Alabama Rules of Criminal Procedure

Rule 11. Incompetency and mental examinations.

Rule 11.6. Preliminary review, transfers, hearings, and orders.

(a) PRELIMINARY REVIEW. After the examinations have been completed and the reports have been submitted to the circuit court, the judge shall review the reports of the psychologists or psychiatrists and, if reasonable grounds exist to doubt the defendant's mental competency, the judge shall set a hearing not more than forty-two (42) days after the date the judge received the report or, where the judge has received more than one report, not more than forty-two (42) days after the date the judge received the last report, to determine if the defendant is incompetent to stand trial, as the term "incompetent" is defined in Rule 11.1. At this hearing all parties shall be prepared to address the issue of competency.

(b) HEARINGS.

(1) The circuit court shall notify the defendant, the defendant's attorney, and the district attorney, in writing, of the date and the time of the competency hearing. Unless the defendant or the defendant's attorney files a written demand for a jury trial, pursuant to Rule 11.2(c) or within seven (7) days after the defendant's attorney is notified that the competency issue has been raised by the court or by motion of the district attorney pursuant to 11.2(a), the circuit judge shall determine whether the defendant is competent to stand trial.

(2) At the competency hearing, the defendant shall be represented by counsel and, if the defendant is financially unable to obtain adequate representation, counsel shall be appointed for the defendant. The defendant shall also be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his or her behalf, and to confront and cross-examine witnesses who appear at the hearing; provided, however, that in lieu of introducing evidence regarding the defendant's mental competency, the parties may, by stipulation, submit the matter to the circuit judge on the reports of the examining psychologists or psychiatrists.

(3) Any party who intends to dispute the findings of a report shall notify the court and counsel for any other parties, in writing, at least fourteen (14) days before the hearing. If no such written notice is given, the report shall be accepted and the findings may be adopted by the court.

(4) If the hearing is conducted without a jury, the court shall, based on the evidence, make a finding regarding competency to stand trial. The court shall make this finding as quickly as possible, but in no event shall the court fail to make a finding within fourteen (14) days after the hearing.

(c) ORDERS.

(1) If after the hearing the circuit judge or the jury does not find that the defendant is incompetent to stand trial, the criminal proceedings shall continue without unnecessary delay and the case may be tried by the same jury that determined the competency issue; provided, however, that on motion of the defendant the trial court shall empanel a new jury.

(2) If after the hearing the judge or jury determines that the defendant is incompetent and that there is no substantial probability that the defendant will become competent within a reasonable period of time, and

(i) if the judge or jury further determines, based on clear and convincing evidence, that the defendant's being at large poses a real and present threat of substantial harm to the defendant or to others, and that the defendant is mentally ill or has a mental defect and, if not treated, will continue to suffer mental distress and will continue to experience deterioration of the ability to function independently, and that the defendant is unable to make a rational and informed decision as to whether treatment would be desirable, the court shall order the defendant committed to the custody of the Department of Mental Health and Mental Retardation for a period not to exceed six (6) months or until the defendant's earlier restoration to competency, unless the court further finds that, as a result of an ongoing supervised regimen of medical treatment or therapy, the risk of harm threatened by the defendant's being at large has been sufficiently minimized or abated, in which case the court shall order that the defendant be released, upon the conditions provided in Rule 7.3 and upon such other appropriate conditions as may be reasonably necessary to ensure that the defendant continues to receive necessary treatment or therapy; but

(ii) if the judge or jury does not find that the threat of substantial harm referred to in the preceding subsection (c)(2)(i) exists, the court shall dismiss the charges against the defendant, either with or without prejudice to the right of the State to bring the charges again, and it shall order the defendant released forthwith.

(3) If after the hearing the judge or the jury determines that the defendant is incompetent to stand trial, but that there is a substantial probability that the defendant will be restored to competency within a reasonable period of time, and

(i) if the judge or the jury also determines, based on clear and convincing evidence, that the defendant's being at large poses a real and present threat of substantial harm to the defendant or to others, and that the defendant is mentally ill or has a mental defect and, if not treated, will continue to suffer mental distress and will experience deterioration of the

ability to function independently, and that the defendant is unable to make a rational and informed decision as to whether treatment would be desirable, the court shall order the defendant committed to the custody of the Department of Mental Health and Mental Retardation for therapy and treatment, in an institution suitable to receive such persons, for a period not to exceed six (6) months or until the defendant's earlier restoration to competency; but

(ii) if the judge or jury does not also find that the threat of substantial harm referred to in the preceding subsection (c)(3)(i) exists, the court shall release the defendant, as provided in Rule 7.3, under such conditions as the court deems necessary to ensure that the defendant receives therapy and treatment designed to restore the defendant to competency within a reasonable period of time, and when applicable, to minimize or abate any risk of harm threatened by the defendant's being at large.

(d) PERIODIC REVIEW.

(1) The court shall periodically review the situation of a defendant released pursuant to Rule 11.6(c)(2)(i) or Rule 11.6(c)(3)(ii) or committed for treatment pursuant to Rule 11.6(c)(2)(i), Rule 11.6(c)(3)(i), or pursuant to other provisions of law in effect before the effective date of these Rules of Criminal Procedure. The defendant shall be required to report periodically to the court at such times and dates as the judge shall specify in the court's order and shall have the right to attend the review hearing, unless the court, after appropriate inquiry, determines that the defendant is so mentally or physically ill as to be incapable of attending. The release or commitment pursuant to an original order providing for release or commitment shall not exceed six (6) months, and the release or commitment pursuant to any order renewing an order providing for release or commitment shall not exceed one (1) year. The sheriff of the county in which the competency review hearing is held shall be responsible for transporting the defendant to and from the competency review hearing and shall be responsible for the custody and care of the defendant during the hearing and while the defendant is being transported.

(2) When a defendant has been committed to the custody of the Department of Mental Health and Mental Retardation pursuant to Rule 11.6(c)(2)(i) or Rule 11.6(c)(3)(i), and it is the opinion of treating clinicians that the defendant is no longer incompetent, or remains incompetent but no longer poses a real and present threat of substantial harm to the defendant or to others by being at large, the Department of Mental Health and Mental Retardation shall file a notice of release from commitment, pursuant to Rule 11.6(g).

(3) If the district attorney has reasonable cause to believe that a defendant released pursuant to Rule 11.6(c)(2)(i) or 11.6(c)(3)(ii) has been restored to

competency before the scheduled hearing for periodic review, the district attorney may move to have the hearing scheduled at an earlier date. Any motion filed pursuant to this subsection shall state facts in support of the district attorney's belief that the defendant is presently competent to stand trial.

(4) If a defendant has received therapy and treatment under order of the court pursuant to Rule 11.6(c)(3)(i) for a period of six (6) months and the court or jury finds that there is no substantial probability that the defendant will be restored to competency within a reasonable time, the court shall proceed as provided in Rule 11.6(c)(2).

(E) MODIFICATION OF ORDER. The court, for good cause, may, at any time, modify any order issued under Rule 11.6(c)(2) or (3).

(f) REPORTS. The court shall order any person responsible for a defendant's therapy and treatment under Rule 11.6(c)(2) or (3) to submit to the court periodic reports on the defendant's status, but in no event shall such reports be made less frequently than every ninety-one (91) days. The original report(s) shall be filed with the clerk of the court, under seal, with copies provided to the circuit judge, the defendant's attorney, the district attorney, and anyone else having a proper interest therein, as determined by the court.

(g) RELEASE FROM COMMITMENT. The individual or institution to whose custody a defendant has been committed under Rule 11.6(c)(2)(i) or (3)(i), or under other provisions of law in effect before the effective date of these Rules of Criminal Procedure, may not release the defendant from custody or knowingly permit the defendant to be at large without direct supervision and attendance, unless authorized to do so by the circuit court. When the court receives notice from the commissioner of the Department of Mental Health and Mental Retardation, an authorized representative of the Department, or the director of the institution having custody of a defendant who has been committed, indicating that the treating clinicians hold the opinion that the defendant is no longer incompetent or no longer poses a real and present threat of substantial harm to the defendant or to others by being at large, the court shall give a similar notice to the district attorney, the defendant, and the defendant's attorney; and, unless the parties stipulate to an order of release either with or without conditions, the court shall hold a hearing within forty-two (42) days to determine whether the defendant is competent to stand trial or no longer poses such a threat. The court shall make a finding on those issues as quickly as possible, but in no event shall the court fail to make a finding within fourteen (14) days after the hearing.

[Amended 6-11-91; Amended 10-1-96; Amended eff. 1-1-200.]

Committee Comments to Rule 11.6

(as Amended Effective January 1, 2000)

Rule 11.6(a) authorizes the circuit court to make a preliminary determination that reasonable grounds exist to conduct a competency hearing, based on the reports submitted by examining psychologists and/or psychiatrists. Authorizing the court to make this initial determination will avoid mandating a competency hearing when reasonable grounds do not exist to doubt the defendant's competency to stand trial, as evidenced by the reports of the examining psychologists or psychiatrists. While this procedure safeguards valuable court time and resources, it also ensures that the defendant's right to a competency hearing before a judge or jury will be preserved when reasonable grounds exist to doubt the defendant's mental competency.

After reviewing the reports, if the judge finds reasonable grounds to doubt the defendant's mental competency, the judge must schedule a competency hearing within forty-two (42) days after the date the last report is received.

Rule 11.6(b)(1) provides for notice to the defendant and the defendant's attorney of the date of the competency hearing. It further provides that in order to get a jury trial on the issue of competency to stand trial, the defendant must request a jury trial either pursuant to Rule 11.2(c) or when the question of competency to stand trial is raised by the court or by a motion of the district attorney.

Subsection (b)(2) describes the hearing that a defendant must be afforded after the mental examinations have been completed and the court has made its preliminary review. That part of subsection (b)(2) setting out the defendant's rights at the competency hearing is patterned after 18 U.S.C. § 4247(d).

Subsection (b)(3) provides that a report submitted by a psychologist or psychiatrist shall be accepted and its findings adopted by the court unless, at least fourteen (14) days before the date set for the hearing, the court and opposing counsel have received written notice that a party intends to dispute the findings of the report.

Rule 11.6(b)(4) requires the court to rule, within fourteen (14) days after the hearing, on the question of the defendant's competency to stand trial.

Rule 11.6(c) is intended to comply with the United States Supreme Court's decision in *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). In *Jackson*, the United States Supreme Court struck down as unconstitutional an Indiana statute that authorized trial courts to commit a defendant to the state department of mental health for an indefinite time based on the defendant's incompetency to stand trial on criminal charges. In reviewing the statute, the Court compared the procedures applicable to incompetent defendants with those governing civil commitment of "feeble-minded" persons,

holding that the commitment standard for incompetent criminal defendants could not be more lenient, nor the standards for release more stringent, than those generally applicable to persons not charged with offenses. Accord, *Ferguson v. State*, 552 So.2d 175 (Ala.Crim.App.1989).

If the court or jury finds, pursuant to Rule 11.6(c)(2)(i), that the defendant is incompetent to stand trial and that there is no "substantial probability" that the defendant will regain competency, the defendant may be committed to a mental health institution only upon a finding 1) that the defendant is suffering from a mental disease or defect, and 2) that the defendant poses a real and present threat of substantial harm to the defendant or to others. See *Lynch v. Baxley*, 386 F.Supp. 378 (M.D.Ala.1974). The applicable standard for such findings is "clear and convincing" evidence, as required by Ala. Code 1975, § 22-52-37, for civil commitments by probate courts.

On September 30, 1996, the United States District Court for the Middle District of Alabama, Northern Division, ordered that the permanent injunction entered in *Lynch v. Baxley* be dissolved, and the action be dismissed. See *Lynch v. Sessions,* 942 F.Supp. 1419 (M.D.Ala.1996). The injunction in *Lynch* had imposed as one of the criteria for commitment that it be shown by clear and convincing evidence that the person being committed posed a real and present threat of substantial harm to himself or to others "as evidenced by a recent overt act." With the dissolution of the injunction of *Lynch*, the recent overt act standard was eliminated. To reflect this change in the law, the amendment to Rule 11.6(c), effective January 1, 2000, eliminates the requirement of a recent overt act as evidence that the person to be committed for inpatient treatment poses a real and present threat of substantial harm to himself or to others.

In *Webster v. Bartlett*, 709 So. 2d 1226 (Ala.Civ.App.1997), the Court of Civil Appeals held that original commitment proceedings and the renewal hearing in Alabama courts need fulfill only the requirements of Alabama law appearing in § 22-52-1.1 et seq., which does not include proof of a recent overt act as evidence that the defendant poses a real and present threat of substantial harm to himself or to others. The court noted that the "recent-overt-act" requirement originally imposed in *Lynch v. Baxley* was eliminated by *Lynch v. Sessions,* supra.

Adoption of this Rule affected somewhat the construction of Ala. Code 1975, § 22-52-31, when it is necessary for a circuit court to exercise its inherent jurisdiction over prescribed constitutional duties and mandates regarding commitment of defendants over whom the circuit court has jurisdiction because of the criminal prosecution.

In *Jackson*, supra, the Court made it clear that a finding of dangerousness cannot be based solely on the fact that the defendant has a pending criminal

charge. 406 U.S. at 724, 92 S.Ct. at 1851, 32 L.Ed.2d at 443. In *Lynch v. Baxley*, 386 F.Supp. at 391, the court, addressing the dangerousness question, stated:

> "A finding of dangerousness indicates the likelihood that the person to be committed will inflict serious harm on himself or on others. In the case of dangerousness to others, this threat of harm comprehends the positive infliction of injury—ordinarily physical injury, but possibly emotional injury as well. In the case of dangerousness to self, both the threat of physical injury and discernible physical neglect may warrant a finding of dangerousness. Although he does not threaten actual violence to himself, a person may be properly committable under the dangerousness standard if it can be shown that he is mentally ill, that his mental illness manifests itself in neglect or refusal to care for himself, that such neglect or refusal poses a real and present threat of substantial harm to his well-being, and that he is incompetent to determine for himself whether treatment for his mental illness would be desirable."

Neither the *Jackson* decision nor the *Lynch v. Baxley* decision precludes the court from hearing evidence concerning the pending charges against the defendant in determining whether the defendant is dangerous to himself or herself or to others. Indeed, such evidence may be very material to the inquiry.

In *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir.1974), the Court of Appeals held that the "need for care" of a person adjudged insane is not enough, standing alone, to support an involuntary civil commitment. In *Lynch v. Baxley*, the court ruled:

"[E]ach order of involuntary commitment shall be supported by the following minimum findings made by the fact-finder upon the basis of the evidence introduced at the commitment hearing:

> "(a) The person to be committed is mentally ill.
>
> "(b) The person to be committed poses a real and present threat of substantial harm to himself or to others."

386 F.Supp. at 390.

Under Rule 11.6, a person charged with a crime may be committed for treatment and therapy for at most a six-month period. In recognition of the *Jackson* holding that no person may be committed for an indefinite time, this rule mandates periodic reports no less frequently than every ninety-one (91) days and an automatic review by the court after the first six months of commitment and every year thereafter. See Rule 11.6(c)(2)(i) and 11.6(c)(3)(i); Rule 11.6(d); and Rule 11.6(f).

If the defendant is found to be incompetent, but there is a substantial probability that his incompetence is not permanent, the circuit court has several options available. It may commit the defendant for a six-month period of treatment and therapy in an institution, if there has been a finding of dangerousness. Rule 11.6(c)(3)(i). See *O'Connor v. Donaldson*, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975). No order made under this section that results in involuntary commitment can be made unless there is a substantial probability of improvement in the mental condition of the defendant. The order is to be effective for only six (6) months, thereby assuring a periodic judicial review of the defendant's status and progress. Subsequent orders may be effective for one year. On the other hand, for any defendant, even where there is no substantial probability that competency may be obtained in a reasonable period of time, if there is no finding of a present threat of substantial harm and thus no basis for commitment of the defendant, the court is given two alternatives.

First, under Rule 11.6(c)(2)(i) and (c)(3)(ii), if the defendant is no longer presently dangerous, the court may permit the defendant to be released conditionally—for example, on condition that the defendant appear at a mental health facility at stated intervals for blood tests or urinalysis or to take necessary medication. A defendant who fails to comply with the conditions may be taken back into custody.

Second, under Rule 11.6(c)(2)(ii) and (c)(3)(ii), if there is no present threat of dangerousness, the only alternative left is for the court to release the defendant, and if there is no substantial probability that the defendant will become competent within a reasonable time, the court must dismiss the charges (with or without prejudice).

In *Klopfer v. North Carolina,* 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), the Supreme Court held that an indefinite suspension of a criminal prosecution violated the petitioner's right to speedy trial. While *Jackson* did not deal with that specific issue, *Jackson* broadly implied that the Sixth Amendment right may be applicable in situations where an incompetent defendant is indefinitely committed. 406 U.S. at 740, 92 S.Ct. at 1859, 32 L.Ed.2d at 451-52.

Rule 11.6(d) provides for periodic review regarding defendants conditionally released pursuant to Rule 11.6(c)(2)(i) or Rule 11.6(c)(3)(ii). The first review comes no later than six (6) months from the date of release; later reviews must be held annually; and the rule authorizes earlier hearings to be scheduled on motion of the district attorney, if the motion is supported by facts establishing reasonable cause to believe the defendant is presently competent to stand trial. Six-month initial reviews and later annual reviews are also provided for defendants committed to the Department of Mental Health and Mental Retardation pursuant to Rule 11.6(c)(2)(i) or Rule 11.6(c)(3)(i).

Rule 11.6(g) was new to Alabama procedure. It recognizes that a commitment made under Rule 11 is based on a determination of dangerousness, under the *Lynch* standards, which must be based on clear and convincing evidence. It does not seem reasonable that a defendant committed under the stringent standards set forth in this rule should be returned to the community without a subsequent determination by the court or a jury that the defendant "no longer poses a real and present threat of substantial harm" to himself or herself or to others. Because the initial determination of dangerousness is made by the judge or jury, it is reasonable that a subsequent decision that the defendant committed no longer poses a substantial threat to himself or herself or to others should likewise be made judicially and not administratively. The authorization to release a defendant committed under this rule may be given after the defendant's custodian has communicated with the court and submitted his or her opinions by a report stating the grounds for the custodian's belief that the defendant is no longer dangerous or incompetent. The court may approve release on the basis of the report alone if it is satisfied with the findings of the expert and if the defendant, the defendant's attorney, and the district attorney do not object. If the parties do not stipulate to an order of release by the court, a hearing, substantially equivalent to the initial commitment proceedings, and with the right to a jury trial on demand, must be held in order to determine whether the defendant is now competent or no longer poses a real and present threat of substantial harm to himself or herself or to others. A hearing held pursuant to section (g) must comply with the procedural due process requirements of *Jackson* and *Lynch v. Baxley*. Such a hearing must be held within forty-two (42) days after notice is given by the defendant's custodian, unless the parties stipulate to a release. A release pursuant to a stipulation by all parties may be made at any time, without a hearing.

Note from the reporter of decisions: The order amending Rule 11.6(c) and the committee comments thereto, effective January 1, 2000, is published in that volume of *Alabama Reporter* that contains Alabama cases from 741 So.2d.