



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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January 10, 2018

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**Re: Commonwealth of Virginia v. Larry Ray Johnson**  
CL-2016-01270

Dear Counsel:

After oral arguments on September 20, 2017, the Court took this case under advisement as to the sole issue of whether the Order of Trial and Commitment should be stayed or vacated and set aside as void *ab initio*. After reviewing the memoranda of law submitted by Counsel, the Court issues the following opinion denying Respondent's Motion to Void and Set Aside Portions of the October 3, 2016 Order of Trial and Commitment.

### BACKGROUND

On February 8, 1973, Larry Ray Johnson ("Respondent") was convicted in the Fairfax County Circuit Court of rape and abduction with intent to defile, which is a sexually violent offense as defined by Virginia Code § 37.2-900. On July 9, 2013 Respondent was convicted in the United States District Court for the Western District of Virginia of eight counts of mailing

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threatening communications for which he was sentenced to twenty years in the United States Bureau of Prisons.

On September 19, 2016 the Commonwealth, by counsel, and the Respondent, who appeared in person and by his counsel, came to the Fairfax County Circuit Court for the trial on the Commonwealth's petition under the Sexually Violent Predator Act ("SVPA"). The Commonwealth sought to have the Respondent declared a Sexually Violent Predator and to be committed to the custody of the Department of Behavioral Health and Developmental Services ("DBHDS").

The respondent waived formal presentation of the evidence for a trial in this matter pursuant to Virginia Code § 37.2-908. The respondent stipulated that he met the criteria of a Sexually Violent Predator, and that civil commitment pursuant to Virginia Code §§ 37.2-908 and 36.2-912 was appropriate.

By Order ("Order of Trial and Commitment") entered on October 3, 2016, the Court found that the Respondent was a Sexually Violent Predator as defined in Virginia Code § 37.2-900. Accordingly, the Court committed the Respondent to the custody of the DBHDS for appropriate treatment and confinement and scheduled his first annual review for September 20, 2017, pursuant to Virginia Code § 37.2-900(A).

At the time the Order of Trial and Commitment was entered, Respondent had an outstanding federal prison sentence of twenty years from a Judgment by the United States District Court for the Western District of Virginia. At that time, it was unknown whether or when the federal government would take him into custody. Consequently, the Order provided that if the Respondent was removed to the custody of the federal system, the Order would be stayed pending completion of his federal sentence.

The Respondent was placed in the custody of the Federal Bureau of Prisons after the Order of Trial and Commitment was entered. He was transported to Butner Medium II FCI where he is currently serving an active sentence from the federal judgment, and his expected release date is March 31, 2034.

Accordingly, on September 14, 2017 the Court granted the Commonwealth's request to remove the Respondent's annual review hearing from its docket for September 20, 2017. Additionally, the DBHDS notified the Fairfax County Circuit Court by letter dated September 15, 2017, that the Respondent had never been admitted to its treatment facility and has not participated in any treatment.

The Respondent asks that Portions of the October 3, 2016 Order of Trial and Commitment be set aside as void *ab initio*. Those portions of the Order are set out below:

- a. that these proceedings be stayed pending respondent's completion of his sentence;

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- b. that upon respondent's release from federal custody that he be returned to the custody of the Commissioner of DBHDS;
- c. that if respondent not otherwise be returned to the Commissioner of DBHDS as described above, that he surrender himself to the Commissioner's custody;
- d. that this Court's jurisdiction over respondent Larry Ray Johnson continues, and that he shall not be released from the custody of the Commissioner without further Order of this Court except as specifically set forth in this Order

## ANALYSIS

In the first phase of a trial under the SVPA, "the court or jury shall determine whether, by clear and convincing evidence, the respondent is a Sexually Violent Predator." Virginia Code § 37.2-908(C). Upon such finding, the Court may "continue the trial to receive additional evidence on possible alternatives to commitment." Virginia Code § 37.2-908(E). "If after considering the factors listed in § 37.2-912, the court finds that there is no suitable less restrictive alternative to involuntary secure inpatient treatment, the judge shall by written order and specific findings so certify and order that the respondent be committed to the custody of the Department for appropriate inpatient treatment in a secure facility." Virginia Code § 37.2-908(D). Twelve months after the respondent is committed under the SVPA, "the committing court shall conduct a hearing...to assess each respondent's need for secure inpatient treatment." Virginia Code § 37.2-910(A). "The burden of proof at the hearing shall be upon the Commonwealth to prove to the court by clear and convincing evidence that the respondent remains a sexually violent predator." Virginia Code § 37.2-910(C).

However, "[i]f a person committed to the Department of Behavioral Health and Developmental Services is arrested," and "a period of active incarceration of 12 months or longer is imposed," then "the person shall not be entitled to an annual or biennial review hearing...until 12 months after he has been returned to the custody of the Commissioner. Such reincarceration shall toll the provisions of § 37.2-910." Virginia Code § 37.2-919(B).

### I. SEXUALLY VIOLENT PREDATOR ACT & ANNUAL REVIEW HEARING

Virginia Code § 37.2-910(A) grants an individual committed under this section an annual review to reevaluate their status as a Sexually Violent Predator. This annual review serves to ensure that ongoing commitment remains necessary.

However, this statutory review is not always mandatory. Virginia Code § 37.2-919(B) provides that the annual period shall be tolled at any time in which the individual is arrested and reincarcerated for a period of twelve months or longer. In such cases, the individual will be returned to the custody of the commissioner of the DBHDS at the termination of their criminal sentence, and will not be granted review until completion of a year of civil confinement. Further, Virginia Code § 37.2-910(A) permits the Attorney General to postpone the hearing "upon good cause shown." Virginia Code § 37.2-910(A).

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## II. APPLICATION

The Order of Trial and Commitment, instructs that “upon release from active incarceration in the United States Bureau of Prisons, Respondent shall be returned to the custody of the Commissioner of DBHDS.” The Respondent argues that the Court lacked authority to recommit the Respondent to the DBHDS upon his release from the Federal Bureau of Prisons without first affording the Respondent an annual review hearing.

The Commonwealth contends that the Order of Trial and Commitment is valid because the Court has the statutory authority. Specifically, the Commonwealth argues that it has authority under Virginia Code § 37.2-919(B), to conduct Respondent’s annual review hearing twelve months after he finishes serving his federal sentence and is returned to the custody of the Commissioner of DBHDS. In response, the Respondent argues that Virginia Code § 37.2-919(B) does not apply because the Respondent never came into the Commissioner’s custody.

In relevant part, § 37.2-919(B) states that “if a person committed to the Department of Behavioral Health and Developmental Services is arrested” and “a period of active incarceration of 12 months or longer is imposed” then “the person shall not be entitled to an annual or biennial review hearing...until 12 months after he has been returned to the custody of the Commissioner. Such reincarceration shall toll the provisions of § 37.2-910.”

The Supreme Court of Virginia has held that “When the language of a statute is unambiguous, we are bound by its plain meaning. In interpreting [a] statute, courts apply the plain meaning ... unless the terms are ambiguous or applying the plain language would lead to an absurd result. If a statute is subject to more than one interpretation, this Court must apply the interpretation that will carry out the legislative intent behind the statute.” *JSR Mech., Inc. v. Aireco Supply, Inc.*, 291 Va. 377 (2016) (citations omitted). Here, the plain meaning of the statute is unambiguous and would not lead to an absurd result.

First, the Court has statutory authority to recommit the Respondent to the DBHDS upon his release from the Federal Bureau of Prisons without first affording the Respondent an annual review hearing. Considering the plain language of § 37.2-919(B), because the Respondent is serving a period of active incarceration of twelve months or longer, his review hearing is tolled until twelve months after he has been returned to the DBHDS.

The Respondent cites to *Paugh v. Henrico Area Mental Health & Developmental Servs.*, for the proposition that the DBHDS has no authority to take custody of the Respondent after he finishes his federal sentence unless a determination is made at that time that he remains a sexually violent predator in need of secure inpatient treatment. 286 Va. 89 (2013). The facts of the case at bar can clearly be distinguished. In *Paugh*, the Virginia Supreme Court held that in a de novo appeal under [Virginia] Code § 37.2-821, the Circuit Court must determine whether an individual meets the requirements for involuntary commitment on the date of the Circuit Court hearing and not whether evidence taken at the General District Court was sufficient to

involuntarily commit the individual on the date of the underlying commitment. *Id.* 89. Here, the Respondent is not appealing his commitment into the DBHDS from the General District Court to the Circuit Court. Thus, the issue is not how a reviewing body is to assess the Respondent's status as a Sexually Violent Predator, but rather whether such review is required at all. Here, the Court has the statutory authority to recommit the Respondent into the custody of the DBHDS upon completion of his federal sentence without any additional review under Virginia Code § 37.2-919(B).


Second, despite that Respondent had never been admitted to DBHDS's treatment facility and has not participated in any treatment, he was still committed into the custody of DBHDS. The October 3, 2016 Order of Trial and Commitment states that the Respondent "is committed to the custody of the Department of Behavioral Health and Developmental Services." The Order does not instruct that the Respondent is "to be committed" or "shall be committed," the Order states that the Respondent "is committed." Thus, for the purposes of Virginia Code § 37.2-919(B), the Respondent was committed into the custody of the DBHDS.

Lastly, the Respondent argues that indefinitely committing the Respondent to the DBHDS without a review hearing is a due process violation. This argument fails for two reasons.

First, the Commonwealth has the statutory authority to demand the Respondent's return to the custody of the Commissioner under Virginia Code § 37.2-919(B), and the Respondent does not challenge the constitutionality of the statute. Second, the Respondent will not be indefinitely committed to the DBHDS without a review hearing. Contrarily, the Respondent is entitled to a review hearing twelve months after he completes his active sentence with the United States Bureau of Prisons under Virginia Code § 37.2-919(B). At that review hearing, the Commonwealth must prove by clear and convincing evidence that the Respondent is a Sexually Violent Predator. Virginia Code § 37.2-910(C). Therefore, the Respondent's due process rights are not violated. *See Shivaee v. Com.*, 270 Va. 112, 126 (2005) (using the clear and convincing evidentiary standard for purposes of the Sexually Violent Predator Act satisfies constitutional requirements of due process). Respondent's detention is not "indefinite" merely because the annual review that he will be entitled to in 2035 has not yet been scheduled.

## CONCLUSION

Respondent's Motion to Void and Set Aside Portions of the October 3, 2016 Order of Trial and Commitment is denied. The Court requests Respondent's Counsel to prepare an Order reflecting the Court's ruling.



Penney S. Azcarate  
Fairfax County Circuit Court

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