 971.17(3)(c).

## **V. Reexamination; Petition For Conditional Release**

### **A. Crimes Committed Before January 1, 1991: Reexamination**

A person committed as not guilty by reason of mental disease or defect for an offense occurring before January 1, 1991, may petition the committing court for reexamination of his “mental condition,” § 971.17(2), 1987 88 Wis. Stats. There is a right to a jury at the reexamination hearing. State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d 489, 256 N.W.2d 531 (1977).

Reexamination hearings held for persons committed as not guilty by reason of mental disease or defect are not to be closed to the public and press without proper findings. Section 51.20(12) does not require such closure upon a simple request; it requires the same exercise of discretion as in other cases where closing the courtroom is an issue. State ex rel. Wisconsin State Journal v. Circuit Court, 131 Wis.2d 515, 389 N.W.2d 73 (Ct. App. 1986).

Section 971.17(2) was amended by supreme court order to allow the receipt of testimony over the telephone at the reexamination hearing: “Upon consent of all parties and approval by the court for good cause shown, testimony may be received into the record of the hearing by telephone or live audiovisual means.” Order of the Wisconsin Supreme

Court dated October 29, 1987. 141 Wis.2d xxi xli. Also see Fullin and Williams, “Teleconferencing Comes To Wisconsin Courts,” Wisconsin Bar Bulletin, January 1988.

### **1. Issue To Be Determined**

The sole issue upon reexamination is the defendant’s dangerousness; mental illness need not be established. State v. Gebarski, 90 Wis.2d 754, 280 N.W.2d 672 (1979).

### **2. Burden Of Proof**

The burden of proof at the reexamination hearing is on the State to prove that the defendant cannot be safely discharged or released. State v. Gebarski, supra. The standard of proof is “to a reasonable certainty by evidence that is clear, satisfactory, and convincing.” State v. Gladney, 120 Wis.2d 486, 355 N.W.2d 547 (Ct. App. 1984).

### **3. Jury Instructions**

#### **a. JI-Criminal 660**

JI-660 is the preliminary instruction to be used at the beginning of the reexamination hearing. It advises the jury of the petitioner’s status and identifies the issue the jury will be asked to decide.

#### **b. JI-Criminal 661**

JI-661 is the instruction to be used after evidence has been received at the reexamination hearing. It identifies the dangerousness of the petitioner as the sole issue for the jury to decide. The continued validity of dangerousness as the only criterion is discussed in note 2, JI-661. JI-661 identifies the three possible verdicts that may be returned: one providing that the petitioner be recommitted to the department; one providing for release on conditions to be determined by the court; and one providing for discharge. These three questions were identified as the ones to be submitted to the jury in State ex rel. Gebarski v. Milwaukee County Circuit Court, 80 Wis.2d 489, 502, 256 N.W.2d 531 (1977).

#### **c. JI-Criminal 662**

JI-662 provides the actual verdict forms for use on reexamination. It assumes that a six person jury will be used and that a five-sixths verdict is acceptable, both by analogy to reexamination procedures in civil commitment cases.

## **B. Crimes Committed On Or After January 1, 1991: Petition for Conditional Release**

For persons found not guilty by reason of mental disease or defect for offenses committed after January 1, 1991, the right to reexamination is replaced by the right to petition for conditional release. Procedures are set forth in § 971.17(4) in great detail. There is no longer a general cross reference to procedures in Chapter 51.

A petition for conditional release may be filed if at least six months have elapsed since the initial commitment order, the denial of the previous conditional release petition, or the revocation of conditional release. However, the director of the institution where the person is placed may file a petition on the person's behalf at any time.

A series of time limits apply once a timely petition is filed: within 20 days, one or more examiners shall be appointed; within 30 days of their appointment, the examiners shall file a written report; and within 30 days of the filing of the report, a hearing on the petition shall be held (unless the person waives the time limits). Testimony may be received at the hearing by telephone or live audio-visual means "upon a showing by the proponent of good cause under s. 807.13(2)(c)." Section 971.17(7)(d), created by Order of the Wisconsin Supreme Court, October 31, 1990.

After the hearing, "the court shall grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or others or of serious property damage if conditionally released." § 971.17(4)(d) The same list of factors applicable to the commitment decision are specified for consideration, "without limitation by enumeration," for application to the conditional release decision. In State v. Wenk, 2001 WI App 268, 248 Wis.2d 714, the court of appeals affirmed the denial of conditional release where the trial court found that the individual remained dangerous because he had a significant substance abuse problem which triggered previous bouts of mental illness and criminal conduct and that he had relapsed when previously released.

If the court grants conditional release, § 971.17(4)(e) provides that "the department of health services and the county department under § 51.42 in the county of residence of the person shall prepare a plan that identifies the treatment and services, if any, that the person will receive in the community." The statute specifies the topics that shall be addressed in the plan.

The statutory changes made by 1989 Wisconsin Act, also provided for a petition for termination of the commitment by a person who is on conditional release. The procedures

and standards are spelled out in § 971.17(5) and parallel those that apply to the commitment and conditional release decisions. Section 971.17(6) provides for proceeding against the person under Chapter 51 at the expiration of the commitment.

### **C. Mental Illness And Dangerousness**

The sole issue for reexaminations for pre-1991 cases and for petitions for conditional release for post-January 1, 1991, cases is the continued dangerousness of the committed person. The viability of this standard was in question following the decision of the United States Supreme Court in Foucha v. Louisiana, 504 U.S. 71 (1992). The uncertainty was resolved in favor of the standard in State v. Randall, 192 Wis.2d 800, 532 N.W.2d 94 (1995).

Foucha was found not guilty by reason of insanity under Louisiana statutes that are the rough equivalent of the procedures in place in Wisconsin. Both are based on the ALI Model Penal Code. He was committed to a mental institution. He could gain release by proving that he was no longer dangerous. In Louisiana, commitment is “indefinite” in the sense that the duration of mental commitment is not limited by the maximum prison sentence the defendant would have faced if convicted. Foucha, however, had been detained for 8 years at the time this litigation began; his maximum prison sentence if convicted would have been 32 years.

Foucha petitioned for release. Doctors indicated that he was not suffering from mental illness, but they could not “certify that he would not constitute a menace to himself or others if released.” Based on this record, the trial court ruled that Foucha was “dangerous” and ordered him returned to the mental institution. The United States Supreme Court held that this statutory scheme was unconstitutional:

In this case, Louisiana does not contend that Foucha was mentally ill at the time of the trial court’s hearing. Thus, the basis for holding Foucha in a psychiatric facility as an insanity acquittee has disappeared, and the State is no longer entitled to hold him on that basis. 504 U.S. 71, 78.

The Court reaffirmed that automatic commitment continues to be permissible after the finding of not guilty by reason of insanity: “. . . it could be properly inferred that at the time of the verdict, the defendant was still mentally ill and dangerous and hence could be committed.” 504 U.S. 71, 76. But that commitment apparently can continue only “until such time as he has regained his sanity or is no longer a danger to himself or society.” 504 U.S. 71, 78.

Wisconsin's procedure is the same as Louisiana's in one respect: automatic commitment with release only if the state fails to prove that the defendant remains dangerous. Lack of mental illness is not grounds for release if dangerousness continues. The latter was established in the Gebarski litigation. But Wisconsin limits the mental commitment to the maximum prison sentence that could have followed conviction, while Louisiana allows indefinite commitment.

In State v. Randall, the Wisconsin Supreme Court addressed the impact of Foucha on Wisconsin's commitment and release procedures. The court held that allowing the continued confinement of an insanity acquittee who is no longer mentally ill, solely on the grounds that the individual is a danger to himself, herself, or others, does not deny the individual due process:

We hold that it is not a denial of due process for an insanity acquittee who has committed a criminal act to be confined in a state mental health facility for so long as he or she is considered dangerous, provided that the commitment does not exceed the maximum term of imprisonment which could have been imposed for the offense charged. We think the fact that an insanity acquittee has already been shown beyond a reasonable doubt to have committed at least one dangerous act justifies the disposition set forth by the legislature in sec. 971.17(2), Stats. Furthermore, we believe that our decision here is not inconsistent with . . . Foucha v. Louisiana. . . . [W]e read Foucha to permit the continued confinement of dangerous but sane acquittees in a mental health facility, so long as they are treated in a manner consistent with the purposes of their commitment, e.g., there must be a medical justification to continue holding a sane but dangerous insanity acquittee in a mental health facility.

....

. . . . Under Wisconsin's statutory scheme, the acquittee, once committed, is subject to treatment programs specifically designed to treat both mental and behavioral disorders. Treatment designed to reduce those behavioral disorders which render the individual dangerous may continue even after clinical signs of mental illness are no longer apparent. Such treatment is necessary to realize the ultimate goal of safely returning the acquittee into the community. Because this state's mental health facilities provide such comprehensive treatment we cannot conclude that it is punitive to continue an acquittee's confinement based on dangerousness alone. Rather, we conclude that there is a reasonable relationship between the commitment and the purposes for which the individual is committed and, therefore, that insanity acquittees are treated in manner consistent with the purposes of their commitment. 192 Wis.2d 800, 806 808.

Thus, the court emphasized two aspects of the Wisconsin commitment scheme to distinguish it from the system reviewed in Foucha. First, the Wisconsin commitment is limited to the maximum term of criminal punishment that would have resulted if the offender had been convicted. Second, the acquittee continues to receive treatment appropriate to the purpose of the commitment, treatment which must go to the “behavioral disorder” or “behavioral disability” that makes the individual dangerous if the person is no longer clinically mentally ill. Under these circumstances, a single standard for continued commitment – based on dangerousness alone – is permissible.

The result of the Wisconsin Supreme Court decision in Randall was a remand to the circuit court where Randall requested another reexamination in light of the standard the court established. He was denied release and appealed. The court of appeals found the jury instructions used on the second reexamination complied with due process. State v. Randall, 222 Wis.2d 53, 586 N.W.2d 318 (Ct. App. 1998).

#### COMMENT

This Introductory Comment was originally published in 1980 with the number 601-662. It was revised in 1982, 1984, 1988, 1989, 1990, 1992, 1995, 2003, 2010, and 2022. This revision was approved by the Committee in February 2023.