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IMMEDIATE APPEAL OF PRETRIAL COMMITMENT ORDERS: "IT'S NOW OR NEVER"

INTRODUCTION

The relationship between the mentally deficient and the criminal law is the subject of much debate and commentary.¹ Criminal justice systems incorporate a variety of safeguards to ensure fair treatment of the mentally deficient.² Congress' recognition of the special needs of mentally deficient criminal defendants culminated in the passage of the original version of the Insanity Defense Reform Act (the "Act").³ The Act, in its original and amended versions, delineates procedures to determine a criminal defendant's competency to stand trial and his sanity at the time of the offense. It also governs the confinement of the mentally deficient defendant.⁴

1. See S. Guze, *Criminality and Psychiatric Disorders* 13 (1976). This interest stems from the "desire to understand the nature of criminality, and the need to define the limits of criminal responsibility." *Id.*; see Goddard, *General Introduction* to E. Hoag & E. Williams, *Crime, Abnormal Minds, and the Law* at xii (1923). Numerous books have been written in an attempt to clarify the legal position of the mentally deficient criminal defendant. See, e.g., H. Fingarette & A. Hasse, *Mental Disabilities and Criminal Responsibility* (1979); E. Hoag & E. Williams, *Crime, Abnormal Minds, and the Law* (1923); H. Huckabee, *Lawyers, Psychiatrists and Criminal Law: Cooperation or Chaos?* (1980); R. Lasky, *Evaluation of Criminal Responsibility in Multiple Personality and the Related Dissociative Disorders* (1982); A. Matthews, Jr., *Mental Disability and the Criminal Law: A Field Study* (1970); A. Stone, *Mental Health and Law: A System in Transition* (1975) [hereinafter *Mental Health*]; W. White, *Insanity and the Criminal Law* (1923). Significant essay collections on the subject include: *By Reason of Insanity* (L. Freedman ed. 1983); *Crime and Insanity* (R. Nice ed. 1958); *Mentally Disordered Offenders* (J. Monahan & H. Steadman eds. 1983); *2 The Psychological Foundations of Criminal Justice* (H. Vetter & R. Rieber eds. 1980). See generally E. Cook, *The Insane or Mentally Impaired Defendant—A Selected Bibliography from the Professional Literature* (1983) (reference to law and psychiatry journals, reviews and books); W. Pointer, *The Handicapped Offender, A Selected Bibliography* (1981) (reference published by the United States Department of Justice); D. Tompkins, *Insanity and the Criminal Law: A Bibliography* (1960) (reference published by the Bureau of Public Administration).

In recent years, debate over the rights of the mentally deficient criminal defendant has reached unprecedented heights in reaction to the acquittal of John Hinckley, Jr. in 1982 under the insanity defense. See American Psychiatric Ass'n., *Issues in Forensic Psychiatry* 3, 7 (1984); Commission on the Mentally Disabled, ABA, *Mental Disability Law: A Primer* 21-22 (1985) [hereinafter *Commission Primer*]. For a full discussion of the Hinckley trial and public reaction to it see A. Stone, *Law, Psychiatry, and Morality* 77-98 (1984).

2. The safeguards include the availability of competency proceedings and the defense of insanity. See 18 U.S.C. §§ 4241-4247 (Supp. III 1985); Favole, *Mental Disability in the American Criminal Process: A Four Issue Survey*, in *Mentally Disordered Offenders* 247-69 (J. Monahan & H. Steadman eds. 1983) (survey of state statutes providing procedures for competency determinations and invocation of the insanity defense). This Note focuses only on competency proceedings under the federal statutes.

3. Act of Sept. 7, 1949, Pub. L. No. 285, 63 Stat. 686 (codified as amended at 18 U.S.C. §§ 4241-4247 (Supp. III 1985)). For a discussion of the purposes of the Act see *infra* notes 162-71 and accompanying text.

4. See Act of Sept. 7, 1949, Pub. L. No. 285, 63 Stat. 686 (codified as amended at 18 U.S.C. §§ 4241-4247 (Supp. III 1985)).

The incompetency plea has received scant scholarly attention in comparison to the insanity defense.⁵ Although the insanity defense is raised affirmatively during the trial,⁶ incompetency may be raised at any time between commencement of prosecution⁷ and sentencing, including during the trial.⁸ Incompetency determinations suspend all criminal proceedings until the defendant attains competency.⁹ Any significant doubt

5. See N. Morris, *Madness and the Criminal Law* 37 (1982); Schulman, *Determination of Competency—Burial at the Crossroad*, in 2 *The Psychological Foundations of Criminal Justice* 149 (H. Vetter & R. Rieber eds. 1980); Steadman & Hartston, *Defendants Incompetent to Stand Trial*, in *Mentally Disordered Offenders* 39 (J. Monahan & H. Steadman eds. 1983).

6. See 18 U.S.C. § 4242 (Supp. III 1985); ABA Standing Committee on Association Standards for Criminal Justice, *Criminal Justice Mental Health Standards*, at 7-139 (First Tent. Draft 1983) [hereinafter ABA Standards]; Commission Primer *supra* note 1, at 21.

7. The legislative history of the 1984 amendments to the Act explain that a motion for a competency determination may be made after either the date of the actual arrest or the filing of an information or the return of an indictment, whichever commences the prosecution. See S. Rep. No. 225, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3416.

8. See 18 U.S.C. § 4241(a) (Supp. III 1985); see also A. Matthews, *supra* note 1, at 72-73 (illustration that issue of defendant's competency may be raised at any time between arrest and sentencing); Mental Health, *supra* note 1 at 200-01 (charting various times when inquiry of defendant's competency may intervene in judicial process). For further discussion of the differences between the insanity defense and competency determinations, see *infra* notes 116-18 and accompanying text.

Despite their differences, insanity and incompetency usually are confused. See Mental Health, *supra* note 1, at 202 ("Unfortunately few psychiatrists understand the distinction between competency and criminal responsibility."); ABA Standards, *supra* note 6, at 7-139 ("Perhaps the criminal mental health concepts most frequently misunderstood by the lay public, . . . attorneys, judges and mental health professionals, are . . . insanity at the time of the offense . . . and [incompetency] to stand trial."); see also D. Whitcomb & R. Brandt, *Competency to Stand Trial* (1985) (policy brief issued by National Institute of Justice, a division of the United States Department of Justice, in response to pervasive confusion between insanity defense and incompetency to stand trial).

The confusion between the two concepts flows logically from what has been termed as the "troubled relationship between the vagaries of psychiatric evaluation and the difficulties of judicial determinations of incompetence." *Suggs v. LaVallee*, 570 F.2d 1092, 1119 (2d Cir.) (Kaufman, J., concurring), *cert. denied*, 439 U.S. 915 (1978). See Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. Rev. 921, 922 (1985) (Competency status is the legal concept "most frequently misunderstood by attorneys, judges, and mental health professionals, as well as by the public."). "[B]ecause of the imprecision of the norms in this area, much is lost in the translation from psychiatrist to judge or jury, between diagnosis and decision." *Suggs v. LaVallee*, 570 F.2d 1092, 1190 (2d Cir.) (Kaufman, J., concurring), *cert. denied*, 439 U.S. 915 (1978).

9. See *United States v. Sullivan*, 406 F.2d 180, 185 (2d Cir. 1969); *Youtsey v. United States*, 97 F. 937, 941 (6th Cir. 1899); Winick, *supra* note 8, at 924. Due process requires the suspension of criminal proceedings against an incompetent defendant. See *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975) (suspension of criminal proceedings is "fundamental to an adversary system of justice"); *Pate v. Robinson*, 383 U.S. 375, 378 (1966); *Acosta v. Turner*, 666 F.2d 949, 953 (5th Cir. Unit B 1982); *Fitch v. Estelle*, 587 F.2d 773, 777 (5th Cir.), *cert. denied*, 444 U.S. 881 (1979); *United States v. Masthers*, 539 F.2d 721, 725 (D.C. Cir. 1976); *United States ex rel. Phillips v. Lane*, 580 F. Supp. 839, 842-43 (N.D. Ill. 1984), *cert. denied*, 107 S. Ct. 249 (1986); see also *Holmes v. King*, 709 F.2d 965, 966-67 (5th Cir.) (state must provide adequate procedures to protect substantive due process right not to be tried for crime while incompetent), *cert. denied*, 464 U.S. 984 (1983).

as to the defendant's competency requires a competency evaluation.¹⁰

10. See *Pate v. Robinson*, 383 U.S. 375, 385 (1966) (where evidence raises bona fide doubt as to defendant's competency, hearing must be held); *United States v. Clark*, 617 F.2d 180, 185 (9th Cir. 1980) (where evidence raises reasonable doubt as to defendant's competency, a hearing must be held); Schulman, *supra* note 5, at 153 ("if any doubt at all is presented by either the defense or the prosecution, the court must then make some determination of the defendant's competency to stand trial"); Bennett, *A Guided Tour Through Selected ABA Standards Relating to Incompetence to Stand Trial*, 53 Geo. Wash. L. Rev. 375, 387 (1985) ("[J]udge not only has the right, but the duty to raise and resolve issue of potential incompetence whenever there is a good faith doubt about the defendant's competence, even over the defendant's objection."); Winick, *supra* note 8, at 925 ("[A] prudent trial judge, wishing to avoid possible reversal, will order a formal competency evaluation in virtually every case in which doubt about competency is raised."); e.g., *Estelle v. Smith*, 451 U.S. 454, 457 n.1 (1981) (trial judge explained that he orders competency proceedings in all cases where defendant may receive death penalty and his competency is doubtful).

The competency determination is made on the facts of the case, with a view to whether the defendant is able to understand the proceedings and assist in his defense. See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (setting out common law test of incompetency as whether the defendant is able to consult with his lawyer and whether he has factual understanding of proceedings against him); 18 U.S.C. § 4241(a) (Supp. III 1985) (court must determine whether defendant "is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense"). In *Wieter v. Settle*, 193 F. Supp. 318 (W.D. Mo. 1961), the court listed eight elements the defendant must possess to be considered competent to stand trial:

- (1) that he has mental capacity to appreciate his presence in relation to time, place and things; (2) that his elementary mental processes are such that he apprehends (i.e. seizes and grasps with what mind he has) that he is in a Court of Justice, charged with a criminal offense; (3) that there is a Judge on the Bench; (4) a Prosecutor present who will try to convict him of a criminal charge; (5) that he has a lawyer . . . who will undertake to defend him against that charge; (6) that he will be expected to tell his lawyer the circumstances, to the best of his mental ability, . . . the facts surrounding him at the time and place where the law violation is alleged to have been committed; (7) that there is, or will be, a jury present to pass upon evidence adduced as to his guilt or innocence of such charge; and (8) he has memory sufficient to relate those things in his own personal manner

Id. at 321-22; see Bennett, *supra* at 379-80. The presence of these elements is determined by evaluating such things as the defendant's medical history and demeanor, psychiatric reports and defense counsel's opinion of defendant's competency. See *Drope v. Missouri*, 420 U.S. 162, 180 (1975); *United States ex rel. Rivers v. Franzen*, 692 F.2d 491, 498 (7th Cir. 1982); *Woodall v. Foti*, 648 F.2d 268, 273 (5th Cir. Unit A June 1981); *United States v. Clark*, 617 F.2d 180, 185-86 (9th Cir. 1980); *Reese v. Wainwright*, 600 F.2d 1085, 1092 (5th Cir.), *cert. denied*, 444 U.S. 983 (1979); *United States v. David*, 511 F.2d 355, 360 (D.C. Cir. 1975).

The mere presence of certain impairments, without more, does not result in incompetency per se. See, e.g., *Barfield v. Woodard*, 748 F.2d 844, 850-52 (4th Cir. 1984) (drug use); *United States v. Metcalfe*, 698 F.2d 877, 881-82 (7th Cir.) (same), *cert. denied*, 461 U.S. 910 (1983); *United States v. Mota*, 598 F.2d 995, 998 (5th Cir. 1979) (amnesia), *cert. denied*, 444 U.S. 1084 (1980); *United States v. Swanson*, 572 F.2d 523, 526 (5th Cir.) (same), *cert. denied*, 439 U.S. 849 (1978); *Reed v. United States*, 529 F.2d 1239, 1240-41 (5th Cir.) (drug use), *cert. denied*, 429 U.S. 887 (1976); *United States v. Williams*, 468 F.2d 819, 820 (5th Cir. 1972) (same). Even displays of a defendant's mental illness will not render automatic a determination of incompetency. See, e.g., *Wolf v. United States*, 430 F.2d 443, 445 (10th Cir. 1970); *Wheeler v. United States*, 404 F.2d 252, 254 (8th Cir. 1968); *Feguer v. United States*, 302 F.2d 214, 236 (8th Cir.), *cert. denied*, 371 U.S. 872 (1962).

The number of defendants hospitalized as incompetent¹¹ and the ultimate length of their commitments¹² is startling.

In light of the hardships borne by the defendant and the criminal justice system upon a finding of incompetency,¹³ the need to provide a mechanism for weeding out erroneous determinations is clear.¹⁴ Although the statutory framework provides for periodic reevaluation of the initial finding of incompetency,¹⁵ it is an inadequate mechanism to

11. See ABA Standards, *supra* note 6, at 7-140 (citing survey revealing that "52% of all offenders in mental institutions are there because of incompetence to stand trial"); Bacon, *Incompetency to Stand Trial: Commitment to an Inclusive Test* 42 S. Cal. L. Rev. 444, 444 (1969) ("[O]ne out of fifty felony defendants is declared incompetent to stand trial; and for each defendant found not guilty by reason of insanity, one hundred persons accused are adjudged incompetent.") (footnote omitted); Schulman, *supra* note 5, at 148 ("[I]t is speculated that across the nation at any given time, there are about 15,000 persons hospitalized who are [adjudicated incompetent to stand trial on charges brought against them]."); Steadman & Hartstone, *supra* note 5, at 39 (incompetent criminal defendants "comprise[] about 32% of the admissions of mentally disordered offenders"); see also Steadman & Hartstone, *supra* note 5, at 40-42 (evaluation of results of 1978 national mail survey sent to mental facilities nationwide revealing that on any given day in the United States in 1978 there were 3400 confined defendants adjudicated as incompetent to stand trial).

12. See Winick, *supra* note 5, at 934 ("One recent study found that incompetent defendants were hospitalized for an average period of two to three years, and that many were held for considerably longer periods."); Steadman & Hartstone, *supra* note 5, at 48 (detention of incompetents ranges from one year to approximately three and one half years, depending on the severity of the pending charges). The case of *United States ex rel. von Wolfersdorf v. Johnston*, 317 F. Supp. 66 (S.D.N.Y. 1970) provides a most egregious example of the length of confinement of an incompetent defendant. In *von Wolfersdorf*, the court held that the defendant's ultimate confinement as incompetent to stand trial for twenty years was a violation of due process. *Id.* at 68; see *United States ex rel. Daniels v. Johnston*, 328 F. Supp. 100, 115 (S.D.N.Y. 1971) (confining defendant for over eight years solely on the basis of incompetency to stand trial violates due process).

13. The defendant's hardships include lengthy confinement to often poorly run maximum security institutions, subjection to psychotropic drug treatment, frustration of bail and impairment to defense. See Winick, *supra* note 8, at 938-49; 2 *The Psychological Foundations of Criminal Justice* 137 (H. Vetter & R. Rieber eds. 1980); see also Note, *The Identification of Incompetent Defendants: Separating Those Unfit for Adversary Combat from Those Who Are Fit*, 66 Ky. L.J. 666, 679-80 (1978) (erroneous incompetency determinations work to disadvantage of defendant by weakening his defense and possibly inducing mental disorder); cf. *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972) (pretrial detention often results in defendant losing his job, his family life being disrupted and impairment of his ability to prepare defense, gather evidence and contact witnesses). The hardships on the criminal justice system largely are the great expenses incurred for psychiatrists, institutionalization and treatment. See Winick, *supra* note 8, at 932-38. The delay in the trial caused by the commitment may also impair the prosecution's case. See *infra* note 43 and accompanying text.

14. The confusion among lawyers and psychiatrists about the criteria for competency, see *supra* note 8, has led to unnecessary and unwarranted commitment to mental hospitals. See *Laboratory of Community Psychiatry*, Harvard Medical School, *Competency to Stand Trial and Mental Illness* 122-23 (1973).

15. See 18 U.S.C. § 4241(e) (Supp. III 1985). When the director of the facility to which a defendant is committed believes that defendant has attained competency, he files with the court a certificate so stating and the court then holds a hearing to determine whether defendant indeed is competent. See *id.* Semiannual progress reports must be filed with the court by the director of the facility to which defendant is committed. See

protect the criminal justice system and the defendant from the cost and delay of the initial erroneous institutionalization of a competent defendant.¹⁶

This Note suggests that immediate appeal of pretrial commitment orders minimizes these hardships. Immediate review of incompetency determinations by an appellate court helps to avoid the unfairness and inefficiencies of unnecessary institutionalization. Part I of this Note discusses the collateral order doctrine and its application in criminal cases. Part II examines the different judicial approaches to appealability of pretrial commitment orders. Part III demonstrates that judicial precedent, the policies underlying the finality requirement of appellate jurisdiction and the purposes of the Insanity Defense Reform Act all support treating pretrial commitment orders as collateral and immediately appealable.

I. THE COLLATERAL ORDER DOCTRINE AND ITS APPLICATION IN CRIMINAL CASES.

A. *The Collateral Order Doctrine*

Pursuant to section 1291 of the Judicial Code,¹⁷ appellate courts may review only final district court orders. The rule of finality, in both civil and criminal cases, is premised on maintaining efficient administration of justice.¹⁸ To avoid an unduly narrow construction of finality,¹⁹ the collateral order doctrine recognizes that certain matters not technically final are sufficiently final, as a practical matter, to warrant immediate appeal.²⁰ In *Cohen v. Beneficial Industrial Loan Corp.*,²¹ the Supreme

id. at § 4247(e)(1)(A). Even when the director has not filed a certificate, defendant's counsel or legal guardian may move for a hearing 180 days after the most recent court finding of incompetency. *See id.* at § 4247(h) (Supp. III 1985).

16. *See supra* notes 13-14 and accompanying text.

17. The statute provides in pertinent part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1982); *see* 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.06 (2d ed. 1985) [hereinafter *Moore's Federal Practice*].

18. *See* *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940); *Kenyatta v. Moore*, 744 F.2d 1179, 1182 (5th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985); *Moore's Federal Practice*, *supra* note 17, ¶ 110.07, at 107; *see also infra* notes 149-61 and accompanying text (discussing policy underlying finality).

19. "Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes." *Cobbledick v. United States*, 309 U.S. 323, 329 (1940); *see* *DiBella v. United States*, 369 U.S. 121, 125-26 (1962) (finality "need not invite self-defeating judicial construction" that would "frustrate the right to appellate review"); *cf.* *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) ("[S]tatutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.").

20. *See* *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *David v. Hooker, Ltd.*, 560 F.2d 412, 416-17 (9th Cir. 1977); *West v. Capital Fed. Sav. & Loan Ass'n*, 558 F.2d 977, 981 (10th Cir. 1977); *In re Master Key Antitrust Litig.*, 528 F.2d 5, 10 (2d Cir. 1975).

21. 337 U.S. 541 (1949).

Court set forth three requirements for appealability under the collateral order doctrine: conclusiveness, collateralness and unreviewability.²²

Conclusiveness²³ under the collateral order doctrine means that there must be a conclusive determination of the matter from which the appeal is taken.²⁴ The decision cannot be one that is "tentative, informal or incomplete."²⁵ An order is conclusive when no further steps can be taken in the district court to avoid its effects.²⁶

An order is collateral if it does not "make any step toward final disposition of the merits"²⁷ and will not "merge" in the final judgment.²⁸ A collateral order resolves an important issue²⁹ so separable from the mer-

22. See *id.* at 546. The Court recently has reaffirmed the collateral order doctrine requirements. See *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 431 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

23. Courts sometimes refer to this requirement as "finality." See, e.g., *Abney v. United States*, 431 U.S. 651, 659 (1977) (referring to trial court's "final rejection of a . . . claim"); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (finding a "final disposition of a claimed right"). The term "finality," however, also is used to describe an order that satisfies the three requisites of the collateral order doctrine and therefore is appealable under § 1291. See, e.g., *Abney*, 431 U.S. at 662 (pretrial order satisfying collateral order doctrine constituted a "final decision"); *Cohen*, 337 U.S. at 546 (district court's decision was final before appeal taken). Thus, to avoid this confusion, this Note uses the term "conclusiveness" to represent finality as one of the requisites of the collateral order doctrine and the term finality as the satisfaction of all three requisites of the collateral order doctrine. Cf. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (one element necessary to satisfy the collateral order doctrine is conclusive determination of the disputed question).

24. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) ("must conclusively determine the disputed question"); *Abney v. United States*, 431 U.S. 651, 659 (1977) ("threshold requirement [is a] fully consummated decision").

25. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

26. See *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985); *Abney v. United States*, 431 U.S. 651, 659 (1977); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

27. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

28. See *id.*

29. The requirement of an important issue sometimes is said to be an independent element of the collateral order doctrine. See, e.g., *Ohio-Sealy Mattress Mfg. Co. v. Duncan*, 714 F.2d 740, 743 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984); *In re Continental Inv. Corp.*, 637 F.2d 1, 4 (1st Cir. 1980); *Socialist Workers Party v. Grubisic*, 604 F.2d 1005, 1007 (7th Cir. 1979). Post-trial reviewability, however, usually reflects the importance of the issue in that the courts define an important interest as one that should not be denied review. See, e.g., *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316, 1318 n.2 (3d Cir. 1982) ("In determining whether an order is effectively unreviewable on appeal, we must 'ascertain whether an important right will be lost, probably irreparably, if review must await a final judgment.'" (quoting *United States v. Levine*, 658 F.2d 113, 124-25 (3d Cir. 1981))); *In re Continental Inv. Corp.*, 637 F.2d 1, 7 (1st Cir. 1980) (regardless of importance of issue, "no interlocutory appeal would lie from the denial of a [disqualification] motion in the absence of showing that irreparable harm might otherwise result"); *Armstrong v. McAlpin*, 625 F.2d 433, 439-40 (2d Cir. 1980) (importance of ethical questions raised by disqualification motions did not require immediate appeal since interest can be vindicated adequately post-trial) *appeal vacated*, 449 U.S. 1106 (1981); see also *Armstrong v. McAlpin*, 625 F.2d 433, 450-51 (2d Cir. 1980) (Mulligan, J., concurring in part and dissenting in part) ("Having found no post-*Cohen* Supreme

its³⁰ that even if erroneous, the order is not grounds for disturbing the final judgment.³¹ When trial proceedings are necessary to determine the validity of the order, separability usually is lacking.³² Because of concern with avoiding unnecessary delay, it is more likely that an order will be deemed collateral when immediate appeal would not directly cause the postponement of the trial.³³

Courts place primary emphasis on the unreviewability requirement of the collateral order doctrine.³⁴ Unless the order is unreviewable on appeal from the verdict, the interest in consolidating all objections in one post-trial appeal outweighs the appellant's interest in immediate review.³⁵ When effective post-trial review is possible, courts do not tolerate

Court authority which has turned upon this 'public importance' factor or indeed has even mentioned it, I am now compelled to conclude that it is not a *Cohen* requirement.").

In any event, the Court of Appeals for the Second Circuit recently has recognized the importance of the liberty interest frustrated by the pretrial commitment order. See *United States v. Gold*, 790 F.2d 235, 238-39 (2d Cir. 1986). For the purposes of this Note, therefore, the element of importance is incorporated into the requirement of unreviewability. See *infra* notes 34-41, 126-47 and accompanying text.

30. See *Abney v. United States*, 431 U.S. 651, 660 (1977) ("elements of [the] claim are completely independent of [defendant's] guilt or innocence"); *DiBella v. United States*, 369 U.S. 121, 127 (1962) (claim cannot involve "an issue that is involved in and will be part of a criminal prosecution in process"); *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 689 (1950) (claim is "fairly severable from the context of a larger litigious process"); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (order "will not be merged in final judgment").

31. See *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) ("the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case"); Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 365 (1961) [hereinafter *Appealability*].

32. See *Flanagan v. United States*, 465 U.S. 259, 268 (1984) (order disqualifying attorney not collateral because "[i]ts validity cannot be adequately reviewed until trial is complete"); *United States v. MacDonald*, 435 U.S. 850, 859 (1978) (order denying motion to dismiss on speedy trial grounds not collateral because its validity depends on prejudice at trial).

33. See *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring) ("order fixing bail can be reviewed without halting the main trial—its issues are entirely independent of the issues to be tried"); *Cobbledick v. United States*, 309 U.S. 323, 326 (1940) (no immediate appeal where the result would be "to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation . . ." (quoting *Segurolo v. United States* 275 U.S. 106, 112 (1927))); see, e.g., *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 434 (1985) (appeal of disqualification order in civil cases has practical effect of delaying proceedings until appeal is decided; order not immediately appealable); *Flanagan v. United States*, 465 U.S. 259, 269-70 (1984) (appeal of disqualification order in criminal case necessarily delays trial so not immediately appealable).

34. See *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 266-67 (1982); *United States v. MacDonald*, 435 U.S. 850, 855-56 (1978); *Spieß v. C. Itoh & Co.*, 725 F.2d 970, 974 (5th Cir.), cert. denied, 469 U.S. 829 (1984); see also *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940) ("[Finality is] departed from only when observance of it would practically defeat the right to any review at all.").

35. See *Cobbledick v. United States*, 309 U.S. 323, 324-25 (1940); *David v. Hooker*, Ltd., 560 F.2d 412, 416-17 (9th Cir. 1977); *Rodgers v. United States Steel Corp.*, 541 F.2d 365, 370 (3d Cir. 1976); cf. *United States v. MacDonald*, 435 U.S. 850, 859 (1978)

the burdens of delay and piecemeal appellate litigation.³⁶

The reviewability of an order is a function of its remediability.³⁷ An order is effectively unreviewable when it results in an irreparable denial of rights that the appellate court is ill-equipped to vindicate after trial.³⁸ When deferred review irretrievably exposes a party to the harm from which a right arguably shields him, immediate appeal is necessary to preserve the right.³⁹ Thus, a desire only to avoid the effects during the trial of certain pretrial orders is insufficient to warrant their immediate appeal.⁴⁰ When the order is not unreviewable, the appellate court may, at a minimum, order a new trial.⁴¹ An order concerning a right that is frustrated by postponing its vindication, however, necessitates immediate appeal.

B. *Application of the Collateral Order Doctrine in Criminal Cases*

The collateral order doctrine appears less frequently in criminal cases

(speedy trial claim was not immediately appealable because the "claim would be largely satisfied by an acquittal").

36. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981) (order refusing to disqualify counsel not immediately appealable because reviewable post-trial); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (order denying class certification not immediately appealable because subject to effective post-trial review).

37. Reviewability is determined not by the existence of jurisdiction over an appeal, but by the opportunity afforded by the appeal to prosecute one's claims. See *Robbins v. Maggio*, 750 F.2d 405, 413 (5th Cir. 1985); cf. *Appealability*, *supra* note 31, at 364 (collateral order doctrine is premised on finding irreparable harm, that is, probable, severe and unreviewable injury).

38. See *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 430-31 (1985); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684, 688-89 (1950); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); see also *United States v. MacDonald*, 435 U.S. 850, 860 (1978) (Supreme Court cases in which unreviewability existed "each involved an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial").

39. See *Helstoski v. Meanor*, 442 U.S. 500, 507-08 (1979) (denial of motion to dismiss on speech and debate clause grounds was immediately appealable collateral order because deferred review would expose the defendant to trial, contrary to the clause's implied protection from trial proceedings); *Abney v. United States*, 431 U.S. 651, 661-62 (1977) (denial of motion to dismiss on double jeopardy grounds was immediately appealable because deferred review would expose the defendant to a second trial, contrary to his right to protection from exposure to a second trial).

40. See *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 268 (1982); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376 (1981); *United States v. MacDonald*, 435 U.S. 850, 860-61 (1978); *Bever v. Gilbertson*, 724 F.2d 1083, 1087 (4th Cir.), *cert. denied*, 469 U.S. 948 (1984).

41. See *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 268 (1982) ("[P]rovision of a new trial free of prejudicial error normally [is an] adequate means of vindicating the constitutional rights of the accused."); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 (1981) ("[S]hould the Court of Appeals conclude after the trial has ended that [denying the disqualification order] was prejudicial error, it would retain its usual authority to vacate the judgment appealed from and order a new trial.")

than in civil cases.⁴² The criminal law recognizes a strong prosecutorial interest in avoiding delay,⁴³ precluding review of most pretrial orders. On the other hand, the criminal law also places a high premium on preventing oppressive pretrial incarceration, minimizing the anxiety and concern of the defendant and limiting any impairment to the defense,⁴⁴ all militating in favor of immediate review of pretrial orders that frustrate these concerns. The need to avoid delay, joined with society's interest in the prompt resolution of crimes and punishment of criminals,⁴⁵ however, usually outweigh the criminal defendant's interest in immediate review of pretrial orders.⁴⁶

The Supreme Court has sanctioned immediate appeal of three types of pretrial orders in criminal cases: denial of a motion to reduce bail,⁴⁷ denial of a motion to dismiss on double jeopardy grounds⁴⁸ and denial of a motion to dismiss on speech and debate clause grounds.⁴⁹ In each case, the asserted right could be vindicated only by immediate appeal.⁵⁰ The

42. See *Flanagan v. United States*, 465 U.S. 259, 265-66 (1984); *DiBella v. United States*, 369 U.S. 121, 124 (1962).

43. See *DiBella v. United States*, 369 U.S. 121, 126 (1962). As time passes, the prosecution's ability to meet its burden of proof may diminish greatly; evidence and witnesses may disappear, and testimony becomes more easily impeachable as the events in issue become more remote. See *Flanagan v. United States*, 465 U.S. 259, 264 (1984); *United States v. MacDonald*, 435 U.S. 850, 853-54, 862 (1978); *Abney v. United States*, 431 U.S. 651, 657 (1977).

44. See *United States v. MacDonald*, 435 U.S. 850, 858 (1978) (quoting *Barker v. Wingo*, 407 U.S. 514, 532 (1972)); see also *Flanagan v. United States*, 465 U.S. 259, 264 (1984) ("As the Sixth Amendment's guarantee of a speedy trial indicates, the accused may have a strong interest in speedy resolution of the charges against him."); *Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("traditional right to freedom before conviction permits the unhampered preparation of a defense"); *Cain v. Smith*, 686 F.2d 374, 384-85 (6th Cir. 1982) (possibility of impairment to the defense is limited by speedy trial clause); *United States v. Acevedo-Ramos*, 600 F. Supp. 501, 507 (D.P.R. 1984) (ability to prepare defense is protected by Bail Reform Act, which affords defendant a reasonable opportunity to consult with counsel and prepare his defense), *aff'd*, 755 F.2d 203 (1985).

45. See *Flanagan v. United States*, 465 U.S. 259, 264-65 (1984); *United States v. MacDonald*, 435 U.S. 850, 862 (1978).

46. It is only when the order is unreviewable in post-conviction appeal that the defendant's interest in immediate review is sufficient to justify immediate appeal. See *supra* notes 34-41 and accompanying text and *infra* notes 47-52 and accompanying text. Although in certain cases the more efficient route is to allow the appellate court to reach the merits despite a lack of finality of the pretrial order, this temptation is resisted out of deference to the finality requirement and its underlying purposes. See 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3905, at 422-24 (1976); *infra* notes 148-61 and accompanying text. Substantial waste is caused by continuing the trial past an order the reversal of which would have ended the proceedings. This practice, however, is ultimately far less wasteful than the immediate appeal of all pretrial orders. See C. Wright, *supra*, § 3907, at 429.

47. See *Stack v. Boyle*, 342 U.S. 1, 6 (1951).

48. See *Abney v. United States*, 431 U.S. 651, 662 (1977).

49. See *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979).

50. See *id.* at 508 (to enjoy full protection of speech and debate clause, which protects congressmen from consequences of a lawsuit as well as burdens of defending themselves, immediate appeal is necessary); *Abney v. United States*, 431 U.S. 651, 662 (1977) (immediate appeal is necessary to protect accused's rights under double jeopardy clause that

federal courts of appeals have taken immediate appeals from other types of pretrial orders.⁵¹ A common thread running through these decisions is a strong emphasis on the unreviewability requirement of the collateral order doctrine.⁵²

Post-conviction review of the denial of a competency hearing or of a finding of competency can effectively redress the wrong inherent in trying an incompetent defendant. The appellate court can eliminate the effects of the tainted trial by ordering a retrial with the opportunity to determine anew the defendant's present competency.⁵³ Post-conviction review of a finding of pretrial incompetency that results in confinement to a mental hospital, however, is ineffective.⁵⁴ No appellate remedy can recompense the defendant for time unnecessarily spent in a mental institution.⁵⁵

II. JUDICIAL APPROACHES TO THE APPEALABILITY OF PRETRIAL COMMITMENT ORDERS

A. *Appealability of Pretrial Commitment Orders Under the Original Statutory Framework*

Congress adopted the original version of the Insanity Defense Reform Act in 1949⁵⁶ after lengthy debate and investigation by the Judicial Con-

includes protection of defendant from being put to trial twice for the same offense); *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring) (immediate appeal of denial of bail reduction motion is necessary because "unless it can be reviewed before sentence, it never can be reviewed at all"); *see also* *United States v. MacDonald*, 435 U.S. 850, 860 (1978) ("[E]ach [case] involved an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.").

51. Immediate appeals have been taken from: orders denying a motion to return property seized pursuant to search warrant, *see* *Angel-Torres v. United States*, 712 F.2d 717, 719 (1st Cir. 1983); *Mr. Lucky Messenger Serv., Inc. v. United States*, 587 F.2d 15, 16 (7th Cir. 1978), orders denying a motion to quash indictment of judge on grounds of lack of jurisdiction, *see* *United States v. Hastings*, 681 F.2d 706, 708-09 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983), orders denying a motion to dismiss on grounds of selective prosecution, *see* *United States v. Wilson*, 639 F.2d 500, 502 (9th Cir. 1981). Additionally, the government has a statutory right to immediately appeal the granting of pretrial suppression motions. *See* 18 U.S.C. § 3731 (1982 & Supp. III 1985).

52. *See, e.g.,* *United States v. Hastings*, 681 F.2d 706, 708 (11th Cir. 1982), *cert. denied*, 459 U.S. 1203 (1983); *United States v. Wilson*, 639 F.2d 500, 502 (9th Cir. 1981) (quoting *United States v. Griffin*, 617 F.2d 1342, 1344 (9th Cir. 1980)); *see also* *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 266 (1982) (Supreme Court cases allowing immediate appeal all involved a right that "'would be destroyed if it were not vindicated before trial'" (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978))).

53. *See, e.g.,* *Dusky v. United States*, 362 U.S. 402, 403 (1960); *United States v. Ives*, 574 F.2d 1002, 1007 (9th Cir. 1978), *cert. denied*, 445 U.S. 919 (1980); *United States v. Pogany*, 465 F.2d 72, 79 (3d Cir. 1972); *United States v. Irvin*, 450 F.2d 968, 970 (9th Cir. 1971); *cf.* *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 268 (1982) (reversal of conviction and provision of new trial free of prejudicial error are generally adequate means of vindicating rights of accused).

54. *See infra* notes 126-47 and accompanying text.

55. *See* *United States v. Gold*, 790 F.2d 235, 239 (2d Cir. 1986).

56. Act of Sept. 7, 1949, Pub. L. No. 81-285, 63 Stat. 686 (current version at 18

ference.⁵⁷ Congress expressly provided for a two step procedure for pre-trial competency determinations. First, the Act of 1949 provided that if a court had reason to believe that the defendant was incompetent, it could order a psychiatric examination.⁵⁸ Upon a psychiatrist's recommendation that defendant was incompetent, the court ordered an adversarial hearing to determine the defendant's competency.⁵⁹ Second, a finding of incompetency warranted committing the defendant to the custody of the Attorney General until either the defendant attained competency or the pending proceedings were disposed of according to law.⁶⁰ If the hearing indicated that the defendant was both incompetent and dangerous he was committed indefinitely.⁶¹ Thus, by its express terms, the statute confined the incompetent defendant for an indefinite duration without any means for reevaluating his competency.⁶²

The first cases to address the issue of immediate appealability⁶³ compensated for the statute's shortcomings⁶⁴ by allowing the defendant to

U.S.C. §§ 4241-4247 (Supp. III 1985)). The Act of 1949 expanded the then existing statute governing mental defectives that only dealt with mentally defective convicts, *see* Act of June 25, 1948, Pub. L. No. 80-121, 62 Stat. 855 (current version at 18 U.S.C. §§ 4241-4247 (Supp. III 1985)), by adding sections governing pre-conviction incompetency and insanity. For the purposes of this Note, therefore, the 1949 enactment will be treated as the original version of the Act.

57. *See* H.R. Rep. No. 1319, 81st Cong., 1st Sess. 2, *reprinted in* 1949 U.S. Code Cong. Serv. 1928, 1928.

58. Section 4244 of the Act provided that at any time "after arrest and prior to the imposition of sentence," upon motion or sua sponte, the court shall order a psychiatric examination to determine if the defendant is "unable to understand the proceedings against him or properly to assist in his own defense." Act of Sept. 7, 1949, ch. 535, § 4244, 63 Stat. 686, 686 (current version at 18 U.S.C. § 4241(a)-(c) (Supp. III 1985)). The court may order the defendant committed for purposes of the examination. *See id.*

59. *See* Act of Sept. 7, 1949, ch. 535, § 4244, 63 Stat. 686, 686 (current version at 18 U.S.C. § 4241(a) (Supp. III 1985)). Following a finding of incompetency, "the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto." *Id.*

60. *See* Act of Sept. 7, 1949, ch. 535, § 4246, 63 Stat. 686, 687 (current version at 18 U.S.C. § 4241(d) (Supp. III 1985)). The statute and the legislative history do not define precisely the phrase "disposed of according to law." The New York statute, the functional equivalent of the federal statute, is instructive. *See* N.Y. Crim. Proc. Law § 730.60(5) (McKinney 1984). The New York statute provides that the charges may be dismissed upon a defendant's failure to attain competency and the defendant may, in lieu, be civilly committed. *See id.*

61. *See* Act of Sept. 7, 1949, ch. 535, §§ 4247, 4248, 63 Stat. 686, 687-88 (current version at 18 U.S.C. § 4246 (Supp. III 1985)). A third prerequisite to § 4247 commitment was that no other suitable arrangements could be made. Commitment continued until one of these three conditions no longer existed. *See id.* at § 4248.

62. *See* *Jackson v. Indiana*, 406 U.S. 715, 732-33 (1972) (straightforward application of §§ 4244 and 4246 would result in indefinite commitment).

63. *See* *United States v. Curry*, 410 F.2d 1372, 1374 (4th Cir. 1969); *United States v. Klein*, 325 F.2d 283, 285 (2d Cir. 1963); *Higgins v. United States*, 205 F.2d 650, 652 (9th Cir.), *cert. dismissed*, 346 U.S. 870 (1953); *see also infra* note 68 (cases where appeal taken without discussing jurisdiction).

64. "Because it has not generally been recognized that a finding of incompetency, which may be made over the defendant's objection, often leads to a deprivation of liberty

appeal immediately the pretrial commitment order.⁶⁵ By invoking the collateral order doctrine, courts found the defendant "plainly entitled" to an immediate appeal.⁶⁶ This view gained uniform acceptance. Courts adopted this approach either summarily⁶⁷ or implicitly by simply entertaining the appeal.⁶⁸ Immediate appeal of pretrial commitment orders thus was consistently permitted at the earliest stage in the proceeding at which they were contested.

In 1956 the Supreme Court had its first opportunity to interpret the Act of 1949. In *Greenwood v. United States*,⁶⁹ the Court explained that the correct procedure under the statute was to order a special dangerousness hearing following a determination that the incompetency was more than temporary so that only dangerous incompetents would be committed indefinitely.⁷⁰ Courts construed *Greenwood* as imposing a limitation of reasonableness on the duration that a defendant could remain committed prior to trial.⁷¹ It was not until 1984 in *United States v. Cheama*,⁷² however, that the procedure under the statute, as judicially construed, was fully delineated.

Prior to *Cheama* courts consistently had allowed appeal at the earliest possible stage in the commitment proceedings.⁷³ In *Cheama*, however, the Court of Appeals for the Tenth Circuit adopted a novel approach. The court analyzed the statutory framework as a three stage process.⁷⁴ The analysis in fact was similar to the procedure of the current statute.⁷⁵

as severe as a prison sentence, safeguards comparable to those surrounding criminal conviction are lacking." Note, *Incompetency to Stand Trial*, 81 Harv. L. Rev. 454, 454 (1967) [hereinafter *Incompetency*].

65. See *United States v. Curry*, 410 F.2d 1372, 1374 (4th Cir. 1969); *United States v. Klein*, 325 F.2d 283, 285 (2d Cir. 1963); *Higgins v. United States*, 205 F.2d 650, 652 (9th Cir.), cert. dismissed, 346 U.S. 870 (1953).

66. See *United States v. Klein*, 325 F.2d 283, 285 (2d Cir. 1963); see also *United States v. Curry*, 410 F.2d 1372, 1374 (4th Cir. 1969) (citing *Klein* with approval).

67. See *United States v. Curry*, 410 F.2d 1372, 1374 (4th Cir. 1969); *United States v. Klein*, 325 F.2d 283, 285 (2d Cir. 1963); *Higgins v. United States*, 205 F.2d 650, 652 (9th Cir.), cert. dismissed, 346 U.S. 870 (1953).

68. See, e.g., *United States v. DeBellis*, 649 F.2d 1 (1st Cir. 1981); *United States v. Collins*, 525 F.2d 213 (1st Cir. 1975); *United States v. Wood*, 469 F.2d 676 (5th Cir. 1972); *United States v. Davis*, 365 F.2d 251 (6th Cir. 1966).

69. 350 U.S. 366 (1956).

70. See *id.* at 374. The Court upheld the constitutionality of the federal courts' power under the Act to commit a defendant for more than a temporary duration. See *id.* at 375.

71. See, e.g., *United States v. Curry*, 410 F.2d 1372, 1374 (4th Cir. 1969); *United States v. Walker*, 335 F. Supp. 705, 708-09 (N.D. Cal. 1971); *Cook v. Ciccone*, 312 F. Supp. 822, 824 (W.D. Mo. 1970); *United States v. Jackson*, 306 F. Supp. 4, 6 (N.D. Cal. 1969); *Maurietta v. Ciccone*, 305 F. Supp. 775, 780 (W.D. Mo. 1969); see also *Jackson v. Indiana*, 406 U.S. 715, 732-33 (1972) (recognizing that since *Greenwood* all courts have construed the statute as containing rule of reasonableness and holding that this limit is constitutionally required).

72. 730 F.2d 1383 (10th Cir. 1984).

73. See *supra* notes 65-69 and accompanying text.

74. See *United States v. Cheama*, 730 F.2d 1383, 1386 (10th Cir. 1984).

75. For a discussion of the current statutory framework, see *infra* notes 90-96 and accompanying text.

Under *Cheama* a court first must inquire into the competency of the defendant by ordering a psychiatric examination and holding a hearing.⁷⁶ Second, upon a finding of incompetency, the court may commit the defendant for a reasonable time to determine if he will regain competency in the near future.⁷⁷ Third, at the end of the initial confinement, another hearing is held to determine if and when the defendant will attain competency.⁷⁸ Upon a finding of long-term or indefinite incompetency, the court may order further confinement only upon a finding of dangerousness.⁷⁹

The defendant in *Cheama* was denied appeal at the second stage, that is, when he was initially committed for six months to determine if he would become competent.⁸⁰ The court held that appeal was proper only when the last stage in the proceedings results in a finding of indefinite incompetency.⁸¹ In the court's view, only then did the pretrial commitment order satisfy the collateral order doctrine and rise to the level of finality required by section 1291.⁸²

B. *Appealability of Pretrial Commitment Orders Under the Current Statutory Framework*

The Insanity Defense Reform Act of 1984,⁸³ an amended version of the Act of 1949,⁸⁴ clarified the predecessor statute and codified its judicial gloss.⁸⁵ For the most part, amendments were made to the structure of the Act.⁸⁶ There were only a few significant changes to its practical

76. See *United States v. Cheama*, 730 F.2d 1383, 1386 (10th Cir. 1984).

77. See *id.*; see also *Jackson v. Indiana*, 406 U.S. 715, 733 (1972) (constitution requires that length of confinement be limited to reasonable period of time).

78. Neither the original Act nor the *Cheama* analysis expressly require this second hearing. The *Cheama* court, however, recognized that a "court [must] follow the statutory guidelines and conduct a hearing to determine whether the defendant is permanently incompetent." *United States v. Cheama*, 730 F.2d 1383, 1386 (10th Cir. 1984). Thus, it reasonably may be inferred that, to reach the third stage—a finding of permanent incompetency—a hearing must be held between the second and third stages. See *id.*; *supra* notes 58-59 and accompanying text.

79. See *United States v. Cheama*, 730 F.2d 1383, 1386 (10th Cir. 1984).

80. See *id.*

81. See *id.*

82. See 28 U.S.C. § 1291 (1982); *supra* note 17.

83. Pub. L. No. 98-473, 98 Stat. 2057 (codified at 18 U.S.C. §§ 4241-4247 (Supp. III 1985)).

84. Act of Sept. 7, 1949, Pub. L. No. 285, 63 Stat. 686 (current version at 18 U.S.C. §§ 4241-4247 (Supp. III 1985)).

85. For example, the amended statute adopts the test of competency set out in *Dusky v. United States*, 362 U.S. 402, 402 (1960), and the durational limit of reasonableness recognized by the Supreme Court in *Jackson v. Indiana*, 406 U.S. 715, 733 (1972). See S. Rep. No. 225, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3418.

86. See S. Rep. No. 225, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3414 ("Section 4241 follows present federal law . . ."). Section 4241 tracks, with some modifications, original sections 4244, 4245 and 4246. See *id.* at 3415. This Note focuses on only those sections of the amended Act that are relevant to pretrial commitment orders. See 18 U.S.C. §§ 4241, 4247 (Supp. III 1985).

application.⁸⁷ Among these changes is the apparent adoption of a three stage approach similar to that delineated in *Cheama*.⁸⁸

The procedure under the amended Act commences if there is reasonable cause⁸⁹ to believe that the defendant is incompetent, in which case a hearing is ordered.⁹⁰ Second, if the court finds the defendant incompetent, it may commit him for a reasonable period of time, not to exceed four months, to determine whether there is substantial probability that he will attain competency in the foreseeable future.⁹¹ The implied limit of reasonableness in the original version of the Act is thereby expressly incorporated and limited to an initial period of four months.⁹² Following initial confinement, the defendant may be recommitted for an additional reasonable period of time until he attains competency or the pending charges are disposed of according to law.⁹³ This provision tracks the original statute,⁹⁴ making express the previously implicit limit of reasonableness.⁹⁵ Third, if any hearing subsequent to the first hearing results in a finding that there is no substantial probability of the defendant attaining competency, he can be committed indefinitely only upon a finding of dangerousness and a lack of suitable state arrangements for his custody.⁹⁶ Thus, *Cheama's* interpretation of the Act of 1949 is directly congruent with the express terms of the Act as amended.⁹⁷

Recently, in *United States v. Gold*,⁹⁸ the Court of Appeals for the Sec-

87. The current version of § 4241 does not require that a motion for a hearing present the grounds for the belief that the defendant is incompetent to stand trial. This provision, however, now is incorporated into the Federal Rules of Criminal Procedure. See S. Rep. No. 225, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3415-16; Fed. R. Crim. P. 47. Section 4241 gives the court discretion to order a hearing prior to a psychiatric examination, contrary to prior law that required an evaluation to precede the hearing. See S. Rep. No. 225, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3416-17.

88. Although Congress did not expressly adopt the *Cheama* approach as such, a comparison of the procedure under the amended statute and the *Cheama* approach reveals their congruence. Compare *supra* notes 74-79 and accompanying text with *infra* notes 90-95 and accompanying text. Recently, in *United States v. Ohnick*, 803 F.2d 1485 (9th Cir. 1986), the Court of Appeals for the Ninth Circuit expressly recognized the congruence of the three stage procedure of *Cheama* with that of the current statutory framework by using the *Cheama* approach in its application of the current statute. See *id.* at 1486.

89. See *supra* note 10 and accompanying text.

90. See 18 U.S.C. § 4241(a)-(c) (Supp. III 1985). At the hearing, the defendant is represented by counsel and has an opportunity to testify, present evidence, subpoena witnesses, and confront and cross examine witnesses. See *id.* at § 4247(d).

91. See 18 U.S.C. § 4241(d)(1) (Supp. III 1985).

92. See S. Rep. No. 225, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3418; *supra* notes 70-71 and accompanying text.

93. See 18 U.S.C. § 4241(d)(2) (Supp. III 1985).

94. See S. Rep. No. 225, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3414.

95. See *supra* note 92 and accompanying text.

96. See 18 U.S.C. § 4246 (Supp. III 1985); S. Rep. No. 225, 98th Cong., 2d Sess. 2, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3418.

97. See *supra* note 88.

98. 790 F.2d 235 (2d Cir. 1986).

ond Circuit recognized the need for the immediate appeal of a pretrial commitment order under the amended Act. Through careful application of the collateral order doctrine, the court held that even if the finding of incompetency results in only a four month commitment, immediate appeal is both appropriate and imperative.⁹⁹ First, the issue of incompetency is "entirely separate"¹⁰⁰ from the issue of guilt or innocence. Moreover, the order is effectively unreviewable on post-conviction appeal.¹⁰¹ Finally, confinement for at least four months conclusively denies liberty prior to trial for that period of time.¹⁰² Thus, immediate appeal of the initial commitment order was held proper.¹⁰³

The *Gold* court, recognizing that the *Cheama* court's approach under the original statute was much like the current statutory framework,¹⁰⁴ refused to adopt the *Cheama* holding that the third stage, commitment for an indefinite period, must occur before appeal is proper.¹⁰⁵ The Second Circuit's express rejection¹⁰⁶ of the *Cheama* holding and the statute's failure to address the issue, leave open the question of when appeal of pretrial commitment orders is proper.

III. IMMEDIATE APPEAL OF PRETRIAL COMMITMENT ORDERS

Immediate appeal of pretrial commitment orders should be permitted before a defendant is confined for any period of time. No other view comports with the collateral order doctrine, the policies underlying the finality requirement of appellate review and the purposes of the Insanity Defense Reform Act.

99. *See id.* at 239.

100. *See id.* at 238.

101. *See id.* at 239.

102. *See id.*; *cf.* *United States v. Theron*, 782 F.2d 1510, 1516-17 (10th Cir. 1986) (to avoid "serious constitutional" questions concerning the length of defendant's detention without bail, court ordered the defendant, who had been detained for four months, immediately released or tried within thirty days). The *Gold* court recognized the importance of immediate appeal of pretrial commitment orders because of their frustration of a liberty interest. "If a defendant is not incompetent, he should not be confined in a psychiatric care facility." *United States v. Gold*, 790 F.2d 235, 239 (2d Cir. 1986); *cf.* *United States ex rel. Schuster v. Herold*, 410 F.2d 1071, 1078 (2d Cir.) (recognizing the "terrifying possibility" that a prisoner transferred to a mental institution "may not be mentally ill at all"), *cert. denied*, 396 U.S. 847 (1969).

103. *See United States v. Gold*, 790 F.2d 235, 239 (2d Cir. 1986).

104. Although the *Gold* court did not expressly recognize the similarities, it did so implicitly by referring to the three stage approach delineated in *Cheama* and holding, under the current statutory framework, that appeal is proper at the second stage. *See id.*; *see also United States v. Ohnick*, 803 F.2d 1485, 1486 (9th Cir. 1986) (following *Cheama's* three step approach under the current statutory framework).

105. *See United States v. Gold*, 790 F.2d 235, 239 (2d Cir. 1986).

106. *See id.* ("We disagree with the view that matters must proceed through the third step, *i.e.*, that of ordering the defendant's long-term commitment, before the defendant is allowed to appeal.").

A. *The Collateral Order Doctrine*

The three requisites of the collateral order doctrine, conclusiveness, collateralness and unreviewability on direct appeal, plainly are met by a pretrial commitment order.

1. Conclusiveness

The pretrial commitment order, whether it be for a "reasonable" period of time or four months, is conclusive as to that period of time.¹⁰⁷ The trial court's determination for that period is not reviewable prior to its expiration.¹⁰⁸ There are no "further steps" that the defendant can take in the trial court to avoid the four month period of confinement.¹⁰⁹

It is not enough to say, as did the *Cheama* court, that upon a finding of indefinite incompetency, the commitment order ultimately may be appealed.¹¹⁰ Not all competency determinations proceed to a finding of

107. *See id.*

108. *See* 18 U.S.C. § 4241(d)(1) (Supp. III 1985). The statute does not provide the defendant with any means to object to the initial commitment order. During the confinement, if the director of the facility believes the defendant has attained competency he must file a certificate with the court so stating. *See* 18 U.S.C. § 4241(e) (Supp. III 1985). The court must then hold a hearing to determine the defendant's competency. *See id.* This procedure, however, does not give the defendant any independent power to challenge the initial commitment. *See Incompetency, supra* note 64, at 471-72. Moreover, the provision for discharge set forth in § 4247 cannot affect the initial four month confinement because motions for discharge under that section can be brought only after six months. *See* 18 U.S.C. § 4247(h) (Supp. III 1985). Similarly, habeas corpus relief is inadequate because the petition must be filed in the same district court in which the defendant was originally found incompetent. *See Glenn v. Ciccone*, 370 F.2d 361, 363 (8th Cir. 1966). Even if the petition is heard by a different judge, habeas corpus is inadvisable because it would have the effect of pitting one district judge against another on the issue of incompetency. *See id.*

109. *See supra* notes 23-26 and accompanying text.

110. *See United States v. Cheama*, 730 F.2d 1383, 1386 (10th Cir. 1984). The court recognized that appeal of commitment orders is proper, but only after a finding of indefinite incompetency. *See id.* Paradoxically, the court referred to earlier cases that allowed immediate appeal of the initial commitment orders. Yet, contrary to its own assertion that there is no need to depart from precedent, the court pushed the point of appealability back from a preliminary commitment order to the final one. *Compare Higgins v. United States*, 205 F.2d 650, 652 (9th Cir.) (appeal taken when a second hearing following the initial inquiry into competency but prior to a finding of indefinite incompetency, the second *Cheama* stage, resulted in order committing defendant), *cert. dismissed*, 346 U.S. 870 (1953) *with United States v. Cheama*, 730 F.2d 1383, 1386 (10th Cir. 1984) (appeal denied at second stage of proceedings).

The *Cheama* court recognized that "[t]he statutory scheme from which orders derive allows the confinement of defendants for extended periods of time, even though they have not been tried or convicted of the offense charged." *Cheama*, 730 F.2d at 1385. The court failed to heed its own concern, however, by denying the defendant's appeal of an order committing him for six months. *See id.* at 1386. This resulted in the defendant being confined for a total of sixteen months before being found indefinitely incompetent and given leave to appeal. *See United States v. Cheama*, 783 F.2d 165, 168 (10th Cir. 1986). Compounding the "serious deprivation of Cheama's liberty," the appellate court even then refused to decide the validity of his continued confinement and remanded the case to the trial court for further development of the record. *See id.*

indefinite incompetency.¹¹¹ Under *Cheama*, if following the initial four month commitment the defendant is found competent, the third stage, indefinite incompetency, is never reached and the defendant has endured one period of unreviewed confinement.¹¹² Similarly, if it is determined that competency soon will be attained, the third stage is avoided and the defendant will have to endure a second period of unreviewed confinement.¹¹³ Both determinations, however, conclude the proceedings as to their respective periods of confinement.¹¹⁴

2. Collateralness

The pretrial commitment order, irrespective of its duration, is collateral to the issue of innocence or guilt.¹¹⁵ Unlike insanity, competency by its nature is a collateral order. Although both competency determinations and insanity pleas require the court to discern the defendant's mental state, they address distinct issues.¹¹⁶ The insanity defense concerns the defendant's mental state at the time of the alleged crime and his criminal responsibility for the offense.¹¹⁷ The purpose of an incompetency hearing, on the other hand, is to determine the defendant's mental health at the time of the proceedings against him.¹¹⁸

A more accurate analogy is between the pretrial commitment order

111. The statutory framework provides for the resumption of the trial proceeding if, prior to a finding of indefinite incompetency but following confinement of four months, and possibly an additional reasonable period, the defendant regains competency. See 18 U.S.C. § 4241(d)-(e) (Supp. III 1985).

112. See *id.* at § 4241(d)(1).

113. See *id.* at § 4241(d)(2). Only when the confinement for an additional reasonable period does not result in the defendant attaining competency is there a third stage dangerousness hearing. See *id.* at §§ 4241(d)(2), 4246.

114. See *supra* note 108.

115. See *United States v. Gold*, 790 F.2d 235, 238 (2d Cir. 1986); *United States v. Cheama*, 730 F.2d 1383, 1385 (10th Cir. 1984).

116. See *United States v. Gold*, 790 F.2d 235, 238 (2d Cir. 1986); Lasky, *supra* note 1, at 12; Commission Primer, *supra* note 1, at 21. Congress recognized the independence of insanity and incompetency by providing for their separation in certain instances. See 18 U.S.C. § 4241(f) (Supp. III 1985) ("A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial for the offense charged.").

117. See, e.g., *United States v. Sims*, 637 F.2d 625, 628 (9th Cir. 1980); *Reese v. Wainwright*, 600 F.2d 1085, 1090 (5th Cir.), *cert. denied*, 444 U.S. 983 (1979); *United States v. Pilkington*, 583 F.2d 746, 747 (5th Cir. 1978), *cert. denied*, 440 U.S. 948 (1979); see also Commission Primer, *supra* note 1, at 12 (1984) ("The insanity defense . . . [is] advanced to prove that at the time of the alleged offense the person could not be held responsible for the acts alleged."); *Incompetency*, *supra* note 64, at 454 ("[T]he defense of insanity . . . [raises] the question . . . whether the defendant's mental condition at the time of the criminal act was such that he should not be held responsible for his conduct.").

118. See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (setting out the common law test of incompetency as whether the defendant is able to consult with his lawyer and whether he has a factual understanding of the proceedings against him); 18 U.S.C. § 4241(a) (Supp. III 1985) (court must determine whether the defendant "is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense").

and a pretrial bail order.¹¹⁹ The pretrial bail order often represents a compromise between the defendant's right to be free prior to conviction¹²⁰ and the public's interest in ensuring the defendant's presence at trial.¹²¹ The pretrial commitment order represents a similar compromise. The defendant's right to be free prior to conviction is balanced against the public's interest in ensuring his effective presence at trial.¹²²

119. The pretrial bail order compels the criminal defendant to deposit with the court some form of security to ensure his presence at trial. *See* *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *United States v. Bass*, 573 F.2d 258, 260 (5th Cir. 1978) (purpose of bail bond is to secure the presence of the defendant, not to punish); *Heikkinen v. United States*, 208 F.2d 738, 740 (7th Cir. 1953) (purpose of bail is to secure defendant's presence at trial); Note, *Release Pending Appeal: A Narrow Definition of "Substantial Question" Under the Bail Reform Act of 1984*, 54 *Fordham L. Rev.* 1081, 1083 (1986) [hereinafter *Release Pending Appeal*]. The 1984 amendments to the Bail Reform Act expanded the scope of bail decisions from merely securing the defendant's presence at trial to also providing protection from dangerous defendants. *See* 18 U.S.C. § 3142(e) (Supp. III 1985); *United States v. Coleman*, 777 F.2d 888, 894 (3d Cir. 1985).

120. The right to pretrial liberty arises from a logical reading of the eighth amendment to the Constitution and is inherent in the liberty concept of due process. *See* *Meechaicum v. Fountain*, 696 F.2d 790, 791-92 (10th Cir. 1983); *see also* *United States v. Melendez-Carrion*, 790 F.2d 984, 998 (2d Cir. 1986) ("[P]hysical confinement of an individual is the ultimate deprivation of liberty."). The Supreme Court recognized the importance of the "traditional right" to be free prior to conviction, explaining that "[u]nless this right . . . is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle*, 342 U.S. 1, 4 (1951); *see* *United States v. Barber*, 140 U.S. 164, 167 (1891) ("[p]resumptively they are innocent of the crime charged, and entitled to their constitutional privilege of being admitted to bail"). Explaining the basis of the bail statutes, the Court wrote that they "have been framed upon the theory that a person accused of a crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment." *Hudson v. Parker*, 156 U.S. 277, 285 (1895); *see* *Heikkinen v. United States*, 208 F.2d 738, 740 (7th Cir. 1953) ("Since appellant has not yet been brought to trial he has an absolute right to be admitted to bail . . .").

121. The Supreme Court has long recognized this conflict. *See* *Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty."); *United States v. Barber*, 140 U.S. 164, 167 (1891) ("[I]n criminal cases it is for the interest of the public as well as the accused that the latter should not be detained in custody prior to his trial, if the government can be assured of his presence at that time . . ."). "[B]y conditioning release on the offer of financial security, [bail] seeks to reconcile the defendant's interest in, and society's commitment to, pretrial liberty with the need to assure the defendant's presence at trial." *Meechaicum v. Fountain*, 696 F.2d 790, 791 (10th Cir. 1983) (quoting *Sistrunk v. Lyons*, 646 F.2d 64, 68 (3d Cir. 1981)); *see also* *Duker, The Right to Bail: A Historical Inquiry*, 42 *Alb. L. Rev.* 33, 101 (1977) (to reconcile the competing interests the motion of bail is employed); *Release Pending Appeal*, *supra* note 119, at 1083 ("The bail bond system . . . was intended as one compromise of [the defendant's and society's] conflicting interest.").

122. The standard used to determine competency reflects this compromise in that only defendants who cannot understand the proceedings or aid in the preparation of their defense are found incompetent. *See supra* note 118. The Supreme Court has recognized that prosecution of a defendant who cannot participate effectively in the proceedings has been construed as being essentially a trial in absentia. *See* *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *cf.* *United States ex rel. Phillips v. Lane*, 580 F. Supp. 839, 843 (N.D. Ill. 1984) (analogizing to pretrial competency proceedings, the court found that "if a suppression hearing [is] of the type . . . at which petitioner had a right to be present, it was also a proceeding that could not go forward if he was shown to be unable to cooperate with his

In the context of a pretrial commitment order, however, the "presence" at trial is mental presence rather than physical presence. The incompetent defendant cannot be effectively present at trial because he cannot aid in his defense or understand the proceedings.¹²³ Both the Supreme Court¹²⁴ and Congress¹²⁵ recognize the right to immediate appeal of bail orders. The similarity between bail orders and pretrial commitment orders calls for their similar treatment as immediately appealable collateral orders.

3. Unreviewability

The Supreme Court has held that certain rights, such as the right to be free from double jeopardy, necessarily embody the right to be exempt from the trial proceeding, making post-trial review impossible.¹²⁶ Similarly, the right to freedom prior to conviction¹²⁷ necessarily includes the right to avoid pretrial commitment.¹²⁸ A post-conviction review cannot protect this liberty interest because the defendant already will have been subject to the confinement.¹²⁹ The most obvious case of the un-

attorney or understand the nature of the proceeding"), *cert. denied*, 107 S. Ct. 249 (1986). The effective absence of the incompetent defendant led the Supreme Court to rule that trial of an incompetent is a due process violation. *See Pate v. Robinson*, 383 U.S. 375, 385 (1966); *supra* note 9.

123. *See* 18 U.S.C. § 4241(a) (Supp. III 1985). The accuracy of the trial is furthered by the defendant's ability to communicate to his attorney all facts of which he is aware. *See Drope v. Missouri*, 420 U.S. 162, 171 (1975); *United States v. Mercado*, 469 F.2d 1148, 1152 (2d Cir. 1972); *United States ex rel. Roberts v. Yeager*, 402 F.2d 918, 919 (3d Cir. 1968); *United States v. Hearst*, 412 F. Supp. 858, 859 (N.D. Cal 1975); *United States v. Sermon*, 228 F. Supp. 972, 974 (W.D. Mo. 1964); *see also supra* note 10 (discussing requisites of competency).

124. *See Stack v. Boyle* 342 U.S. 1, 4 (1951).

125. The Bail Reform Act, originally passed in 1966, provides for prompt appellate review of bail decisions. *See Bail Reform Act of 1984*, Pub. L. No. 98-473, 98 Stat. 1976, 1982 (codified at 18 U.S.C. § 3145(c) (Supp. III 1985)).

126. *See Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (to avoid exposure to questions for acts in Congress and thereby enjoy full protection of the speech and debate clause, congressmen must be able to immediately appeal denial of motion to dismiss on such grounds); *Abney v. United States*, 431 U.S. 651, 661 (1977) ("[T]he guarantee against double jeopardy assures an individual that . . . he will not be forced . . . to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense.").

127. *See supra* note 120 and accompanying text.

128. To avoid exposure to double jeopardy, the accused cannot be forced to "run the gauntlet" of a second trial before review of his double jeopardy claim. *See Abney v. United States*, 431 U.S. 651, 662 (1977). Similarly, to avoid frustration of the accused's right to freedom prior to conviction, he must not be made to endure a pretrial commitment without immediate review. *See United States v. Gold*, 790 F.2d 235, 239 (2d Cir. 1986) ("[T]he liberty interest of the committed defendant is one as to which the '[r]elief . . . must be speedy if it is to be effective.'" (quoting *Stack v. Boyle*, 342 U.S. 1, 4 (1951))); *United States v. Cheama*, 730 F.2d 1383, 1385 (10th Cir. 1984) ("To hold that committed [defendants] must wait until the substantive charges are finally disposed of would mean that there would be no meaningful review of the relevant hearings and determinations.").

129. *See United States v. Gold*, 790 F.2d 235, 239 (2d Cir. 1986); *United States v. Cheama*, 730 F.2d 1383, 1385 (10th Cir. 1984); *cf. Corey v. United States*, 375 U.S. 169,

reviewability of the commitment order occurs when the defendant is subsequently not convicted. If the charges are disposed of according to law or there is an acquittal, there will be no review of the pretrial commitment order because the defendant will not, and the prosecution may not,¹³⁰ appeal a final judgment in the defendant's favor.¹³¹

An order denying the right to be free prior to trial, as manifested in the bail laws, is immediately appealable.¹³² Unless such orders are reviewed immediately they "never can be reviewed at all."¹³³ The bail provisions allow the defendant to stay out of jail until a trial renders him guilty and he has exhausted his judicial appeals.¹³⁴ Denying bail¹³⁵ or setting bail at an excessive amount¹³⁶ results in incarceration of the defendant without a conviction. Further, the defendant's ability to consult with counsel and to prepare his defense is impaired.¹³⁷ A procedure for immediate reconsideration, therefore, is a "practical necessity."¹³⁸ The pretrial commitment order is directly analogous.

A pretrial commitment order frustrates a defendant's right to be free

173 (1963) (post-conviction diagnostic commitment "might raise constitutional problems of significant proportions" if not immediately appealable).

130. See generally *United States v. Wilson*, 420 U.S. 332, 336-53 (1975) (full discussion of historical and current interperations of double jeopardy prohibition).

131. See *United States v. Gold*, 790 F.2d 235, 239 (2d Cir. 1986).

132. See *Stack v. Boyle*, 342 U.S. 1, 6 (1951).

133. *Id.* at 12 (Jackson, J., concurring).

134. See Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified at 18 U.S.C. § 3141 (Supp. III 1985)); see also *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring) ("[T]he spirit of the [bail] procedure is to enable [defendants] to stay out of jail until a trial has found them guilty."); *Hudson v. Parker*, 156 U.S. 277, 285 (1895) ("[A] person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment.").

135. See Bail Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified at 18 U.S.C. § 3141 (Supp. III 1985)).

136. See *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (excessive bail is repugnant to the Constitution and the statutory standards).

137. See *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring); Duke, *Bail Reform for the Eighties: A Reply to Senator Kennedy*, 49 *Fordham L. Rev.* 40, 67 (1980) ("Pretrial incarceration . . . heavily burdens the defendant in both his ability and his willingness to contest the charges. . . . He completely lacks control over the amount of time and attention paid to the preparation of his defense."); Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 *Wis. L. Rev.* 441, 452 (1978) ("[M]ost importantly, the mere fact of detention severely restricts the extent to which the detainee can participate in his own defense."); cf. *Barker v. Wingo*, 407 U.S. 514, 532 (1972) (most important interest that the speedy trial right protects is to limit the impairment of the defense caused by delay because such impairment "skews the fairness of the entire system"); *Sistrunk v. Lyons*, 646 F.2d 64, 69 (3d Cir. 1981) ("[A]dmission to bail enhances the adversary system by permitting an untrammelled preparation of the defense."); Duker, *supra* note 121, at 68 (the taking of bail "theoretically permits the accused to aid his counsel in the preparation of a defense").

138. See *Stack v. Boyle*, 342 U.S. 1, 11 (1951) (Jackson, J., concurring). Justice Jackson recognized that although the discretionary nature of the bail order is such that it rarely will be disturbed on appeal, some form of immediate review is nevertheless necessary. See *id.* at 11-12. This conclusion recognizes that if the bail order is not reviewed immediately there can be no review at all. See *id.* at 12; *United States v. Gold*, 790 F.2d 235, 238-39 (2d Cir. 1986).

prior to conviction.¹³⁹ The defendant's ability to prepare his defense is impaired¹⁴⁰ and he is confined without first being convicted.¹⁴¹ Immediate appeal of pretrial commitment orders, therefore, is a similar "practical necessity" to ensure their effective review.¹⁴² Like an erroneous bail determination, the erroneous commitment order is not one that implicates the validity of the trial proceedings or the criminal charges;¹⁴³ the remedy of a new trial cannot rectify the defendant's interim loss of liberty.¹⁴⁴

That the initial commitment order is for a maximum of four months¹⁴⁵ rather than, as *Cheama* requires, an indefinite duration,¹⁴⁶ does not lessen the need for its immediate review. The appellate court in a post-conviction review is no more able to restore to the defendant the four months unnecessarily spent in an institution than it is able to restore any longer period of time.¹⁴⁷ In sum, any order of confinement prior to trial pursuant to a finding of incompetency is, by its own terms irremediable after its execution.

B. *The Policies Underlying the Finality Requirement of Section 1291*

Finality as a prerequisite to appeal is based on general notions of efficient administration of justice.¹⁴⁸ Review of pretrial orders in criminal cases usually is postponed until after conviction and sentencing to avoid unnecessary delay in the pending proceedings.¹⁴⁹ The importance of avoiding delay in criminal cases is manifest in the sixth amendment right

139. See *United States v. Gold*, 790 F.2d 235, 238-39 (2d Cir. 1986); *supra* note 120 and accompanying text.

140. Pretrial confinement can have a detrimental impact on the accused by causing him to lose his job, disrupting his family life, hindering his ability to gather evidence, contact witnesses and otherwise prepare his defense. See *Barker v. Wingo*, 407 U.S. 514, 532-33 (1972); *supra* note 137.

141. Due process requires suspension of the proceedings until the defendant attains competency. See *supra* note 9.

142. Pretrial commitment orders, like pretrial bail decisions, cannot be reviewed effectively after conviction. See *supra* notes 126-31 and accompanying text. Thus, although pretrial commitment orders are set aside only if they are clearly arbitrary, see *infra* note 167, like bail decisions, their immediate review is necessary. See *supra* notes 133-38 and accompanying text; cf. *United States v. MacDonald*, 435 U.S. 850, 857 n.6 (1978) ("Appeal rights cannot depend on the facts of a particular case." (quoting *Carroll v. United States*, 354 U.S. 394, 405 (1957))). Both bail and pretrial competency proceedings seek to protect the same interests, see *supra* notes 119-25 and accompanying text, and may result in undue hardship on the defense, see *supra* notes 134-41 and accompanying text.

143. Compare *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (Jackson, J., concurring) (pretrial bail order) with *United States v. Gold*, 790 F.2d 235, 238 (2d Cir. 1986) (pretrial commitment order).

144. See *United States v. Gold*, 790 F.2d 235, 239 (2d Cir. 1986); *supra* notes 35 & 41 and accompanying text.

145. See 18 U.S.C. § 4241(d)(1) (Supp. III 1985).

146. See *supra* notes 80-82 and accompanying text.

147. See *United States v. Gold*, 790 F.2d 235, 239 (2d Cir. 1986).

148. See *supra* notes 17-18 and accompanying text.

149. See *supra* notes 42-46 and accompanying text.

to speedy trial¹⁵⁰ and the emphasis in the Federal Rules of Criminal Procedure on the swift resolution of criminal cases.¹⁵¹ When an order is amenable to effective post-conviction review, the benefits to the defendant of immediate appeal are outweighed by the costs of delay to the system.¹⁵²

In the case of a pretrial commitment order, there can be no effective post-conviction review¹⁵³ and the cost and delay caused by the confinement¹⁵⁴ actually can be avoided by reversal of erroneous findings on immediate appeal. Indeed, concern over delay caused by commitment prompted the earliest holdings of immediate appealability of pretrial commitment orders.¹⁵⁵ Some state courts have taken advantage of the opportunity to avoid delay by granting an immediate appeal when the defendant contests a finding of incompetency, but not when he has been adjudged competent.¹⁵⁶ These state courts have thus minimized both delay of trial and piecemeal appellate litigation of pretrial commitment orders.

Other policy considerations underlying the finality requirement include deference to the trial court judge and avoiding the frustration and cost of piecemeal appellate litigation.¹⁵⁷ Deference is embodied in the standard of review on appeal¹⁵⁸ and the choice of an appellate remedy

150. See U.S. Const. amend. VI; Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982).

151. See Fed. R. Crim. P. 2 (purpose of the rules is to eliminate "unjustifiable expense and delay"), 50 (preference to be given to criminal proceedings on district court calendars).

152. See *supra* notes 34-41 and accompanying text.

153. See *supra* notes 126-47 and accompanying text.

154. See *supra* notes 9-14 and accompanying text.

155. See *United States v. Klein*, 325 F.2d 283, 285 (2d Cir. 1963); *Higgins v. United States*, 205 F.2d 650, 652 (9th Cir.), *cert. dismissed*, 346 U.S. 870 (1953). The concern for promptness in criminal cases "has become increasingly important as crime has increased, court dockets have swelled, and detention facilities have become overcrowded." *Flanagan v. United States*, 465 U.S. 259, 264 (1984).

156. See, e.g., *People v. Fields*, 62 Cal.2d 538, 540-42, 42 Cal. Rptr. 833, 834-35, 399 P.2d 369, 370-71, *cert. denied*, 382 U.S. 858 (1965); *Jolley v. State*, 282 Md. 353, 357 & n.3, 384 A.2d 91, 94 & n.3 (1978); *State v. Guatney*, 207 Neb. 501, 507-08, 299 N.W.2d 538, 543 (1980); see also *State v. Lodge*, 608 S.W.2d 910, 912 (Tex. 1980) (temporary civil commitment order pursuant to state statute can be challenged on appeal despite usual mootness effect of release because of the importance of providing opportunity for the individuals to challenge any unfair institutionalization); Casenote, *State v. Lodge: The Mootness Doctrine as it Applies to an Appeal from Involuntary Commitment for Temporary Hospitalization in a Mental Hospital*, 22 S. Tex. L.J. 155 (1981).

157. See *Flanagan v. United States*, 465 U.S. 259, 263-64 (1984); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981); *Cobbledick v. United States*, 309 U.S. 323, 325-26 (1940).

158. The pretrial commitment orders are not set aside unless clearly arbitrary. See *United States v. Barker*, No. 86-5455, slip op. at 8 (6th Cir. Dec. 29, 1986); *United States v. Hayes*, 589 F.2d 811, 822 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979); *United States v. Aponte*, 591 F.2d 1247, 1249 (9th Cir. 1978); *United States v. Fratus*, 530 F.2d 644, 647 (5th Cir.), *cert. denied*, 429 U.S. 846 (1976); *In re Harmon*, 425 F.2d 916, 918 (1st Cir. 1970).

that ranges from rehearing to reversal.¹⁵⁹ The concern of avoiding piecemeal appellate litigation is embodied in the requirements of the collateral order doctrine.¹⁶⁰ Harrassing appeals generally are remedied by sanctions or awarding costs and attorney's fees.¹⁶¹ Thus, immediate appeal of the pretrial commitment order, which satisfies the collateral order doctrine, does not frustrate these concerns.

C. *The Purposes of the Insanity Defense Reform Act*

The Act originally was adopted out of concern for the large number of incompetents convicted without the capacity to aid in their own defense.¹⁶² The Act seeks to protect the defendant with less than full mental capacity from trial and possible conviction.¹⁶³ With the passage of the 1984 amendments,¹⁶⁴ Congress reiterated that the purposes of the Act are to avoid the fundamental unfairness of convicting an incompetent defendant and to protect the integrity of the judicial process by ensuring the highest level of accuracy and defendant participation.¹⁶⁵

The extensive procedures the Act employs to determine and treat incompetency underscore the concern for fairness to the defendant.¹⁶⁶ Immediate appeal is consistent with this concern. Fairness to the defendant is furthered by allowing the appellate court immediately to provide the defendant with a second opinion of the legal sufficiency of the evidence regarding his competency.¹⁶⁷

The effect of a pretrial commitment order is to suspend the proceed-

159. See 28 U.S.C. § 2106 (1982).

160. The collateral order doctrine is a narrow departure from the final judgment rule that arises out of a practical reading of finality. See *supra* notes 19-41 and accompanying text.

161. See, e.g., *Boomer v. United States*, 755 F.2d 696, 697 (8th Cir. 1985); *Moulton v. Commissioner*, 733 F.2d 734, 735 (10th Cir.) *modified*, 744 F.2d 1448 (1984); *DeWitt v. Western Pac. R.R.*, 719 F.2d 1448, 1451 (9th Cir. 1983); 28 U.S.C. § 1912 (1982); Fed. R. App. P. 38.

162. See H.R. Rep. No. 1319, 81st Cong., 1st Sess. 2 (1949), *reprinted in* 1949 U.S. Code Cong. Serv. 1928, 1928; 1 C. Wright, *Federal Practice and Procedure: Criminal* 2d § 196, at 719-20 (1982) ("The statute was a recognition of the inadequacy of prior procedures for sifting out mental cases prior to trial and conviction . . ."); see also *United States v. Dunn*, 594 F.2d 1367, 1372 (10th Cir. 1979) ("The purpose of [incompetency] proceeding is to advise the trial court as to competency [of the] defendant . . ."), *cert. denied*, 444 U.S. 852 (1979).

163. See *supra* note 9 and accompanying text.

164. See Insanity Defense Reform Act of 1984, Pub. L. No. 473, 98 Stat. 2057 (codified at 18 U.S.C. §§ 4241-4247 (Supp. III 1985)).

165. See S. Rep. No. 98-225, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3414. A competent defendant advances the accuracy of the trial. See *supra* note 123 and accompanying text.

166. The Act delineates extensive procedures to provide the defendant with the treatment necessary to restore his competence. See *supra* notes 83-97 and accompanying text; see also *United States v. Hollis*, 569 F.2d 199, 205 (3d Cir. 1977) ("Congress underscored the significance of mental competency as a prerequisite to a fair and humane criminal trial by its enactment of [the original version of the Insanity Defense Reform Act].").

167. Cf. *supra* note 158 (standard of review on appeal).

ings until the defendant attains competency.¹⁶⁸ By delaying the trial, memories may fade and documents and witnesses may disappear.¹⁶⁹ The cost of institutionalizing the defendant and providing him with effective treatment is great.¹⁷⁰ These burdens, however, justifiably are borne by the system to further the purposes of the Act. Immediate appeal minimizes the delay and costs by weeding out erroneous findings of incompetency.

Immediate appeal also guards against abuse of the Act. Commentators warn that competency proceedings often are instituted in an attempt to thwart the opponent's case or to secure a delay in the trial.¹⁷¹ Immediate appeal counters these abusive tactics by catching erroneous findings before they can have their intended effect.

In sum, immediate appeal of pretrial commitment orders effectively ensures that the statutory shield of the Act is not turned into a sword against the defendant nor the government.

CONCLUSION

The necessity and propriety of immediate appeal of pretrial commitment orders is compelling. Pursuant to the collateral order doctrine, the orders are final trial court orders from which there is a statutory right to immediate review. The orders conclusively determine the defendant's right to be free prior to trial. Post-conviction review of the orders is meaningless. Nothing that can be done after trial can recompense the defendant for the time spent confined in a mental institution. Weeding out erroneous incompetency determinations as soon as possible furthers the policy of the finality rule to avoid unnecessary delay. The protection provided to incompetents by the Insanity Defense Reform Act from being tried effectively in absentia is unnecessary where the incompetency finding is erroneous. Indeed, commitment may frustrate accuracy by the effect of delay on memories and availability of documents and witnesses. The integrity of the court is preserved by providing the means immediately to contest a finding of incompetency, thereby protecting the system from unnecessary cost and delay.

Helene R. Banks

168. See *supra* notes 9, 163 and accompanying text.

169. See *supra* notes 43-44 and accompanying text.

170. See *supra* notes 9-14 and accompanying text.

171. See ABA Standards, *supra* note 6, at 7-142 to 7-143; A. Matthews, *supra* note 1, at 92-100; Schulman, *supra* note 5, at 154-56; Bennet, *supra* note 10, at 382-83; Winick, *supra* note 8, at 933.