

# RECENT CHANGES IN OREGON MENTAL HEALTH LAW

## MENTAL HEALTH LAW AT THE BOUNDARY OF CIVIL COMMITMENT AND THE CRIMINAL JUSTICE SYSTEM

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## Case – 1: Ms. K.

- **April 22, 2011: Eugene Police Officer was fatally shot after stopping a car that had sped away during an attempted traffic stop.**
- **The suspect, a 56 year old woman, was charged with aggravated murder. She had a history of Schizophrenia and/or DD was sent to OSH and after a Competency to Stand Trial evaluation a judge found her “ to mentally ill to stand trial”.**
- **Since 2011 she has been civilly committed to OSH every 180 days to the present time. (until last week)**
- **(source various articles: Eugene Register Guard)**

## Case 2 -- Mr. S.

- **Mr. S. -- charged with the murder of his wife in 1997. He was diagnosed as suffering from schizophrenia and found IST.**
- **In 2000 he was found persistently incompetent and in accord with Oregon statutes the charges against him were dropped “without prejudice” and he was civilly committed. He was then civilly committed every 6 months until 2010 when OSH decided to release him in a secure community placement.**
- **At the time of his release he was rearrested, charged with aggravated murder and housed in Wa. Co. jail**

## Case 2 (con't)

- **Mr. S. deteriorated in jail and eventually returned to hospital again on a civil commitment.**
- **My understanding is that he still is in OSH in this status.**
- **(Source: Rodol L, Epton MF, Bloom JD: Limitations of constitutional protections in *Jackson v. Indiana* pertaining to charges with no statutes of limitations. J Am Acad Psychiatry Law 41: 114-120, 2013.)**

# Case Summaries

- **Two cases illustrate the problem**
- **Seriously mentally ill individuals, both originally charged with murder and both found IST.**
- **Both now civilly committed, one for close to 15 years and the other now for 3 years.**
- **Charges dismissed “without prejudice” can be held in abeyance pending return to competency at some point in time or final dismissal of charges when statute of limitation for the crime ends.**
- **Murder charges have no statute of limitations. Both individuals are now in this legal limbo.**

## *Jackson v. Indiana (U.S. Supreme Ct.- 1972)*

- 1. “ Due process requires that the nature and duration of commitment (as IST) bear some reasonable relation to the purpose for which the individual is committed”**
- 2. defendant can be held only for a “reasonable period of time” to determine whether there is a substantial probability of attaining competency in foreseeable future.**
- 3 Oregon – reasonable period of time = up to 3 years. At the end of this time, either release or civil commitment.**

# 2013 Oregon Legislature

- **Both cases led to proposals in 2013 Legislature.**
- **Case 1 – very recent, caused significant pain in Eugene: death of a policeman, family grief, strong advocacy for change from police, Eugene DAs and general community.**
- **Case 2 – embarrassment in Washington Co DA & PD Offices with bar complaint against both after attempted irregular civil commitment.**
- **4 primary bills presented in 2013 Legislature in Senate Judiciary Committee.**
- **Committee Chair, Senator Prozanski is from Eugene and is a Eugene City Attorney when not in the Legislature.**

# Problems Presented to Judiciary Committee

- **What were the main problems illustrated by these 2 cases?**
- **Separation of civil commitment and criminal justice systems did not allow for clear communication between OSH and DAs regarding patient status while civilly committed where discharge or release are contemplated. Rules of confidentiality and notification very unclear.**
- **Frequency of re-commitment hearings every 6 months places victim families in very difficult situation of almost constant reminders of the circumstances than led to love ones death.**

# Bills Considered by the Senate Judiciary Committee

- **SB 88 – Submitted by Disability Rights Oregon**
- **Bill required the State to give notice to the Court, DA and defense attorney when someone who had been found IST and not restorable, regains competency or is discharged from the hospital as long as the person is within the statute of limitations for the crime charged.**
- **SB 89 (companion bill) requires state to complete competency exam prior to discharge.**
- **Sponsors were willing to try and work out a longer civil commitment for those found persistently incompetent.**
- **Although SB 88 and 89 seemed to deal with the problems presented in the cases. They went nowhere in the Committee.**

# SB 421

- **Introduced by Judiciary Committee Chair, at the request of the family of the deceased police officer.**
- **After several iterations this bill became the only bill considered and the one that finally passed the Legislature.**
- **After an initial preliminary hearing the Senator formed a “work group” to review the various bills.**
- **OPA volunteered for the work group. Only lawyers were chosen: Judiciary Committee lawyers, DRO, DAs (Eugene DA) and Defense Attorneys. No mental health professionals appointed and no professional from OSH or AMH were appointed or allowed to testify on the bill.**

# Provisions of SB 421

- **Creates a new type of civil commitment for an “extremely dangerous mentally ill person”**
- **Petition initiated by a District Attorney**
- **Definitions: (1) “Extremely Dangerous Person”**
  1. **At least 18 years old.**
  2. **Is exhibiting sx. or behaviors of a mental disorder substantially similar to act described (see below).**
  3. **Presents serious danger to the safety of other persons by reason of an extreme risk that the person will inflict grave or potentially lethal physical injury to other persons**

# SB 421 Provisions (con't)

4. Unless committed, will continue to represent extreme risk to the safety of other persons in the foreseeable future.

**Mental Disorder: (ALI Test for Insanity):**

1. Does not include a disorder manifested solely by repeated criminal or otherwise antisocial acts.
2. A disorder constituting a personality disorder

**In addition – Mental Disorder is Resistant to Treatment: If after receiving care from psychiatrist and exhausting all reasonable psychiatric treatment or *after refusing psychiatric treatment*, the person continues to be significantly impaired to make competent decisions and to be aware of and control extremely dangerous behavior**

## SB 421- Provisions (con't)

- **Because of the Mental Disorder that is Treatment Resistant the person committed one of the following acts:**
- **(1) Caused the death of another person. (2) Caused serious physical injury to another by means of a firearm or explosion. (3) Engaged in oral-genital contact with a child under 14 years of age. (4) Forcibly compelled sexual intercourse, oral-genital contact or penetration of another person's anus or vagina. (5) Caused a fire or explosion that damaged the protected property of another etc...**

# SB 421-Court Finding

- **Upon receipt of a petition (filled by a DA), the Court shall schedule a hearing, appoint an examiner, etc.**
- **The Court shall order commitment of the person to the jurisdiction of the Psychiatric Security Board (PSRB) for a maximum of 24 months if the Court finds that the person is:**
  - **Extremely dangerous**
  - **Suffers from a mental disorder that is treatment resistant**
  - **And because of the mental disorder committed one of the acts specified in statute (see above)**

# SB 421 – Additional Court Actions

- **Commitment is based on “clear and convincing evidence” (Civil Commitment Standard)**
- **Court determines -- initial placement (hospital or community on conditional release) and if there is a victim of the act, and if victim wants notification of future PSRB hearings.**
- **The provision of Oregon’s privilege statutes do not apply to the Examiners report, (unclear if earlier reports are privileged)**
- **Findings of this Court not to be admitted in a later criminal prosecution.**

# Role of the PSRB

- **Commitment for “extremely dangerous mentally ill person”(EDMIP) is to the PSRB is for maximum of 24 months.**
- **PSRB to hold hearings every 6 months to determine if the person is eligible for conditional release or early release.**
- **PSRB may conditionally release the person without a hearing unless DA objects.**
- **PSRB may discharge the person if the Board cannot make the findings that the person is an EDMIP. In this case regular civil commitment is an option.**

## Role of the PSRB -- 2

- **PSRB may revoke the person at any time for violation of CR plan etc. Hearing within 30 days.**
- **If discharge is recommended DA must be notified and DA may order a competency exam to determine if the person is “fit to proceed in the criminal proceedings”**
- **At the end of the 24 months the PSRB may certify that the person remains “extremely dangerous and suffers from a mental disorder that is treatment resistant” and the process can start over. The person may agree to 24 more months of supervision or request a hearing.**

# Discussion and Critique

- **SB 421 was focused on two goals:**
  1. **the possibility that “extremely dangerous” individuals who are IST would be released from custody and threaten the general public without the explicit knowledge of district attorneys who might want to reinstitute criminal charges.**
  2. **the fact that ordinary civil commitment requires recommitment every 6 months representing significant potential strain on victim families**  
**(No empirical data was presented to the Senate Judiciary Committee on either point)**

## Discussion and Critique - 2

- **In order to accomplish its goals SB 421 chose to dramatically alter and merge aspects of the fundamental goals of two critical law-mental health interactions:**
- **Civil Commitment and the management and treatment of insanity acquittees; (in Oregon governed by the Psychiatric Security Review Board)**
- **(The merger of these two law-mental health interactions does damage to the integrity and meaning of each)**

# Civil Commitment

- **Civil process in which mentally ill individuals are committed, most often to a hospital, for care, custody and treatment based on two traditional principles. Two traditional prongs:**
  - **Dangerous to self or others, now more likely based on “imminent” dangerous, -- (based on police powers of the state)**
  - **Inability to provide for basic personal needs: “gravely disabled” -- based on parens patriae)**
  - **Current Oregon law dates to 1973 changes, due process rights, personal and civil rights which guaranteed limited commitment period, process initiated within the medical-mental health system and discharge controlled by the hospital.**

# The Psychiatric Security Review Board (PSRB)

- **Started in 1978, PSRB responsible for all individuals who have had a successful insanity defense in Oregon criminal courts who remain mentally ill and a “substantial danger to others”**
- **Major features: 5 member Board provides centralized decision making, limited period of jurisdiction (except in murder cases), conditional release and prompt revocation options, PSRB responsible for movement between OSH and CR and back again, while AMH responsible for treatment at OSH or contract services in community, provision for early discharge – (no longer MI or substantial danger to others).**

# Effects of SB 421 on Civil Commitment

- **Creates a new category for CC: an “extremely dangerous person”, initiated by a DA, rules of privileged communications appear to be suspended, extending commitment period for this group up to 24 months with discharge governed by PSRB and not by physicians. Recommittment permitted for additional 24 month periods.**
- **MH Law – very confusing re: dangerousness, (danger, imminent, substantial, and extreme) – defy logical definition.**
- **Oregon’s AG’s office did not allow the new statute to refer to original criminal charge (because there is no conviction). Creates a list a heinous “acts” with which the individual is associated without any trial, evidence or conviction, or ability to introduce an insanity defense. (legal limbo)**

# Sexually Violent Predator Statute-State of Washington (71.09.020)

- **SB 421 now very close to “sexually violent predator” civil commitment statutes that began in Kansas and Washington & uniformly opposed by organized psychiatry, and opposed in Oregon.**
- **SVP means “a person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility”.**
- **Nothing in SB 421 limits the use of this CC to individuals found permanently IST or prevents a DA from initiating a CC for an individual at the end a prison term. Can be applied to a broader group— individuals “associated” with homicide, some violent assaults including sexual assaults and arson.**

# Effects on PSRB and OSH

- ❑ **PSRB not designed for individuals who have not had a trial and who are civilly committed.**
- ❑ **PSRB is a small agency currently managing over 650 insanity acquittees in the hospital and on CR**
- ❑ **New task places additional burden on this agency.**
- ❑ **There is no experience with the term of “extremely dangerous” individuals who are likely to spend more time than necessary in hospital, (not conditionally released), resulting in an increasing census of this group of patients.**

# Other Concerns

- **Key component to the definition of an “extremely dangerous person” is “treatment resistance”.**
- **“refusing psychiatric treatment” is not a valid criteria for a definition of treatment resistance –**
- **This criteria represents a political point of view and reflects a serious deficit in Oregon law in regard to treatment refusal within the hospital.....which could be fixed.**
- **Surely these cases represent “an important government interest” – one of 4 Sell criteria endorsed by the US Supreme Ct.**
- ***See: Epsom M, Rodol L, Bloom JD: A model treatment refusal procedure for defendants found Incompetent to Stand Trial in the Ninth Circuit, JAAPL 40: 417-21***

# Other Concerns – Confidentiality and Privilege

- **As mentioned earlier, the report of the examiner in the CC hearing is not privileged but the question remains about the use of earlier reports and records in this hearing.**
- **The question remains about whether defense attorneys will advise their clients who are committed to the state hospital as IST and charged with one of the acts that falls under this new CC statute to refuse to answer evaluators questions at any point along the line.**
- **If this happens it would represent a further intrusion of the trial process into the hospital treatment process.**

# Personal Summary

- **The OPA was the only organization that opposed this bill. The bill was supported by the Oregon Defense and District Attorneys organizations and passively by DRO.**
- **It was a bill crafted by lawyers for lawyers with no real professional mental health input either from professional organizations like OPA or from AMH, the organization immediately effected by the bill. It is my understanding that AMH professionals were prohibited from testifying or providing the Legislature with their views on this bill.**
- **It was in essence “wired” from the beginning with little to no testimony, and certainly no data presented. It was a bill that did deal with legitimate issues with the least effective mechanism to deal with these issues.**

## Personal Summary -- 2

- **Why did groups who know better head for the hills on this bill.**
- **My opinion is that is mostly a case of “politics” vs. good law. A powerful legislator with a home town bill (with potential ramifications around the whole state).**
- **I believe that natural adversaries to this bill (DRO and the defense attorneys) stayed with the bill because of the above reason.**
- **However, they did abandon a small and particularly defenseless (without them) group of mentally ill individuals in favor mostly of staying in a political game.**

# Personal Summary – 3

- The bigger picture
- In the last 2 legislative sessions (2011 and 2013) the PSRB has been pulled between two poles in regard to the management of “risk of harm to others”. (DA’s toward more security: Defense attorneys and DRO toward less security). This has been fought out in the Senate Judiciary Committee by the same group of people, Committee Chair, DRO, and the Defense Attorneys and District Attorneys organizations. (No MH input)
- In 2011 – PSRB was viewed as “risk adverse” & PSRB’s authority for certain hospitalized insanity acquittees was given OHA. (partial victory for each side)
- See: *bloom JD: CRIPA, Olmstead and the transformation of the Oregon PSRB. JAAPL 40:383-9, 2012*

# Personal Summary -- 4

- In 2013, SB 421, pendulum swung to DA group using PSRB to manage more “risk” (if it exists) in the form of the group of CC – “exceedingly dangerous people”.
- PSRB caught in this dynamic of managing risk, in one session losing authority to OHA and in the very next session gaining authority from OHA
- And in both cases distorting its original design.
- All done by mixing and matching parts of MH laws without knowledge or concern about historical and national trends in these areas and without any data presented.
- And all done with token input from mental health professionals or AMH. Reveals to me a lack of any organized sense of mental health policy guiding these deliberations.

# Contact Information.

- **This is a very disturbing trend in Oregon mental health law. There is no center here, little consistency and, from my point of view, no guiding policy.**
- **I am available for questions or comments at:**  
[bloomj@ohsu.edu](mailto:bloomj@ohsu.edu)