IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,554

EUGENE JOHNSON,

Petitioner,

vs.

THE HONORABLE RICHARD YALE FEDER,
Circuit Judge, Eleventh Judicial
Circuit, Dade County, Florida

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

CERTIFIED CONFLICT

REPLY BRIEF OF PETITIONER ON MERITS

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ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL ERRONEOUSLY HOLDS THAT PETITIONER IS NOT ENTITLED TO AN ANNUAL COURT HEARING AND THE APPOINTMENT OF INDEPENDENT EXPERTS ON THE LEGAL ISSUE OF PETITIONER'S CONTINUED INVOLUNTARY HOSPITALIZATION WHERE THE CLEAR PROVISIONS OF RULE 3.218, FLA.R.CRIM.P., PROVIDE FOR SUCH A HEARING AND APPOINTMENT OF EXPERTS.

In its answer brief, the State first argues the language of Rule 3.218(a), Fla.R.Crim.P., provides only that "the court must hold a hearing within thirty days of receipt of a report stating the defendant no longer meets the criteria for hospitalization," but that no hearing is required upon receipt of any other report. (Respondent's brief, pg. 4-5)

As pointed out in petitioner's initial brief, part (a) of Rule 3.218 is the section of the rule pertaining to hearings before the committing court and this section is not and cannot be limited to administrator's reports finding only that a patient no longer meets the criteria for hospitalization. Part (a) follows immediately the provision of the rule setting forth the reports that must be filed both when the administrator finds the patient continues to meet the criteria for hospitalization and when the administrator finds the patient no longer meets the criteria. Part (a) expressly states that the court shall hold a hearing within 30 days of the receipt of "any such report" (emphasis supplied) and there is nothing in part (a) which can even be interpreted as limiting its mandatory provisions to only those

reports finding the patient no longer meets the criteria. The state does not point to any such limiting language in the rule; instead, the state merely argues the language of the rule should be interpreted as limiting the hearings.[1]

Moreover, the right to yearly reports and hearings is expressly provided for in §916.15, Fla. Stat. (1980 Supp) and Rule 3.218 simply implements those rights in a parallel manner.[2] The state, however, does not even discuss §916.15 in its brief. Indeed, the state never answers petitioner's extensive argument in his initial brief pointing out that the Florida legislature, in enacting §915.15(2), expressly provided

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Any argument by the state that the phrase "any such report" somehow refers to only those reports in the last sentence of the paragraph immediately preceding part (a) (ie. reports determining the defendant no longer meets the criteria) is rebutted by reference to identical language in the complementary rule pertaining to defendants found incompetent to stand trial, Rule 3.212.

Rule 3.212(b)(3) requires an initial six-month report from the hospital administrator as well as a report at any time during the six-month period or during any period of extended hospitalization when the patient no longer meets the criteria, just like insanity acquittees under Rule 3.218. Rule 3.212(3) then provides that reports may also be filed by counsel for the defendant or by the court on its own motion as well as by the hospital administrator. Part (4) of Rule 3.212 then requires the committing court to hold a hearing within 30 days "of the receipt of any such report," (emphasis supplied) just like Rule 3.218. If the phrase "of any such report" is to be interpreted as pertaining solely to the report immediately preceding the phrase, as the state is suggesting for Rule 3.218, then in Rule 3.212 a hearing would be mandated only when the court on its own filed a report since that is the report immediately preceding the paragraph containing the phrase "any such report." This is, of course, absurd. "Any such report" means any report filed under the rule.

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The Committee Notes to Rule 3.218 expressly state that §916.15 is the "complementary statute" to the rule.

for reports to be filed by the hospital administrator on three critical occasions: (1) no later than six months after the date of admission, (2) prior to the end of any period of extended hospitalization, and (3) at any time the administrator determines the patient no longer meets the criteria for continued hospitalization. On each of these occasions, the statute requires a report. The statute also provides that these reports shall be "pursuant to the applicable Rules of Criminal Procedure." The corresponding rule is Rule 3.218 which, not surprisingly, also provides for such reports at each of the critical periods.

The state also fails to discuss part (3) of §916.15, which expressly gives both the patient and the state the right to a hearing before the committing court in all proceedings under §916.15 at which hearing both the patient and the state have the right to present evidence and the right to depose witnesses and obtain discovery of the patient's records. The court proceedings under §916.15 at which the patient is entitled to this hearing include: (1) the initial determination by the court as to whether an insanity acquittee meets the criteria for involuntary hospitalization and (2) subsequent action by the court on all the reports filed by the hospital administrator, including the report filed after extended hospitalization. Under the clear provisions of the statute, <u>all</u> of these proceedings require a hearing and a hearing is prerequisite to any decision reached by the committing court.

As previously mentioned, the procedure for hearings before the committing court upon reports from the hospital administrator as set forth by the Florida legislature in §916.15 is implemented by Rule 3.218. The rule provides that after the initial six-month report and hearing, an insanity acquittee who enters into extended hospitalization, as petitioner here, is then entitled to an annual report and court hearing on the issue of his continued involuntary hospitalization:

> "The same procedure shall be repeated prior to the expiration of each additional one year period the defendant is retained by the facility."[3]

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The state's argument here is that this sentence providing for one-year periods only pertains to reports, not hearings. The state proffers that the word "procedure" in "the same procedure shall be repeated" means reports by the hospital administrator, not hearings before the committing court. Thus, the state agrees that petitioner is entitled to annual reports, but denies that he is entitled to annual hearings before the committing court. (Respondent's brief, pg. 5, 8)

The state's argument is unpersuasive. "Procedure" means procedure, "a series of steps followed in a regular orderly definite way . . . a particular course of action," Webster's New International Dictionary, and the procedure expressly addressed in detail in part (a) wherein this phrase is located is the procedure of the filing of a report, then a hearing before the committing court on the issues raised by the report of the hospital administrator with the defendant having the right to be present at the hearing. To interpret the word "procedure" as the state would like, would pit the rule against the statue, §916.15, which clearly provides for a hearing.

The state next argues in its answer brief that a "finding that a defendant should be released is a legal question and not a medical question." (Respondent's brief, pg. 6) This is not an entirely accurate statement. The true legal question is whether an insanity acquittee is still mentally ill and, because of his illness, is manifestly dangerous to himself or others. Sections 916.15(a) and 394.467(1)(a), Fla. Stat. (1983); Rules 3.217 and 3.218, Fla.R.Crim.P.; Hill v. State, 358 So.2d 190, 207 (Fla. 1978); Thomas v. State, 443 So.2d 406 (Fla. 4th DCA 1984). It is this standard that the court must apply in determining not only whether to release a patient, but also whether to commit an insanity acquittee initially or to recommit him for extended hospitalization. Thus, this judicial determination must be made anew after each report from the hospital administrator, regardless of whether the administrator found the patient no longer meets the criteria or still meets the criteria.

Involuntary hospitalization and recommitment is a serious deprivation of liberty which the state cannot accomplish without due process of law. Shuman v. State, 358 So.2d 1333 (Fla. 1978); In Re Holland 356 So.2d 1311 (Fla. 3d DCA 1978). Due process requires that application of the legal standard to effect recommitment be made following a hearing at which the patient is present with counsel, has an opportunity to be heard and to present evidence, and has an opportunity to confront and cross-examine witnesses. Powell v. State of Florida, 579 F.2d 342, 330 (5th Cir. 1978); Specht v. Patterson, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212, 18 L.Ed.2d 326 (1967); Bolton v. Harris, 395

F.2d 642, 650 (1968). A trial judge's recommitment of an insanity acquittee based only on the administrator's report, as in the present case, denies the patient due process of law. See Powell v. State of Florida, supra at 330; Specht v. Patterson, supra. This is true regardless of whether the hospital administrator finds the patient does or does not continue to met the criteria. Contrary to the state's position, merely filing a report with the court stating that the patient continues to meet the criteria does not protect the patient from violation of his right to due process of law.[4]

The state next relies on the Third District's "two - fold rationale" of Rule 3.218 to support its position. (Respondent's brief, pg. 6) This rationale finds the purpose of Rule 3.218 to vindicate the committing court's ability to control the circumstances surrounding the release from custody of the acquittee and to protect the public from an inadvertent release of an insanity acquittee. According to this view, these two

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The state argues that the Committee Notes support the state's position because the Notes provide for the appointment of experts only when court hearings are "necessary" and "if the rule had meant to afford hearings to every committed defendant, every year, the note would not refer to hearings of necessity."

This argument makes no sense. After all, if the rule meant to afford hearings to every defendant who no longer meets the criteria, which is the state's position, then the rule still would not have to refer to hearings of necessity, as that would be the only time hearings are necessary. What the Committee Notes clearly mean is that the appointment of experts need only be made when court hearings are necessary not whenever the hospital intends to evaluate the patient or issue reports and not whenever the patient requests such an appointment. Hearings before the committing court are only necessary once within the first six-month period and once a year thereafter.

reasons are the only reasons for holding hearings before the committing court, so hearings are only necessary when the hospital wants to release the patient.

Petitioner agrees that under the state's and Third District's rationale for the rule, those two interests are protected. However, those interests are equally protected under petitioner's interpretation of the rule, as under petitioner's interpretation a report and hearing are mandated when the administrator wants to release a patient as well as when the administrator wants to keep a patient. Thus, the rule and the statute not only protect the public from an inadvertent release of an insanity acquittee, but they also protect both the patient and the public from indefinite hospitalization of a patient based solely upon administrator's reports without judicial application of the statutory legal standard and evaluation by independent experts. This is precisely what Judge Bazelon in his concurring opinion in United States v. McNeil, 434 F.2d 502, 515 (D.C. Cir. 1970), cited by the state on page 7 of its answer brief, warned against when he stated that the reason for requiring judicial supervision of the release of patients hospitalized following a verdict of acquittal by reason of insanity is to protect both the patient and the public by insuring that statutory standards for release are "not subverted by allowing the ultimate determination to be made according to the individual, subjective standards of the hospital staff." Id., at 515. The Florida legislature, in order to ensure that the hospital administrator's determination that the patient either does or does not meet the criteria for

continued hospitalization meets the statutory standard of mentally ill and manifestly dangerous to himself or others, §916.15(a) and §394.467(1)(a), Fla. Stat. (1983); Rules 3.217 and 3.218, has provided that both release and extended hospitalization must be preceded by a judicial determination at a hearing that the statutory legal standards have been met.

Petitioner agrees with the state's statement that "the government's legitimate interest is protecting the public from a likelihood of injury that would result from the acquittee being at liberty." Indeed, this is precisely why the standard for release or continued hospitalization of an insanity acquittee is whether he is still mentally ill and, because of this illness, is manifestly dangerous to himself or others. Sections 916.15(a) and 394.467(1)(a), Fla. Stat. (1983) ; Rules 3.217 and 3.218, Fla.R.Crim.P., Hill v. State, 358 So.2d 190, 207 (Fla. 1978); Thomas v. State, 443 So.2d 406 (Fla. 4th DCA 1984). The judicial application of this standard provides the necessary protection for the public. But the public is not better protected by denying an insanity acquittee who continues to meet the criteria a hearing before the very committing court charged with the responsibility of applying this legal standard and making this judicial determination as to mental illness and manifest dangerousness. Indeed, quite the opposite is true. The public is best protected and justice is best served when the legal determination is made following a full annual hearing at which all evidence is presented with the aid of independent experts so that the statutory standards "are not subverted by allowing the

ultimate determination to be made according to the individual, subjective standards of the hospital staff." United States v. McNeil, 434 F.2d 502, 515 (D.C. Cir. 1970) (J. Bazelon, concurring).

The state's final argument is that petitioner's interpretation of the rule, carried to its extreme, would mean "that even a catatonic insanity acquitee is entitled to an annual hearing." (Respondent's brief, pg. 8) This statement bespeaks the state's total misunderstanding of the issue and the legal standard. The legal standard is not merely whether a person is still mentally ill or "catatonic," but whether, because of this mental illness, he is still manifestly dangerous to himself or others. Sections 916.15(a) and 394.467(1)(a), Fla. Stat. (1983); Rules 3.217 and 3.218, Fla.R.Crim.P.; Hill v. State, 358 So.2d 190, 207 (Fla. 1978); Thomas v. State, 443 So.2d 406 (Fla. 4th DCA 1984). Thus, even a "catatonic" insanity acquittee may be entitled to release if the court determines, based upon the statutory legal standard, that he is no longer manifestly dangerous to himself or others.[5] Contrary to the state's position in its answer brief on page 8, there is nothing "absurd, senseless or ridiculous" about this; it is the legal standard as

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As a practical matter, such persons who are still mentally ill but who are no longer manifestly dangerous to themselves or others are placed into conditional release programs of treatment, so their "release" is from the confines of the facilities at Chattahoochee, but involves placement into treatment programs at other facilities. The Florida State Hospital at Chattahoochee reports a total of approximately 200 insanity acquittees statewide, many of whom already receive hearings annually.

established by the Florida legislature in §916.15(a) and §394.467(1)(a) and by this Court in Rule 3.217 and Rule 3.218. In the present case, petitioner was denied the judicial application of this statutory legal standard. Consequently the Third District's decision denying the petition for writ of mandamus to compel compliance with the rule must be reversed.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits the decision of the Third District Court of Appeal is in error and should be quashed or reversed with directions to require the circuit court to appoint no fewer than two nor more than three independent experts to examine petitioner relative to the criteria for his continued involuntary hospitalization and to hold a court hearing on the issue of petitioner's continued involuntary hospitalization with petitioner's right to be present at such hearing, and for such other and further relief as this Court may deem just and proper.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, a copy delivered by hand to the Honorable Phillip Bloom, Circuit Judge in Judge Feder's division, and a copy mailed to the Honorable Richard Yale Feder, Circuit Judge, 73 West Flagler Street, Miami, Florida this 18th day of April, 1985.

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