

may, therefore, represent a nascent trend toward an increase in influence of effective and credible psychiatric expert witnesses regarding a defendant's diminished capacity and an increase in the number of downward departures.

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## Recommitment of NRRMDD Defendants

### ***NRRMDD Defendants May Be Recommitted Using the Preponderance-of-the-Evidence Standard***

In *Ernst J. v. Stone*, 452 F.3d 186 (2nd Cir. 2006), the U.S. Court of Appeals for the Second Circuit affirmed a U.S. district court's denial of a petition for a writ of *habeas corpus* in which the petitioner, who had been acquitted through a defense of not responsible by reason of mental disease or defect (NRRMDD), claimed that his recommitment by a preponderance-of-the-evidence standard violated either the due process clause or the equal protection clause of the Fourteenth Amendment.

#### *Facts of the Case*

Ernst J., who had chronic schizophrenia, had a history of violent behavior related to his disorder. On February 27, 1992, while in the midst of a psychotic episode, he believed that an elderly man was the devil and attacked him, inflicting bite wounds on his hand and genitals. On April 7, 1993, he pleaded not responsible by reason of mental disease or defect (NRRMDD) to assault in the second degree before a New York state supreme (trial) court. Subsequently, as prescribed by New York statute, he was examined by psychiatrists to determine which level of follow-up and monitoring he required as an NRRMDD defendant in New York. The psychiatrists determined that he did not have a "dangerous mental disorder" and was not "mentally ill," as defined by New York law; therefore, he was classified as a track-three defendant according to New York criminal procedure law. A track-three defendant is discharged

either unconditionally or with conditions that usually involve outpatient services. Mr. J. was subjected to an order of conditions for five years which included his compliance with an outpatient treatment program.

In 1996 and 1997, he was admitted for inpatient psychiatric care subsequent to arrests, first for criminal trespass and harassment and then for criminal trespass. Shortly before the expiration of his order of conditions, he showed a significant increase in symptoms, including violent behavior. On May 24, 1999, one week before his order of conditions was to expire, Mr. J. held a social worker hostage and threatened to sexually assault her at his residential treatment center. He was hospitalized involuntarily for 15 days on an emergency certificate. At the request of the state commissioner of mental health, his involuntary hospitalization was prolonged through an extension of the order of conditions as an NRRMDD defendant. He was transferred to the state inpatient facility at Kingsboro Psychiatric Hospital where he continued to show violent behavior. At the hospital's request, in July 1999, the New York supreme court, under the civil commitment statute, "ordered a three-month period of retention upon clear and convincing evidence" of mental illness and danger of physical harm to himself and others and also ordered under the NRRMDD statute that his order of conditions be extended for three years.

In October 1999, the hospital petitioned to have Mr. J. recommitted to a secure psychiatric facility under the NRRMDD statute because he had developed a dangerous mental disorder. The hospital simultaneously filed for an extension of commitment under the civil retention statute. Mr. J. filed to dismiss the application for recommitment, arguing that his rights under the Fourteenth Amendment would be violated were he to be recommitted pursuant to the lower standard of preponderance of the evidence under the NRRMDD statute rather than under the clear-and-convincing standard required by civil commitment.

The New York supreme court denied Mr. J.'s motion to dismiss and on July 12, 2000, found by a preponderance of the evidence that Mr. J. had a dangerous mental disorder and ordered him to be recommitted to a secure psychiatric facility.

Mr. J. appealed to the appellate division of the state supreme court, which reaffirmed the commitment order. It cited that recommitment provisions

had a direct and substantial relationship with the state's interest in protecting public safety, safeguarding the rights of insanity acquittees, and providing treatment for those acquittees with a mental illness. It also concluded that NRRMDD defendants are "an exceptional class of individuals who may properly be treated somewhat differently from persons subject to civil commitment."

Mr. J. appealed the ruling to the New York court of appeals, which dismissed the appeal. Mr. J. then petitioned on a writ of *habeas corpus* to the U.S. District Court for the Eastern District of New York, which held that the recommitment of NRRMDD acquittees did not violate due process or equal protection and was not unreasonable. The district court denied the petition but granted a certificate of appealability, and Mr. J. appealed to the U.S. Court of Appeals for the Second Circuit.

#### Ruling

The U.S. Court of Appeals for the Second Circuit affirmed the district court's denial of Mr. J.'s application for a writ of *habeas corpus*.

#### Reasoning

The court first established that because the case came to the Second Circuit Court of Appeals on review of petition of *habeas corpus*, which is governed by the standard of review set forth by the Antiterrorism and Effective Death Penalty Act (AEDPA), the scope of inquiry was limited to determining whether the U.S. district court correctly concluded that the appellate court did not act contrary to or unreasonably apply "clearly established Federal law" when it rejected the petitioner's constitutional challenge. The same constraints were placed on the Second Circuit when reviewing *Francis S. v. Stone*, 221 F.3d 100 (2nd Cir. 2000), in that it was not authorized to consider the initial question of whether New York's criminal procedure law violates the Fourteenth Amendment. In *Francis S.*, a track-two defendant was recommitted to a secure psychiatric facility based on the lower, preponderance-of-the-evidence standard.

The Second Circuit Court of Appeals held that it was not objectively unreasonable for the state appellate division to conclude that a New York statute—a statute that provides for the recommitment of track-three NRRMDD defendants under a preponderance-of-the-evidence standard—did

not violate either the due process or equal protection clause of the Fourteenth Amendment.

In denying the due process claim, the Second Circuit Court of Appeals was doubly constrained. In addition to being limited by the terms of AEDPA, which prescribed a limited standard of review in *habeas* appeals, it was required to adhere to its previous ruling in *Francis S. v. Stone*, which raised issues almost indistinguishable from those raised in the current case. The state court's interpretation of clearly established U.S. Supreme Court precedent was entitled to deference because it was not objectively unreasonable. The Second Circuit recognized that there was possibly a compelling equal protection argument for not applying different evidentiary standards, but it was limited by the deferential standard of review.

The equal protection claim was similarly denied in light of the standard of review prescribed by AEDPA. As was the case in *Francis S. v. Stone*, the Second Circuit Court of Appeals could not say it was objectively unreasonable for the district court to reject the equal protection claim. Since the *Ernst J.* case could not be distinguished from *Francis S.* "in any constitutionally-relevant sense," the claim was denied.

Although the court was constrained by the AEDPA and its own finding in *Francis S. v. Stone*, the petitioner's claim identified the procedural due process arguments: to the extent that Mr. J. had been classified as not mentally ill under the initial NRRMDD evaluation, recommitment ought to require the same standard applicable to commitment for civil confinement, since by classification the petitioner was removed from the exceptional class of individuals who could be treated differently. Mr. J. further argued that *Jones v. U.S.*, 463 U.S. 354 (1983) had established that a separate standard could be justified for initial commitment but was silent on recommitment. Mr. J maintained that because the civil commitment statute requires that evidence reach the clear and convincing standard for each recommitment, the application of a lower standard for recommitment of NRRMDD defendants once released from confinement is a violation of due process:

... although the lesser standard of proof is appropriate in the first instance because of the presumption which arises from the not responsible plea or verdict (the continuance of mental illness and dangerousness), at the point when that original basis for holding the individual in a psychiatric facility as an insanity acquittee has disappeared (because he is either not mentally ill or not dangerous), ... the civil standard of clear and convincing

evidence must be applied to justify further retention [*Ernst J.*, 452 F.3d, pp 195–6].

The court found merit in the petitioner’s argument and viewed the issue of appropriate standard for commitment to be “a close question” in not only this case but in the preceding case of *Francis S. v. Stone*. The court further indicated that the constraints of review for a *habeas* case prevented it from giving full consideration of the questions raised by the petitioner and concluded that although the:

... petitioner is not entitled to habeas relief, we do not endorse the constitutional analysis of the Appellate Division other than to say that it was not objectively unreasonable, nor do we foreclose the possibility that other NRRMDD defendants who are subjected to New York’s recommitment procedure may raise constitutional objections to that procedure or seek relief through other legal means [*Ernst J.*, 452 F.3d, p 202].

*Discussion*

Standards for psychiatric commitment have long been debated in U.S. judicial history. Since *Addington v. Texas*, 441 U.S. 418 (1979) set the threshold for civil commitment at clear and convincing evidence, authorities have debated the abridgment of this standard in various circumstances. In *Jones*, the Supreme Court ruled that differences between potential civil commitment candidates and criminally charged acquittees provided justification for different standards of proof on initial commitment.

However, *Ernst J.* raises the complicated question about how long such differences can be justified: does an insanity acquittee, treated for a psychiatric disorder and then deemed no longer dangerous to self or others and released to the community, remain in the exceptional class when experiencing an exacerbation of mental illness? The question is complicated by the convergence of psychiatric and legal conditions that cloud a logical consideration of both risk and protection of rights. Under New York statute, a person with severe mental illness who, convicted of a violent crime after a failed insanity defense, must be involuntarily committed by a standard of clear and convincing evidence. Had the same person been successful in the insanity defense and released to the community, recommitment would occur at the lower standard of preponderance of the evidence. This outcome based on status as an insanity acquittee could serve as a point of contention, as illustrated by the Second Circuit Court of Appeals, in stating that had the matter been presented as “an initial question of federal constitutional law, uncon-

strained by section 2254(d)(1), we might well rule that [a constitutional] violation has been shown” (*Ernst J.*, 452 F.3d, p 197).

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## Continued Psychiatric Hospitalization After Competency Restoration

### ***Should a Defendant be Committed to a Psychiatric Facility After Restoration of Competence in Order to Maintain Competence Throughout the Legal Proceedings?***

In *In re: Tavares*, 885 A.2d 139 (R.I. 2005), the Rhode Island Supreme Court reviewed the superior court’s order continuing the commitment of defendant, Anthony Tavares, to the forensic unit of the Department of Mental Health, Retardation and Hospitals (MHRH) after Tavares had been found to be restored to competency by psychiatric examination. MHRH had filed a petition arguing that the superior court had improperly ordered continued commitment of a defendant who had been restored to competency.

*Facts of the Case*

On November 10, 2001, Tavares was arrested and charged with the murder of Glen Hayes, his social worker. Hayes was making a routine home visit with Victor Moniz, a psychiatric nurse, on November 9, 2001, to deliver psychiatric medication to Tavares, who had a long history of chronic paranoid schizophrenia, substance abuse, and multiple psychiatric hospitalizations. As the visit progressed, the defendant made increasingly bizarre statements and asked the providers if they would pray to Satan with him. As the providers prepared to leave, Tavares stabbed Hayes in the head with a knife and punched Moniz. After the attack, Tavares fled the scene and was arrested the following day.

Shortly after his arrest, the district court judge found Tavares incompetent to stand trial and committed him to the forensic unit at Eleanor Slater Hospital (ESH), a facility under MHRH. After an ex-