

No.

IN THE
SUPREME COURT OF THE UNITED STATES

SEALED APPELLANT,

Petitioner

v.

SEALED APPELLEE.

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED FOR REVIEW

I. Should the Court grant review to determine whether continued custody under 18 U.S.C. § 4142 for eight months beyond the expiration of an order to determine mental competency violates the Petitioner's rights under the Due Process Clause? ?

PARTIES

The Sealed Appellant is the petitioner, who was the respondent below. The United States of America is the respondent, who was the petitioner-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Sealed Appellant (Appellant), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fifth Circuit is captioned as *Sealed Appellee v. Sealed Appellant*, No. 17-10143 (5th Cir. December 19, 2017), and is provided in the Appendix to the Petition. [Appx. A]. No petitions for rehearing were filed.

JURISDICTIONAL STATEMENT

The judgment and order of the United States Court of Appeals for the Fifth Circuit were filed on December 19, 2017. [Appx. A]. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

18 U.S.C. § 4241(d) provides, in part, for the following procedure once a district court has made a determination that a defendant is incompetent to stand trial:

(d)Determination and Disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

The portion of the mental health statute which allows for the continued commitment of a person found incompetent to stand trial reads as follows:

§ 4246 Hospitalization of a person due for release but suffering from a mental disease or defect

(a) Institution of Proceeding.—

If the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

The Fifth Amendment to the United States Constitution provides:

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

A. Facts and Proceedings Below¹

On June 10, 2015, the Petitioner/Appellant (Petitioner) was indicted in a one count indictment in the Middle District of Florida for the offense of making a threat to kill the President of the United States, in violation of 18 U.S.C. § 871 (a), (ROA.81-82). On September 11, 2015, the district court in that district entered an order finding the Petitioner incompetent to stand trial and committing her to the custody of the Attorney General, Federal Medical Center (FMC) Carswell, Fort Worth, Texas, **“for a period not to exceed four months.”** (ROA.84)(**emphasis added**). According to the record before this Court there is nothing to indicate that period of commitment was extended.

On June 28, 2016, a motion to allow forced medication was denied by the district court. (ROA.86). On September 12, 2016, a full year after the original order finding the Petitioner incompetent to stand trial and committing her for further treatment – and eight months after the expiration of that order – the district court in the Middle District of Florida, entered an order requiring the Bureau of Prisons to “evaluate the defendant to determine whether her mental disease or defect would create a substantial risk of bodily injury to another person or serious damage to the property of another.” (ROA.87). In that order, the district court specifically noted that the time period for hospitalization pursuant to 18 U.S.C. § 4246(d) has expired.” (ROA.87).

On September 23, 2016, the Warden for Federal Medical Center, Carswell filed a certificate of mental disease or defect and dangerousness. (ROA.89). On October 27, 2017, the United States filed a petition to determine the mental condition of the Petitioner in the Northern District of Texas, Fort Worth Division (Appellant was hospitalized in this district). (ROA.74). On January 12, 2017, the District Court for the

¹ For the convenience of the Court and the Parties, the petitioner is citing to the page number of the record before the court of appeals.

Northern District held a hearing on the petition during which both parties presented evidence concerning the mental health diagnosis of the Petitioner and the mental health professionals' opinions regarding her risk of danger if released. (ROA.2-35).

During the January 12, 2017 hearing, the government presented the report and testimony of Dr. Amor Correa, forensic psychologist at the Federal Medical Center in Carswell, Texas. (ROA.5-26; Government's Exhibit 3). The Petitioner presented the report and testimony of Dr. Emily Fallis. (ROA.27-32; Defendant's Exhibit 2).

The government's expert found that the Petitioner suffered from Delusional Disorder, Persecutory Type. (ROA.93; Government's Exhibit 3). The government expert also testified that the Petitioner's release from the facility "would create a substantial risk of bodily injury to another person or serious damage to the property of another." (ROA.95; Government's Exhibit 3). The basis of this opinion was essentially that the Petitioner had made threats on the President, the Governor of Florida, law enforcement officers and individuals at FMC Carswell. The Petitioner had made several statements about killing people and having people killed (ROA.94-95; Government's Exhibit 3). However, the only assaultive conduct reported while she was in custody was throwing her shoes and spitting while in another facility. There was no report of violent conduct on the Petitioner's part while she was in custody in FMC Carswell. (ROA.94-95; Government's Exhibit 3).

The Petitioner countered with her own testimony from Dr. Fallis. In Dr. Fallis's opinion, the release of the Petitioner would not create a substantial risk of bodily injury to another person or serious damage to the property of another. (ROA.29; Defendant's Exhibit 2). The basis of this opinion was essentially that there was no history of the Petitioner causing substantial injury to another or substantial damage to property, and that the Petitioner had never acted out on any of her verbal threats. (ROA.29-30; Defendant's Exhibit 2).

At the conclusion of the hearing, the district court found by clear and convincing evidence that the Petitioner was suffering from a mental disease or defect, as a result of which her release would create a substantial risk of bodily injury to another person and committed the Petitioner to the custody of the Attorney General pursuant to 18 U.S.C. §4246(d). (ROA.34). The district court entered a written order reflecting this finding. (ROA.194). A timely notice of appeal was filed. (ROA.195).

B. The Appeal

Petitioner appealed her sentence, arguing that the district court and Bureau of Prisons had no authority to hold the Petitioner for the 8-month period of time between the expiration of the 4-month order of commitment to determine competency (January 10, 2016) and the date when the government filed a certificate of mental disease and dangerousness on September 23, 2016. Petitioner argued she was deprived of her rights under the Due Process Clause by being held during that 8-month period of time and that her commitment order, entered January 12, 2017, should be dismissed. The court of appeals affirmed her sentence in an unpublished opinion. *See* [Appendix A].

REASONS FOR GRANTING THE PETITION

The Court should grant review to determined whether continued custody under 18 U.S.C. § 4142 for eight months beyond the expiration of an order to determine mental competency violates the Petitioner's rights under the Due Process Clause?

Title 18 U.S.C. 4241(d) provides for the following procedure once a district court has made the determination that a defendant is incompetent to stand trial:

(d)Determination and Disposition.—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the proceedings to go forward; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the proceedings to go forward; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

18 U.S.C. § 4241(d)

The mental health statute also allows for the continued commitment of a person found incompetent to stand trial , but only upon a certification by the Warden of the facility that the person suffers from a mental disease or defect and presents a danger, as follows:

§ 4246 Hospitalization of a person due for release but suffering from a mental disease or defect

(a) Institution of Proceeding.—

If the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons whose sentence is about to expire, or who has been committed to the custody of the Attorney General pursuant to section 4241(d), or against whom all criminal charges have been dismissed solely for reasons related to the mental condition of the person, is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. *A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.*

18 U.S.C. § 4246(a)(*emphasis added*)

Holding the Petitioner in custody pursuant to a mental health commitment without a proper certificate from the Bureau of Prisons violates the Appellant's Fifth Amendment Due Process rights. *See United States v. Baker*, 807 F.3d 1315, 1324 (6th Cir. 1986).

In the present case, On September 11, 2015, the district court for the Middle District of Florida found the Petitioner was incompetent to stand trial and ordered the Petitioner committed to the Federal Medical Center Carswell in Fort Worth, Texas for a period not to exceed four months. (ROA.84). That period expired on January 10, 2016. To counsel's knowledge, no order was entered extending that period of time, nor, to counsel's knowledge, was there a finding made pursuant to 18 U.S.C. § 4241(d)(2)(A) which would have extended the period of time.

From the record before this Court, the next action taken by that court was to deny a motion for forced medication on June 28, 2016, There is still no indication in the record that the four-month period for commitment had been extended beyond January

10, 2016. (ROA.86). In an order dated September 12, 2016, the district court finally ordered the Bureau of Prisons evaluate the Petitioner to determine whether she presented a risk of danger if release and, if so, to proceed under the provisions of 18 U.S.C. § 4246. (ROA.87). In this September 12, 2016 order, the district court specifically found that the commitment to the Bureau of Prisons had expired. (ROA.87).

There should be no question that the Petitioner in this case was held at FMC Carswell without authority for at least 8 months past the expiration of the September 11, 2015 order committing her to hospitalization. *See United States v. Magassouba*, 544 F.3d 387, 410 (2nd Cir. 2008) (“Because §4241(d)(1) is unequivocal in limiting custodial hospitalization under that subsection to a reasonable period of time, ‘not to exceed four months,’ we necessarily conclude that the Attorney General exceeded its authority in holding Magassouba in custodial hospitalization through May 12, 2005, approximately three weeks longer than the four months specified in the court’s unopposed order of January 4, 2005.”); *See also United States v. Wood*, 469 F.2d 676, (5th Cir. 1972).

The government may argue that this error is subject to harmless error analysis, relying on *United States v. Magassouba*, 544 F.3d 411. However, in *Magassouba*, the defendant was seeking dismissal of the indictment. The Court of Appeals for the Second Circuit found the unauthorized custody was harmless in the context of a motion to dismiss the indictment as a remedy for such error. *See id.* at 392. In so holding, The court in *Magassouba*, also stated the following:

We further conclude that the district court did not exceed its authority in ordering Magassouba’s § 4241(d)(2)(A) commitment for additional custodial hospitalization and involuntary psychiatric treatment. We agree with the defendant that § 4241(d) does not permit an incompetent defendant to be held in *uninterrupted* custodial hospitalization unless a district court finds before expiration of a defendant’s initial term of § 4241(d)(1) confinement (which cannot exceed four months), that circumstances warrant additional hospitalization pursuant to §4241(d)(2)(A). Thus, when a defendant’s term of § 4241(d)(1) confinement expires and no § 4241(d)(2) order has been entered, the Attorney General lacks statutory authority to hold a defendant in further custodial hospitalization.

United States v. Magassouba, 544 F.3d at 392.

In the Petitioner case, from what appears in the record as it now exists before this Court and the court of appeals below, there was never a finding made by the district court authorizing the extension of the initial four month extension. From January 10, 2016, until the present, that initial four-month period was never extended. The Attorney General was without authority to hold the Petitioner beyond January of 2016, and was without authority to hold her in custody while a certification of dangerousness was finally filed eight months later or even during the time the district court in the Northern District of Texas held a civil commitment hearing. The Petitioner has been severely harmed by this error in that she has now been indefinitely committed to the custody of the Attorney General, rather than returned to the court with original Jurisdiction for the court to determine how to move forward on the pending criminal charges.

While it appears that some Court's have allowed a reasonable period of time after the expiration of the four-month period to file the dangerousness certificate, it's difficult to imagine how an eight-month delay could be justified or harmless. See *United States v. Godinez-Ortiz*, 563 F.3d 1022, 1030 (9th Cir. 2009).

This error of the Bureau of Prisons holding the Appellant and filing a certificate of dangerousness a full eight months after the expiration of the commitment period resulted directly in an indefinite civil commitment and violates the Petitioner Fifth Amendment Due Process rights. See *United States v. Baker*, 807 F.3d at 1324 (Holding a defendant in custody pursuant to § 4246 without a proper certificate from the Bureau of Prisons violated the defendant's Fifth Amendment Due Process rights).

Finally, because this issue was not raised in the district court, it must be reviewed for plain error. See *United States v. Mondragon-Santiago*, 564 F.3d 357, 368-69 (5th Cir. 2009). The Petitioner may be entitled to relief if: (1) the district court

erred, (2) its error was plain, and (3) the error affected substantial rights. *See United States v. Cotton*, 535 U.S. 625, 631 (2002)). If these conditions are met, this Court has discretion vacate the commitment order if the error “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.*; *see also United States v. Jones*, 527 U.S. 373, 389 (1999).

1. Error

There is no question that the continued commitment of the Petitioner to FMC Carswell was without authorization. *See United States v. Magassouba*, 544 F.3d at 410.

2. The error is plain and obvious

The district court in the Middle District of Florida clearly knew the time had expired for the initial commitment. The district court specifically limited the September 11, 2015, commitment order to four months. (ROA.84). Accordingly the district court and the parties knew that the initial commitment expired after four months. One year later, in his September 12, 2016, order, the district court recognized that the four-month commitment had expired. (ROA.87). Moreover, the plain language of the statute is clear and unambiguous, yet there was never an order entered finding the Petitioner was likely to regain competency, thereby authorizing and extending the continued commitment.

3. Effecting the substantial rights of the Appellant

As a result of this error, the Petitioner, rather being returned to the original court to face the criminal charges and a disposition of that case, has been indefinitely committed to the custody of the Attorney General under 18 U.S.C. § 4246(a). Moreover, her liberty was deprived for more than a year past the expiration of her commitment order. This was a violation of her Fifth Amendment Due Process rights *See United*

States v. Baker, 807 F.3d at 1324.

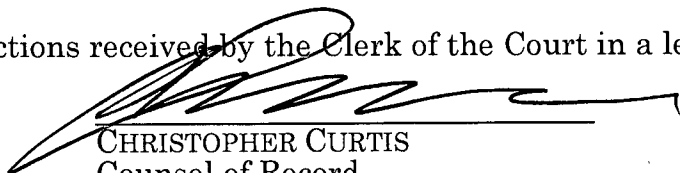
4. That seriously affects the fairness, integrity, or public reputation of judicial proceedings.

As a result of the error in the case, The Petitioner has been indefinitely committed to the custody of the Bureau of Prisons. Realistically, the Petitioner could spend the rest of her life in FMC Carswell. At best, perhaps someday she might enjoy a conditional release, which would be equivalent to a term of supervised release for life. This for a woman who is clearly ill, but who has no history of violence. To allow this severe of a deprivation of liberty without following the proper procedures and affording a person due process truly affects the fairness, integrity and public reputation of the judicial system. This civil commitment order must be vacated and the Petitioner should be returned to the Middle District of Florida to face the still pending criminal charges against her.

CONCLUSION

Petitioner respectfully prays that this Honorable Court grant *certiorari*, and reverse the commitment order below, and/or vacate the commitment order and remand for reconsideration in light of any relevant forthcoming authority.

Respectfully submitted this 18th day of May, 2018. The petition was originally submitted on March 19, 2018, and is being re-submitted, in compliance with the instructions received by the Clerk of the Court in a letter dated March 23, 2018.



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APPENDIX A

**FIFTH CIRCUIT OPINION DATED
DECEMBER 19, 2017**

REDACTED

APPENDIX B

**DISTRICT COURT ORDER DATED
JANUARY 12, 2017**

REDACTED