NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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RETIRED JUDGES

February 5, 2019

Mark Bodner
3925 University Drive
Fairfax, VA 22030

Mark Sullivan
Assistant Commonwealth Attorney
4110 Chain Bridge Road
Fairfax, VA 22030

Re: *Commonwealth* v. *Bezaye Ermias Belete*, FE 2010-262

Dear Mr. Bodner and Mr. Sullivan:

This matter came before the court on January 9, 2019 for the annual review hearing on the continued commitment of acquittee, Bezaye Ermias Belete ("Belete"), pursuant to Code § 19.2-182.5. At the conclusion of the Commonwealth's evidence, counsel for the acquittee made a motion to strike on the ground that Code § 19.2-182.5 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as applied in *Foucha v. Louisiana*, 504 U.S. 71 (1992), in that it does not require a showing of future dangerousness.

The court holds that Code § 19.2-182.5 does not violate the Due Process Clause and that the Commonwealth has met its burden pursuant to Code § 19.2-182.5, and thus DENIES the motion to strike for the reasons that follow.

Factual Background

On December 22, 2010, Respondent Belete was found not guilty by reason of insanity ("NGRI") of the amended felony charge of larceny from the person in excess of $5.00. Pursuant to Code § 19.2-182.2, Belete was adjudicated mentally ill and was committed to the custody of the Commissioner of the Department of Behavioral Health and Developmental Services ("Commissioner") for evaluation and mental health treatment. Belete remained in commitment until July 3, 2014 when the court granted Belete conditional release to outpatient treatment,

OPINION LETTER

conditioned upon his compliance with specified requirements. He was ordered to remain on conditional release by order of May 29, 2015. Belete was later found to have violated the conditions of his release and, on September 2, 2016, an evidentiary hearing was held on a rule to show cause why Belete's conditional release should not be revoked. While new conditions were added, Belete's conditional release to outpatient treatment was not revoked and he was permitted to remain on conditional release.

On October 6, 2017, Belete was again permitted to remain on conditional release pending a hearing on October 5, 2018. On March 28, 2018, Arlington County Police obtained warrants for Belete for possession of marijuana and damaging a moped scooter, resulting in the revocation of Belete's conditional release and Belete's recommitment to the custody of the Commissioner on July 23, 2018.

Analysis

Due Process

The United States Supreme Court has held that "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Jones v. U.S.*, 463 U.S. 354, 361 (1983) (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)). In particular, *Jones* held that a person found not guilty by reason of insanity could be involuntarily committed based upon a preponderance of the evidence until "he has regained his sanity or is no longer a danger to himself or society." 463 U.S. at 370.

In *Jones*, the acquittee was charged with a misdemeanor punishable by a maximum prison sentence of one year. *Id.* at 359. Jones was determined to have suffered from schizophrenia, paranoid type, and was thus found not guilty by reason of insanity. *Id.* at 359-60. Pursuant to statute, Jones had a hearing to consider his commitment 50 days later, then a second hearing which took place more than a year after his NGRI verdict. *Id.* at 360. This meant his commitment had continued beyond the length of time he could have been detained on a maximum sentence for the crime charged. *Id.* It was determined at the second hearing that Jones remained mentally ill and, "because his illness is still quite active, he is still a danger to himself and to others." *Id.* at 360.

Jones challenged his continued commitment on the ground that it violated his due process rights because his NGRI judgment was only based on a finding by a preponderance of the evidence and it did not constitute a finding that he was mentally ill *and* dangerous. 463 U.S. at 362. Jones demanded he be released unconditionally or be re-committed pursuant to the higher civil commitment standard, which requires proof by clear and convincing evidence and affords a jury trial. *Id.* at 360. Jones also argued, because he was committed for longer than the maximum period of time he could have been confined had he been found guilty of the crime charged, that his continued commitment violated his due process rights without proof of his insanity by clear and convincing evidence, required for civil commitments. *Id.* at 366-67.

The Court held that Jones' continued commitment comported with due process requirements. *Id.* at 367. The Court based its decision on the premise that concerns critical to civil commitment cases are not present with an insanity acquittee due primarily to the fact that "the *acquittee himself* advances insanity as a defense and proves that his criminal act was a product of his

mental illness . . . ." *Id.*

The Court further held that "[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness." *Jones*, 463 U.S. at 365 (citing *Lynch v. Overholser*, 369 U.S. 705, 714 (1962)). The Court opined that it "comports with common sense to conclude that someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill and in need to treatment." *Id.* at 366.

In 1992, the Court had the opportunity to reexamine *Jones* and reconsider the due process rights of an involuntarily committed acquittee. In *Foucha v. Louisiana*, 504 U.S. 71 (1992), a Louisiana statute was challenged by an individual who was charged with aggravated burglary and illegal discharge of a firearm, but found not guilty by reason of insanity and committed to a forensic facility. Several years later, Foucha was recommended for conditional release as it was determined that he had exhibited no signs of mental illness since his admission. 504 U.S. at 74. Foucha, however, was found to have been involved in several altercations with others at the facility and thus one of the doctors who examined him "cannot certify that he would not constitute a menace to himself or others if released." 504 U.S. at 74-75.

Foucha challenged the Louisiana statute on the ground that it violated his right to due process because it allowed him to be involuntarily committed, even though he was no longer mentally ill, because he was "a danger to himself or others." 504 U.S. at 78. The Court found several difficulties with the statute.

> First, even if his continued confinement were constitutionally permissible, keeping Foucha against his will in a mental institution is improper absent a determination in civil commitment proceedings of current mental illness and dangerousness. . . . Due process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed. . . .
>
> Second, if Foucha can no longer be held as an insanity acquittee in a mental hospital, he is entitled to constitutionally adequate procedures to establish the grounds for his confinement. . . . [T]he State was entitled to hold a person for being incompetent to stand trial only long enough to determine if he could be cured and become competent. If he was to be held longer, the State was required to afford the protections constitutionally required in a civil commitment proceeding. . . .

504 U.S. at 78-80.

Thus, the Court determined that, for continued commitment of an NGRI acquittee to be constitutionally permissible, absent a civil proceeding, there must be a showing the acquittee was both mentally ill and dangerous. In short, absent a showing of current mental illness and future dangerousness, Foucha could not continue to be confined as a mentally ill person.

While the Court did not explicitly state that it was overturning *Jones*, that is the effect of *Foucha*. As Justice Kennedy's *Foucha* dissent noted: "The majority today in effect overrules that holding." 504 U.S. at 90 (Kennedy, J., dissenting). Likewise, Justice Thomas characterized the majority's holding as

an attempt to circumvent *Jones*. 504 U.S. at 109.

Further evidence that *Foucha* overruled *Jones* is the Supreme Court's treatment of *Foucha* in two later cases, *Kansas* v. *Hendricks*, 521 U.S. 346, 357 (1997) (relying on *Foucha* when stating that "[w]e have consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards") and *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001) (citing *Foucha*, suggesting that preventative detention for the purpose of protecting the community has only been upheld in limited circumstances, such as "harm-threatening mental illness," and subject to strong procedural protections). The Court's numerous citations to *Foucha* in *Hendricks* and *Zadvydas* makes it clear that the Court looks to *Foucha* for the correct due process analysis for involuntarily commitment. It is also telling that the Court makes only a few references to *Jones* in *Hendricks* and only cites to *Foucha* when discussing proper procedural and evidentiary standards for involuntary commitment of individuals. 521 U.S. at 346. Furthermore, the Court does not cite to *Jones* in *Zadvydas;* it only cited to *Foucha*.

In *Hendricks*, the respondent challenged his confinement under Kansas' Sexually Violent Predator Act, which allowed for civil commitment "when a person 'has been convicted of or charged with a sexually violent offense,' and 'suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.'" 521 U.S. at 357. In upholding the statute, the Court explained:

> A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with the proof of some additional factor, such as a "mental illness" or "mental abnormality."

521 U.S. at 358.

It is notable that Justice Kennedy cited to *Foucha* in his concurring opinion despite having written a dissent in *Foucha*. *Id.* at 374. Justice Kennedy wrote:

> This Court has held that the civil commitment of a "mentally ill" and "dangerous" person does not automatically violate the Due Process Clause provided that the commitment takes place pursuant to proper procedures and evidentiary standards.

Id. at 374 (Kennedy, J., concurring) (citing *Foucha*, 504 U.S. at 80).

In *Zadvydas*, resident aliens challenged their post-removal detention by the Immigration and Naturalization Service (INS) when they were held beyond the 90 day period following their ordered removal. The Court cited both *Hendricks* and *Foucha* stating that government detention in a nonpunitive context violates due process, except:

> in certain special and "narrow" non-punitive "circumstances," *Foucha*,

> *supra*, at 80, where a special justification, such as harm-threatening mental illness, outweighs the "individual's constitutionally protected interest in avoiding physical retrain." *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997).

533 U.S. at 690.

The Court in *Zadvydas* thus held that, "once the flight risk justification evaporates, the only special circumstance present is the alien's removable status itself, which bears no relation to a detainee's dangerousness." *Id.* at 691-92 (highlighting that due process demands require a showing of dangerousness).

In sum, the current state of the Supreme Court's jurisprudence is that, to satisfy due process demands, continued commitment of an acquittee requires both a showing of mental illness and a showing of future dangerousness.

Code § 19.2-182.5

A person may be acquitted by reason of insanity pursuant to Code § 19.2-182.2. The verdict is more commonly referred to as not guilty by reason of insanity ("NGRI"). When a person is found NGRI pursuant to Code § 19.2-182.2, the acquittee is temporarily released to the custody of the Commissioner of Behavioral Health and Developmental Services (hereinafter "Commissioner") "for evaluation as to whether the acquittee may be released with or without conditions or requires commitment." *Id.*

Pursuant to Code § 19.2-182.5, the court is required to conduct an annual review for the first five years and biennially thereafter. This case is now before the court for Belete's annual review. This statute provides that the court shall hold a hearing and, "based upon the report and other evidence provided at the hearing,":

> the court shall (i) release the acquittee from confinement if he does not need inpatient hospitalization and does not meet the criteria for conditional release set forth in § 19.2-182.7 . . . (ii) place the acquittee on conditional release if he meets the criteria for conditional release . . . or (iii) order that he remain in the custody of the Commissioner if he continues to require inpatient hospitalization *based on consideration of the factors set forth in § 19.2-182.3.*

Code § 19.2-182.5 (emphasis added).

Belete challenges Code § 19.2-182.5, arguing that it violates his right to due process because it does not require a showing the acquittee presents a risk of future dangerousness. Belete's challenge, however, fails on its face with a plain-language reading of the statute.

"When a statue is plain and unambiguous, a court may look only to the words of the statute to determine its meaning." *Caprio v. Com.*, 254 Va. 507, 511, 493

S.E.2d 371, 374 (1997) (internal quotation marks omitted). Furthermore, the Court has firmly established:

> While in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity. Where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.

Caprio, 254 Va. at 511-12 (internal citations and quotation marks omitted).

In Code § 19.2-182.5, the court is required to order that a defendant "remain in the custody of the Commissioner if he continues to require inpatient hospitalization *based on consideration of the factors set forth in § 19.2-182.3.*" (Emphasis added). This language is plain and unambiguous in directing the court to consider the factors set forth in § 19.2-182.3 if the defendant is not to be released.

The factors which the General Assembly directed that evaluators shall consider are as follows:

> 1. To what extent the acquittee has mental illness or intellectual disability, as those terms are defined in § 37.2-100;
>
> 2. The likelihood that the acquittee will engage in conduct presenting a substantial risk of bodily harm to other persons or to himself in the foreseeable future;
>
> 3. The likelihood that the acquittee can be adequately controlled with supervision and treatment on an outpatient basis; and
>
> 4. Such other factors as the court deems relevant.

Code § 19.2-182.3.

The second factor speaks directly to the acquitee's risk of future dangerousness to himself, or to anyone else. This provision is plain and unambiguous.

It follows that Code § 19.2-182.5 requires that an evaluation of an acquittee for commitment must take into account the acquittee's risk of future dangerousness, as well as finding that he is mentally ill. Accordingly, Code § 19.2-182.5 does not violate the Due Process Clause.

The Commonwealth Met Its Burden For Continued Commitment

Having determined that Code § 19.2-182.5 requires a finding of current mental illness and a showing of future dangerousness, as required by the Due Process Clause, the court must determine whether the Commonwealth met that burden.

At Belete's review hearing on January 9, 2019, the Commonwealth placed into evidence two reports prepared by two different clinical psychologists. The first report was the Annual Continuation of Confinement Report prepared by the clinical psychologist on Belete's treatment team. Kelly Rpt. Com. Ex. 1. The second report was prepared at Belete's request to provide a second opinion concerning Belete's continued psychiatric hospitalization. Will Rpt. Com. Ex. 2. Both psychologists conclude that Belete remains mentally ill and requires continued inpatient psychiatric hospitalization.

Dr. Kelly's report also stated that "there would be a heightened risk of bodily harm to other persons in the forseeable future if Mr. Belete does not remain hospitalized at this time." Kelly Rpt. Com. Ex. 1 at 8.[1] Similarly, Dr. Will noted that "there would be a significant risk of bodily harm to other persons or himself in the foreseeable future" if Belete were to be conditionally released at this time. Will Rpt. Com. Ex. 2 at 21.

While both psychologists noted an improvement in Belete's behavior and response to treatment since July 2018, both also recommended continued hospitalization. A significant factor underpinning both psychologists' recommendations was that Belete admittedly relapsed into illegal drug use and nonadherence to his medication regimen several times while on conditional release between July 2014 and April 2018. Kelly Rpt. Com. Ex. 1 at 3-4; Will Rpt. Com. Ex. 2 at 5-6. This reportedly resulted in the deterioration of Belete's mental state on a number of occasions, which further resulted in acts of aggression and violence.

Both psychologists attributed Belete's recent progress and lack of behavior problems since July 2018 to his adherence to a stabilized medication regimen. DR. Will's report noted two significant concerns. First, that Belete reported that he "does not need antipsychotic mediation." Will Rpt. Com. Ex. 2 at 9. Second, that Belete does not see the value in going through the gradual release process as he had already completed it prior to his first conditional release. Will Rpt. Com. Ex. 2 at 9. The concern of both psychologists was that, if Belete did not remain in inpatient hospitalization, he was at a high risk of discontinuing his medication regimen and other treatment requirements which would likely lead to a deterioration of his condition, leading to an event that would necessitate re-admittance to inpatient hospitalization.

While noting Belete's motivation to return to the community and obtain a job as positive, Dr. Will stated Belete overlooks his noncompliance with the release plan during the period he was on conditional release, to include his continued illegal drug use, failure to attend monthly drug screenings, lack of adherence to medication regimen, and discontinued attendance to program therapy sessions. Additionally, he has a poor understanding of the nature of addiction, and he fails to appreciate the factors that contribute to his re-commitment.

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[1] It bears noting that the cover letter to which Dr. Kelly's report is attached states that the model language included in the draft order for recommitment prepared for the court "complies with Virginia Code and U.S. Supreme Court decision (Foucha v. Louisiana, 504 U.S. 71 (1992))."

Having considered the evidence presented at the hearing, the Court is satisfied the Commonwealth has met its burden and DENIES the Respondent's motion to strike.

An appropriate order will enter.

Sincerely yours,

[redacted]

Richard E. Gardiner
Judge

OPINION LETTER

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	CRIMINAL NUMBER FE-2010-262
v.	)	
	)	INDICTMENT - ATTEMPTED GRAND
BEZAYE ERMIAS BELETE	)	LARCENY FROM THE PERSON

O R D E R

THIS MATTER CAME before the court on January 9, 2019 for the annual review hearing on the continued commitment of Defendant-Acquittee, pursuant to Code § 19.2-182.5. Mark Sullivan, Assistant Commonwealth's Attorney, BEZAYE ERMIAS BELETE, Defendant-Acquittee, and Mark Bodner, counsel for Defendant-Acquittee, appeared before the court. At the conclusion of the Commonwealth's evidence, counsel for Defendant-Acquittee made a motion to strike on the ground that Code § 19.2-182.5 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as applied in *Foucha v. Louisiana*, 504 U.S. 71 (1992), in that it does not require a showing of future dangerousness.

HAVING CONSIDERED Defendant-Acquittee's motion and the opposition thereto, it is hereby

ORDERED that Defendant-Acquittee's motion to strike is DENIED for the reasons set forth in the court's letter opinion of today's date, and it is further,

ORDERED that the parties shall, in consultation with the courtroom clerk, select a date to resume the hearing at which Defendant-Acquittee may present evidence and the Commonwealth may present rebuttal evidence.

Entered this 5th day of February, 2019.

[redacted]
RICHARD E. GARDINER
JUDGE

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA

Copies to:

Mark Bodner
Counsel for Defendant-Acquittee

Mark Sullivan
Assistant Commonwealth Attorney
Counsel for the Commonwealth