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UNITED STATES V. SAHHAR: THE RIGHT TO A JURY DETERMINATION OF INVOLUNTARY CIVIL COMMITMENT

JOHN GEORGE SAHHAR was indicted in September 1987 for making a threat against the President of the United States. Sahhar was found incompetent to stand trial in November 1987 and was again found incompetent in July 1988. Upon a motion by the acting warden of the federal correctional facility in which he had been held, Sahhar was involuntarily committed in October 1988. This placement could be permanent. Sahhar appealed his commitment to the United States Court of Appeals for the Ninth Circuit.

In *United States v. Sahhar*,[1] a three judge panel of the Ninth Circuit considered Sahhar's equal protection and due process objections. The panel held that the federal statute[2] permitting the indefinite commitment, without a jury trial, of a defendant found incompetent to stand trial does not violate the Constitution.

Sahhar is worthy of study for a number of reasons. The case is one of a number exploring the relevance of criminal procedural safeguards to noncriminal settings in which the liberty interest of the defendant is at risk. The court's holding is another in the line of cases that limit the procedural safeguards extended to criminal defendants. Finally, this case is noteworthy for the lessons in equal protection analysis taught by the divergent approaches of the majority and dissenting opinions.

I. BACKGROUND

Sahhar challenged his involuntary commitment on three grounds. He first asserted that the federal statute providing for his commitment "denie[d] him equal protection by creating a different standard for commitment for those charged with federal crimes than for the general population."[3] Second, he charged that his commitment, in the absence of a jury trial, violated his fifth and sixth amendment rights. Last, he claimed that due process required the court to make a finding that he had recently commit-

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1. 917 F.2d 1197 (9th Cir. 1990).
2. 18 U.S.C. §§ 4241-4247 (1988).
3. *Sahhar*, 917 F.2d at 1200.

ted dangerous acts before he could be committed.

A. Equal Protection

Sahhar's involuntary commitment raises equal protection issues because the statute under which he was committed creates a procedure for the commitment of a category of persons, those accused of federal crimes, leaving all others subject to the civil commitment law of the individual states. The first step in any equal protection analysis is the determination of the appropriate standard of review. Sahhar argued that since commitment represents "'a significant deprivation of liberty,'"[4] a heightened level of scrutiny should apply.[5] A brief review of the relevant case law, however, demonstrates that the Supreme Court has been reluctant to establish a definite standard for commitment procedures.

Jackson v. Indiana,[6] concerning the involuntary commitment of a defendant found incompetent to stand trial, is the Supreme Court case most nearly on point with *Sahhar*. Indiana law provided for the pretrial commitment of those found incompetent to stand trial. Jackson, a retarded deaf mute accused of two robberies totaling cash in the amount of nine dollars, was "committed to the Indiana Department of Health until such time as that Department should certify to the court that 'the defendant is sane.'"[7] Indiana law provided for three separate involuntary commitment procedures: one for criminal defendants found incompetent, another for the "feeble-minded," and a third for those found mentally ill.[8] Jackson's commitment was all but formally permanent.[9] The Court compared the ease with which the state could win commitment and the difficulty with which Jackson could win release to the requirements under the other two procedures. The disparity was so significant that the Court found a violation of Jackson's equal protection rights. Despite the Court's elaborate analysis, however, it failed to state the standard by which it rendered its comparison.

The Court has also refused to articulate a standard for review

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4. *Id.* at 1201 (quoting Addington v. Texas, 441 U.S. 418, 425 (1979)).

5. *Id.* (citing Craig v. Boren, 429 U.S. 190, 210-11 n.* (1976) (Powell, J., concurring)).

6. 406 U.S. 715 (1972).

7. *Id.* at 719.

8. *Id.* at 720-23.

9. *Id.* at 729 (while the court indicated that Jackson could be released when he became competent, experts testified that Jackson likely would never become competent).

of the commitment process for defendants at other stages in the criminal justice system. *Baxstrom v. Herold*[10] concerned a New York statute permitting the commitment of inmates at the completion of their jail sentences. Such persons could be committed to mental institutions "[w]ithout the jury review available to all other persons civilly committed in New York."[11] Striking down the statute, the Court held that the

> [c]lassification of mentally ill persons as either [criminally insane or 'civilly insane'] . . . may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*.[12]

Again, the Court was not explicit about the standard of review.

In *Jones v. United States*,[13] the Supreme Court considered the commitment of a District of Columbia criminal defendant found not guilty by reason of insanity. Such a person was held to be entitled to a judicial hearing on commitment within fifty days of the not guilty verdict. The defendant bore the burden of showing by a preponderance of the evidence that he did not then suffer from a mental illness. He was not entitled to a jury determination of the issue. But the civil commitment process in the District of Columbia required that the state bear the burden of proving, by clear and convincing evidence, that the defendant was mentally ill and dangerous. Further, the defendant in the civil process was entitled to demand a jury.[14]

The Court found the distinction did not violate the criminal defendant's equal protection rights. It held that the jury's determination of insanity at the criminal trial, combined with the "common sense [conclusion] that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need of treatment,"[15] justify the unequal treatment. Although the Court did not specifically state the level of analysis it applied, by implication it accepted the reasoning of the District of Columbia Court of Appeals' decision,[16] which used a rational basis standard of review.

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10. 383 U.S. 107 (1966).
11. *Id.* at 110.
12. *Id.* at 111 (emphasis in original).
13. 463 U.S. 354 (1983).
14. *Id.* at 356-59.
15. *Id.* at 366.
16. *See* Jones v. United States, 432 A.2d 364 (D.C. 1981).

In sum, the Court has never expressly stated the level of scrutiny it will apply to the equal protection analysis of procedures for the commitment of criminal defendants and not guilty by reason of insanity acquittees. The language it uses, however, seems to be that of rational basis analysis.[17]

B. Right to a Jury Determination

Sahhar's second claim was that without the right to demand a jury, the federal commitment process is unconstitutional. He asserted that this right might derive from guarantees found in either the fifth or the sixth amendment.

The sixth amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."[18] The Court has never considered the specific question of whether a pretrial commitment proceeding is criminal for purposes of the sixth amendment's right to trial by jury. However, in *Allen v. Illinois*[19] it considered whether the fifth amendment's guarantee against self-incrimination in criminal cases applied in a commitment proceeding.

The Illinois Sexually Dangerous Persons Act permitted the commitment of those found to be suffering from a mental disorder presently and for more than one year and had demonstrable propensities to commit sex offenses.[20] Allen was committed under the statute on the basis of testimony by psychiatrists who examined him. He claimed a fifth amendment violation. The Court held that fifth amendment self-incrimination rights did not attach to this civil proceeding. The civil nature of the commitment was established by consideration of the state interests it furthered. The statute did not "promote either of 'the traditional aims of punishment—retribution and deterrence.' "[21] Instead, the state's interest was to provide "care and treatment."[22] The nonpunitive nature of its interests was exemplified in the provision for the release at such a time that the "patient is found to be no longer danger-

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17. In *Baxstrom* and *Jones*, the Court searched for a legitimate state interest and then looked to see if the discrimination practiced was rationally related to achieving that legitimate state interest. Such a test has traditionally been referred to as the rational basis standard. *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401 (1982).

18. U.S. CONST. amend. VI.

19. 478 U.S. 364 (1986).

20. *Id.* at 366 n.1.

21. *Id.* at 370 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)).

22. *Id.* at 369.

ous."[23] Since the proceeding was not a criminal prosecution as required by the sixth amendment, its terms were held not to apply.

Sahhar also claimed that the fifth amendment due process guarantee[24] requires that a commitment proceeding be held before a jury, even though the proceeding is civil in nature.[25] The general approach for testing whether a particular procedure is a necessary part of due process was set out in *Mathews v. Eldridge*.[26] According to *Mathews*, the court is required to balance a number of factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[27]

The Ninth Circuit had occasion to review the *Mathews* weighing of due process procedures as they apply to commitment proceedings in *Tyars v. Finner*.[28] The *Tyars* court found that the essential question is whether the committed party has been afforded "fundamental fairness,"[29] not whether a certain procedural protection must be transferred from the criminal to the civil setting. The *Tyars* court was influenced by the line of Supreme Court cases beginning with *Addington v. Texas*.[30] *Addington* recognized that while "civil commitment for any purpose constitutes a significant deprivation of liberty,"[31] the Constitution does not require that all criminal procedure protections be extended to defendants in commitment proceedings.[32] The language of *Tyars*, quoted in *Sahhar*, summarized the state of the law:

> In weighing the liberty interest of the individual against the le-

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23. *Id.*
24. "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.
25. United States v. Sahhar, 917 F.2d 1197, 1206 (9th Cir. 1990).
26. 424 U.S. 319 (1976).
27. *Id.* at 335.
28. 709 F.2d 1274 (9th Cir. 1983).
29. *Id.* at 1283.
30. 441 U.S. 418 (1979).
31. *Id.* at 425, *quoted in Tyars*, 709 F.2d at 1282.
32. *Addington* held that a clear and convincing standard of proof, rather than the criminal requirement of proof beyond a reasonable doubt, was sufficient to protect the defendant in a commitment proceeding *Addington*, 441 U.S. at 431.

> gitimate interests and purposes of the state in the civil commitment process, it is vital that, as a matter of constitutional due process, we impose those restrictions that are 'imperative to assure the proceedings' fundamental fairness.' However, we must also strive to 'preserve, so far as possible, the essential elements of the State's purpose,' and that we measure the requirements of due process with a sensitive awareness of the need to 'permit the orderly selection of any additional protections which may ultimately prove necessary.[33]

The *Tyars* court approved of the "flexibility of the fundamental fairness requirement,"[34] which does not require "any automatic congruence between the procedural due process requirements in criminal trials, juvenile proceedings and involuntary civil commitments."[35]

C. Due Process and Recent Dangerous Acts

Lastly, Sahhar claimed that "due process and section 4246 . . . require the government to prove that he had recently committed overt acts evincing his dangerousness."[36] The statute itself includes no explicit requirement that recent acts justify the finding of substantial risk.

In *Addington v. Texas*,[37] the Court reviewed the due process requirements for civil commitment proceedings. The Court held that a clear and convincing standard of proof, rather than a preponderance of the evidence standard, is required to make the risk of an erroneous commitment less likely. This risk was of concern because a court might commit a person "based solely on a few isolated instances of unusual conduct."[38] The Court intended to guard against commitment based merely on "idiosyncratic behavior."[39] No mention of the relative recency of the unusual behavior was made in *Addington*. Because only the standard of proof was

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33. *Sahhar*, 917 F.2d at 1206 (quoting *Tyars*, 709 F.2d at 1283, and *In re* Gault, 387 U.S. 1, 72 (1967)). The *Tyars* opinion found that shackling Tyars during his testimony, absent any demonstration of his disruptive behavior in court, was a due process violation. The opinion therefore avoided the subject of Tyars's habeas corpus petition, his fifth amendment right against self-incrimination. The court nonetheless offered lengthy dicta on the fundamental fairness test.

34. *Tyars*, 709 F.2d at 1283.

35. *Id.*

36. United States v. Sahhar, 917 F.2d 1197, 1207 (9th Cir. 1990).

37. 441 U.S. 418 (1979); *see supra* text accompanying notes 30-32.

38. Addington v. Texas, 441 U.S. 418, 427 (1979).

39. *Id.*

at issue,[40] the Court's review of civil commitment due process requirements in *Addington* does not dispose of the recency issue.

II. *United States v. Sahhar*

A. The Majority Opinion

The majority opinion, written by Judge Kozinski, began with a summary of the facts and procedural history of the case. John George Sahhar was indicted on September 18, 1987, "for making a threat against the President of the United States."[41] Prior to trial, the government requested a competency hearing, resulting in a November 1987 finding that Sahhar was not competent to stand trial.[42] At a second competency hearing, held on July 29, 1988, the court found that Sahhar was still incompetent to stand trial.[43]

"Soon thereafter," the acting warden at Terminal Island prison filed a certificate requesting an involuntary commitment hearing.[44] At the hearing on October 13, 1988, "the court found that Sahhar . . . suffer[ed] from a mental disease or defect and that his release would present a substantial risk of harm."[45] He was committed to the custody of the Attorney General who was asked to seek an appropriate state placement for Sahhar. In addition, the court required a report every six months on Sahhar's condition.

The court then summarized the commitment procedures set out by federal statute.[46] These procedures apply to federal criminal defendants and to no other population. The statute provides for an initial hearing on competency[47] that may be initiated by

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40. *Id.* at 419-20.

41. United States v. Sahhar, 917 F.2d 1197, 1198 (9th Cir. 1990).

42. *See* 18 U.S.C. § 4241(d) (1988) (The court will not proceed against a person "presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.").

43. *Sahhar*, 917 F.2d at 1199. A psychiatrist from the Medical Center for Federal Prisoners in Springfield, Missouri, Dr. Donald R. Britts, testified that Sahhar was a "paranoid schizophrenic . . . and was not competent to stand trial and unlikely to become so within a reasonable period of time." *Id.*

44. *Id.*

45. *Id.* at 1200. Dr. Jeanne Hetzel, Chief of Psychology Services at Terminal Island testified that Sahhar was psychotic. Further, she found that he "[p]resented a substantial risk to other people" basing that opinion on both general tendencies and specific instances of violent behavior she observed while Sahhar was at the facility. *Id.* at 1199.

46. 18 U.S.C. §§ 4241-4247 (1988).

47. *Id.* § 4241.

either party or the court acting sua sponte.[48] A defendant found incompetent may be committed to the custody of the Attorney General for "a reasonable period of time, not to exceed four months."[49] This temporary commitment is for the purpose of assessing whether there is a "substantial probability" the defendant will become competent to stand trial "in the foreseeable future."[50] The four month period may be extended "for an additional reasonable period of time,"[51] but a defendant who has not become competent within that time is subject to section 4246.

Section 4246 provides the procedures by which federal prisoners committed to the care of the Attorney General under section 4241(d), but due to be released, may be committed for a further, indefinite period of time. The process is initiated by the director of the facility in which the defendant is being housed. The director first certifies to the court that the prisoner "is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for state custody and care of the person are not available."[52] The court must then order a hearing to determine the validity of the director's certificate. If the court finds by clear and convincing evidence that the director's certificate is accurate, the defendant is committed to the custody of the Attorney General. The Attorney General is then to release the person to the custody of the appropriate state official, provided that the state will "assume responsibility for [the defendant's] custody, care, and treatment."[53] If the state will not assume this responsibility, the United States Attorney General is empowered to hospitalize the prisoner until the state assumes responsibility for the prisoner or the prisoner's mental condition becomes such that there is no longer a risk of harm to persons or property.[54]

A procedure for the release of prisoners hospitalized under section 4246, very much like that which governs their hospitalization, is set out in section 4246(e). The director of the facility at which the defendant is hospitalized must certify to the court that

48. *Id.* § 4241(a).
49. *Id.* § 4241(d)(1).
50. *Id.*
51. *Id.* § 4241(d)(2).
52. *Id.* § 4246(a).
53. *Id.* § 4246(d).
54. *Id.* § 4246(d)(1)-(2).

"the person has recovered from his mental disease or defect to such an extent that his release would no longer create a substantial risk of bodily injury to another person or serious damage to [the] property of another."[55] The court may then either order the release of the defendant, order a hearing on the release, or be required to order a hearing by motion of the attorney for the government. If it is established by a preponderance of the evidence that "the person has recovered from his mental disease or defect to such an extent that" he would no longer pose a substantial threat of bodily injury or of serious damage to property, the court must order his release or conditional release.[56] After its lengthy but necessary review of the statute, the court began its analysis with Sahhar's equal protection claim. It first raised the question of the appropriate standard of review. The court cited dicta suggesting that the rational basis standard would apply and then noted Sahhar's contention that the intermediate scrutiny standard, announced in *Craig v. Boren*,[57] should apply. The majority concluded that it would come to the same result no matter which standard were applied. It therefore left the question unanswered but applied the intermediate scrutiny analysis in considering Sahhar's claim.

The majority next considered the government interest furthered by the classification in question. It found "[t]he government's interest in protecting society from those charged with crimes [to be] both 'legitimate and compelling.' "[58] Sahhar's argument that this interest does not permit Congress to "establish procedures that make it easier to commit those charged with crimes than to commit members of the general population" was rejected.[59]

The majority's rejection of Sahhar's claim began with a citation to the cases he raised in its support, chiefly *Baxstrom v. Herold*[60] and *Jackson v. Indiana*.[61] After admitting that "*Jackson* and *Baxstrom* do provide some support for Sahhar's position," the court concluded that "other cases teach that not every disparity

55. *Id.* § 4246(c).
56. *Id.* § 4246(e)(2)(A)-(B).
57. 429 U.S. 190 (1976).
58. *Sahhar*, 917 F.2d at 1201 (quoting United States v. Solerno, 481 U.S. 739, 749 (1987)).
59. *Id.* at 1201.
60. 383 U.S. 107 (1966); *see supra* text accompanying notes 10-12.
61. 406 U.S. 715 (1972); *see supra* text accompanying notes 6-9.

between commitment procedures applicable to individuals accused of crimes and those applicable to the general population amounts to a denial of equal protection."[62] *Houghton v. South*,[63] in which the Ninth Circuit upheld a Montana statute establishing different standards for the commitment of criminal defendants and for the general population, and *Jones v. United States*[64] are given as examples. The court then held that "the classification created by section 4246 [is] substantially related to important federal concerns."[65] These concerns are "the protect[ion of] society from dangerous criminal defendants . . . [and] the control and treatment of dangerous persons within the federal criminal justice system who are incompetent to stand trial."[66] Section 4246 was held to be "narrowly tailored" to achieve these goals because it applies to the discrete category of "dangerous persons charged with federal crimes but found incompetent to stand trial."[67]

The court then defended the distinction between the category of persons reached by section 4246 and the general population. The government is not required to establish a procedure for the involuntary commitment of members of the general population. That would represent "a massive federal intrusion into a field that has generally belonged to the states."[68] The court noted the similarities between commitment procedures established by the states and the federal procedure set out in sections 4241-4247, emphasizing the protections offered to the committee.[69] Finally, the court acknowledged the liberty interest at stake in a commitment hearing, but upheld the government's decision not to subject the general population to such proceedings. It concluded therefore that section 4246 does not violate the equal protection clause.[70]

The court then considered Sahhar's claim to a right to a jury determination. It rejected Sahhar's contention that the commitment proceedings of those charged with federal crimes are "in the

62. *Sahhar*, 917 F.2d at 1202.

63. 743 F.2d 1438 (9th Cir. 1984).

64. 463 U.S. 354 (1983); *see supra* text accompanying notes 13-16.

65. *Sahhar*, 917 F.2d at 1203.

66. *Id.* (citation omitted).

67. *Id.*

68. *Id.*

69. The court noted that committees are guaranteed a full evidentiary hearing, an attorney, and the right to testify, to present evidence, and to subpoena their own witnesses and cross-examine those for the government. *Id.* at 1204.

70. *Id.*

routine of the criminal process"[71] and thus entitled to sixth amendment constitutional procedural protections.[72] The court cited *Allen v. Illinois*,[73] where the Supreme Court held that Illinois's commitment proceedings under that state's Sexually Dangerous Persons Act were regulatory, not punitive, in nature.[74] The fifth amendment right against self-incrimination was held not to apply to such proceedings.

The proceedings established by sections 4241-4247 were held to be regulatory as well. "Section 4246 is not intended to address past wrongs, but rather to reduce the risk of future harm . . . ."[75] The procedure assures that the committee shall be released upon recovery, a key indication that the procedure is not punitive. Since the procedure is not criminal in nature, the sixth amendment is held not to apply to those proceedings.

Sahhar also argued that the fifth amendment's due process clause required a jury determination of his commitment. The court set out the weighing test they referred to as "the fundamental fairness requirement."[76] While the liberty interest of the individual is admittedly a strong one, the Supreme Court has held that the right to a jury trial "is neither a necessary element of the fundamental fairness guaranteed by the due process clause, nor an essential component of accurate factfinding."[77] Since Sahhar failed to convince the court that the lay judgment a jury introduces would increase the proceeding's reliability or fairness, his claim for fifth amendment protection was also rejected.

Finally, the majority considered Sahhar's claim that a commitment would comport with due process only if it were proved that "he had recently committed overt acts evincing his dangerousness."[78] The court disposed of this claim by first reviewing the statute, which provides that commitment be ordered if it is proved that the defendant presents a "substantial risk of bodily injury . . . or serious damage to property."[79] The majority held that the

71. *Id.*

72. "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury." U.S. CONST. amend. VI.

73. 478 U.S. 364 (1986).

74. *See supra* text accompanying notes 19-23.

75. *Sahhar*, 917 F.2d at 1205.

76. *See supra* text accompanying notes 29-35.

77. *Sahhar*, 917 F.2d at 1207 (*citing* McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) (trial by jury not guaranteed in a juvenile delinquency proceeding)).

78. *Id.* at 1207.

79. 18 U.S.C. § 4246(a) (1988).

recency of the activity on which this finding was based represented "but one factor . . . to [be] consider[ed] in weighing the evidence" to determine if the requirements of the statute have been met.[80] The court next considered the fifth amendment due process clause as a possible source of the jury requirement. The court concluded that as long as the commitment was based on more than idiosyncratic behavior it would comport with due process. This standard is derived from *Addington v. Texas*,[81] where the Court's due process analysis of commitment proceedings did not require a jury determination.

A summary consideration of the sufficiency of the evidence to meet the clear and convincing standard completed the majority opinion. The court concluded that the district court's decision was "supported by substantial evidence."[82]

B. The Dissent

Judge Nelson's dissent agreed with the holding that there is no sixth amendment right to a jury in the federal prisoner commitment setting but concluded that Sahhar was denied equal protection. The dissent began by addressing the question of the level of scrutiny to be applied to the classification. Judge Nelson agreed with the majority that the Supreme Court has never explicitly addressed the question. Where the majority found dicta indicating the rational basis test would apply,[83] however, Judge Nelson pointed to a Ninth Circuit decision suggesting that intermediate scrutiny should apply. In *Hickey v. Morris*,[84] the Ninth Circuit stated that "[i]n *Jackson*, *Humphrey*, and *Baxstrom*, the Court used rational basis language but invalidated the classification. This suggests that it applies the intermediate scrutiny test to classifications affecting involuntary commitment."[85] Judge Nelson's own consideration of the matter concluded that "the rational basis test . . . would be totally inappropriate . . . in light of the threat to individual liberty" created by the statute in question.[86] She therefore chose to apply intermediate scrutiny.

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80. *Sahhar*, 917 F.2d at 1207.
81. 441 U.S. 418 (1979); *see also supra* text accompanying notes 30-32.
82. *Sahhar*, 917 F.2d at 1208.
83. *See supra* text accompanying notes 6-17.
84. 722 F.2d 543 (9th Cir. 1983).
85. *Id.* at 546.
86. United States v. Sahhar, 917 F.2d 1197, 1209 (9th Cir. 1990) (Nelson, J., dissenting).

The dissent's analysis placed significant weight on the possibility that a defendant coming under section 4246 could be committed for a lifetime with only "limited review" of the court's determination.[87] Judge Nelson then noted that other criminal defendants facing six months or more of imprisonment are guaranteed the right to a jury trial. The subclass of those who are mentally ill, she claimed, are not.

Judge Nelson then reviewed the government interests advanced to justify the classification: "the protection of society . . . and . . . the control and treatment of dangerous persons within the federal justice system."[88] While acknowledging the importance of these interests, she denied that they are substantially related to the denial of a jury trial in commitment proceedings. "Denying a criminal defendant the right to a jury determination of dangerousness does not make our streets safer; it merely compromises the procedural integrity of the judicial system."[89] She concluded that the statute violated Sahhar's equal protection rights and was therefore unconstitutional.

III. Analysis

The majority and dissenting opinions in *United States v. Sahhar*[90] derive from two very different viewpoints. The majority thought that the provisions of section 4246 provide reasonable safeguards for society while respecting the rights of the accused; the dissent saw them as the first step toward an involuntary lifetime commitment made without a jury. These viewpoints began to diverge in their analysis of the classification established by the statute and in their choice of classifications for comparison.

The majority began by dividing all people into two categories: federal prisoners found incompetent to stand trial and all other persons. The procedures established in section 4246 to govern the involuntary civil commitment of those federal prisoners were then compared to the procedures for civil commitment of all other persons. Since there is no federal statute for the civil commitment of members of the general population, the commitment procedures of the states were substituted for the nonexistent federal law.

The dissent did not accept this comparison as relevant, al-

87. *Id.* (Nelson, J., dissenting).
88. *Id.* (Nelson, J., dissenting).
89. *Id.* at 1210 (Nelson, J., dissenting).
90. 917 F.2d 1197 (9th Cir. 1990).

though neither opinion explicitly recognized the distinction. For Judge Nelson, the relevant comparison was between federal prisoners found incompetent to stand trial and federal prisoners in general. She then compared the procedures under which a state may limit the liberty of each category. Her approach was to require some justification for permitting fewer rights to be guaranteed to the subclass than to the larger class out of which it was carved.

The differing categories for comparison explain the conflicting results. State statutes governing civil commitment of members of the general population are not required to extend criminal procedural protections to that population. Thus, the majority reasoned that there is no requirement to do so for federal prisoners such as Sahhar. The dissent's federal criminal population facing trial does, of course, have a right to those protections. The dissent therefore saw no reason to deny them to a federal criminal defendant such as Sahhar.

On its face, the majority approach is the stronger one. The lesson of *Addington v. Texas*[91] is clear: not all criminal procedural protections are required for defendants in civil commitment proceedings, even though the infringement of liberty may be great. While *Addington* considered only the standard of proof required in the civil commitment setting, the majority saw no reason to distinguish *Addington*'s holding in the context of the right to a jury determination. Had Sahhar demonstrated that a jury determination in civil commitments was somehow more reliable or just, the majority might have reconsidered its decision.

Wisely, the dissent did not challenge this line of reasoning directly. Judge Nelson, along with the majority, agreed that procedural due process does not require a jury determination of a civil commitment. The majority relied on the holding in *McKeiver v. Pennsylvania* that a jury trial is not a necessary part of the process due in a juvenile delinquency hearing for this proposition.[92]

But Judge Nelson rejected *McKeiver*'s precedential value on equal protection grounds. Whereas juvenile delinquency proceedings may be distinguished from typical judicial proceedings on the basis of their informality, the same rationale does not apply to involuntary civil commitment proceedings. In Judge Nelson's

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91. 441 U.S. 418 (1979).

92. 403 U.S. 528, 545 (1971), *cited in Sahhar*, 917 F.2d at 1207.

view, the special government interest in creating " 'an intimate, informal protective proceeding' "[93] for juveniles has no counterpart in commitment proceedings. The goals advanced by the government in *Sahhar* could be achieved just as well with a jury determination as without one, but the juvenile proceeding would lose its special qualities were a jury required.

Judge Nelson's approach is better-reasoned. She is correct in perceiving the classification established in section 4246 as one carved out of the larger class of all federal defendants. It is not all those in the general population who are presently suffering from a mental disease and are dangerous that are reached by the statute. Only those who have committed a federal crime and are incompetent to stand trial are affected. Even the majority admit that *Jackson v. Indiana*[94] and *Baxstrom v. Herold*[95] provide some support for Sahhar's argument.[96]

The majority minimized the lessons of those cases by asserting that *Houghton v. South*[97] and *Jones v. United States*[98] teach that not all disparities between commitment procedures for the general population and the criminal population are prohibited. *Houghton*, a Ninth Circuit case, held that differences between the commitment procedures for those accused of crimes and the general population were not equal protection violations.[99] The opinion, however, failed to mention how the procedures differed and is therefore of uncertain precedential value. *Jones* is also distinguishable. There, the Court permitted commitment, without a jury determination, of a defendant found not guilty by reason of insanity. The Court, however, based its holding on the reasonableness of using the jury's verdict at the criminal trial as the basis of a finding of mental defect and dangerousness.[100] Defendants in Sahhar's position have never been brought before a jury; their situation is therefore distinguishable.

Even if the majority is correct and *Houghton* and *Jones* permit some disparities, the fact remains that some disparities are

93. *Sahhar*, 917 F.2d at 1210 (Nelson, J., dissenting) (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971)).
94. 406 U.S. 715 (1972).
95. 383 U.S. 107 (1966).
96. *Sahhar*, 917 F.2d at 1202.
97. 743 F.2d 1438 (9th Cir. 1984).
98. 463 U.S. 354 (1983).
99. *Houghton*, 743 F.2d at 1439-40.
100. *Jones*, 463 U.S. at 363-66.

prohibited. To determine which ones are permitted, an equal protection analysis is required. This must begin with the question of the standard of review. The majority chose not to come to a conclusion on this question, but the dissent argued for the intermediate scrutiny standard. Judge Nelson is correct in concluding that a rational basis test, virtually assuring the approval of the statute, is too lenient a standard when a significant liberty interest is at stake. The *Hickey* court's analysis of Supreme Court hints on the question is also persuasive;[101] having invalidated statutes, it stands to reason that the Court applied more than rational basis scrutiny.

Judge Nelson's analysis of the relation between the government interests to be achieved and the classification in question is more incisive than the majority's. The majority sought to justify the federal interest, but that interest is not in question. Clearly, the protection of society and the treatment of dangerous persons suffering from mental diseases are important interests. It is the connection between the procedure established by section 4246 and those interests that is questionable. The majority can merely point to state commitment procedures that are similar to the federal scheme, lamely acknowledging that most states guarantee the defendant a jury trial. The majority fails to show how section 4246's denial of a jury determination is substantially related to those interests. No claim is made that the denial of a jury determination advances substantial government interests. In the absence of such a claim, the dissent's argument that the defendant may not be denied a jury is convincing.

The most troubling aspect of the dissent is that it glossed over the distinction between the liberty interests at risk in criminal prosecutions and in civil commitments. While either may end in the loss of freedom, to equate them is to ignore differences in their purpose and in their context. While these distinctions are not fatal to the dissent's conclusion, their analysis is certainly in order.

In addition, the dissent (like the majority opinion) failed to give adequate consideration to just what substantive value a jury determination might have. Whether the jury's contribution is merely symbolic, or lies in representing the community's view of dangerousness, or lies in its reliability or justness might have been

101. Hickey v. Morris, 722 F.2d 543, 545-46 (9th Cir. 1983).

explored. Both the majority opinion and the dissent have left the true meaning of a jury determination for another day

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