

UNITED STATES DISTRICT COURT

SIGNED 1/8/96

DISTRICT OF MAINE

ALBERT BISHOP, JR., An Adult  
Resident of the City of  
Augusta, County of Kennebec,  
State of Maine,

Plaintiff

v.

MELODIE PEET, COMMISSIONER,  
Maine Department of Mental  
Health and Mental Retardation,

Defendant

Civil No. 95-202-P-C

GENE CARTER, Chief Judge

MEMORANDUM OF DECISION AND ORDER DISMISSING COMPLAINT

Plaintiff herein, after amendment of the Complaint (Docket No. 26), now seeks as relief only a declaratory judgment of this Court declaring "that the policy of requiring Plaintiff to establish by clear and convincing evidence that he does not suffer from a mental disease or defect and that he is not a danger to himself or others violates Plaintiff's constitutional and statutory rights." Id. At 4-5. Plaintiff is now incarcerated under Maine law pursuant to a criminal judgment finding him to be not guilty of the criminal offense with which he was charged at trial by reason of mental disease or defect. His detention pursuant to that judgment is authorized under Maine law

by 15 M.R.S.A. § 103.<sup>1</sup> The Commissioner of Mental Health and Mental Retardation is required pursuant to the statute to annually initiate a process, by filing a specified "report," which may result in a superior court hearing as to whether a person detained in the position of Plaintiff is "ready for release or discharge." 15 M.R.S.A. § 104-A(1). The statute further provides, "if after hearing, the court finds that the person may be released or discharged without likelihood that he will cause injury to himself or to others due to mental disease or defect," the court shall enter its order releasing the subject person from the institution of confinement on appropriate conditions or discharge the person from the custody of the Commissioner. Id. (emphasis added).

The Maine Law Court has interpreted the release or discharge statute, as has the Commissioner, to place upon a person in the posture of this Plaintiff the burden of proof at the subject

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<sup>1</sup>Title 15 M.R.S.A. § 103 reads as follows:

**§ 103. Commitment of persons acquitted on basis of mental disease or defect.**

*When a respondent is found not criminally responsible by reason of mental disease or mental defect the verdict and judgment must so state. In such case the court shall order such person committed to the custody of the Commissioner of Mental Health and Metal Retardation to be placed in an appropriate institution for the mentally ill or the mentally retarded for care and treatment. Upon placement in such appropriate institution and in the event of transfer from one such institution to another of persons committed under this section, notice thereof must be given by the commissioner to the committing court.*

hearing to establish by "clear and convincing evidence"<sup>2</sup> that such person "would not cause injury to himself or others due to a mental disease or defect." Roberts v. Commissioner of Mental Health and Mental Retardation, 562 A.2d 680, 683 (Me. 1989).<sup>3</sup> It

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<sup>2</sup>"Clear and convincing evidence" is defined as proof that "leads the trier of fact to find that the existence of the contested fact is highly probable, rather than merely more probable than not." Taylor v. Commissioner of Mental Health and Mental Retardation, 481 A.2d 139, 152 (Me. 1984).

<sup>3</sup>The Law Court's rationale in so holding did not go unchallenged on the basis of state law principles of statutory construction. Roberts v. Commissioner of Mental Health and Mental Retardation, 562 A.2d at 684 (Hornby, J. dissenting).

[T]he process here was initiated by the Commissioner, not by Roberts. In Taylor v. Comm'r of Mental Health, 481 A.2d 139, 144 n.6 (Me. 1984), we recognized that the statute fails to provide an express declaration of who bears the burden of proof. There, the inmate had brought the release petition and we imposed the burden of proof upon him as the moving party "as in any other civil proceeding." Although the issue was not before the court we went on to add that the burden lay with "the acquittee, whether he is the petitioner or only the person on whose behalf the proceeding is undertaken" (emphasis supplied). This position creates some difficulty. It is not entirely clear that the Commissioner undertakes a proceeding such as this only on behalf of the inmate. When the Commissioner believes that an inmate has no mental disease or defect and cannot be treated for one, his interest may be an independent State interest in freeing up scarce resources, and perhaps the burden of proof should lie with the Commissioner as the moving party. But then who is the [C]ommissioner's opponent? Or, in this case, who is Roberts' opponent? Under either approach, since Roberts and the Commissioner were the only two parties and since neither had any adversary submitting evidence at the hearing, burden of proof principles are difficult to apply and certainly do not serve to "allocate the risk of error between the litigants." 481 A.2d at 151 (speaking of choice of standard of proof).

is this interpretation and application of the statute that Plaintiff attacks as a violation of his federal constitutional rights to equal protection and due process of law.

No Maine court has been presented with the constitutional challenge this Plaintiff makes in this action to that application of the statute either before or after the Supreme Court's decision in Foucha v. Louisiana, 504 U.S. 71 (1992). Counsel represent to the Court in this proceeding, without disagreement, that Plaintiff has previously been denied release or discharge in a proceeding under section 104-A(1) in the Maine Superior Court and that the placement of the evidentiary burden and the articulation of the standard of proof thereby imposed upon him were those set forth in Roberts. Although he had a right of appeal available to him in the course of that proceeding by which he could have asserted his present constitutional challenge to the Roberts doctrine, and any other basis of attack of either state or federal constitutional dimension, he did not exercise his right of appeal. No further proceeding has been commenced nor is any such proceeding pending at either the initiative of Plaintiff or of the Maine Superior Court pursuant to the requirements of section 104-A(1).<sup>4</sup>

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<sup>4</sup>*The record is unclear as to all of this prior procedural history. It cannot be said with reasonable certainty that the record made here establishes these prior procedural facts. This circumstance, together with others, creates a grave doubt in this Court's mind as to whether the Maine Law Court would adopt under the certified question statute, see White v. Edgar, 328 A.2d*

This case, in the Court's view, presents itself in an unusual and troublesome posture; one that is artificially manufactured by Plaintiff's strategic decision not to pursue his right of appeal from the denial of statutory relief in the prior proceedings and his election to pursue, in a factual vacuum, a declaration of a federal court on the constitutionality of a statute of significant interest to Maine where the state courts have never been confronted with the challenge Plaintiff now launches in this Court. He has resolutely refused to launch that challenge himself in the state judicial system. There is no emergency, on the record made here, requiring a declaration in order to protect Plaintiff from the practical effect of any alleged violation of his federal constitutional rights. No hearing is pending for his release or discharge in any forum, nor is any apparently imminent.

No reason is assigned for him to believe that the Maine courts would be less hospitable than this Court to a cogent, viable, meritorious, federally based challenge to the holding in Roberts. Roberts was decided years before the Supreme Court's decision in Foucha as a question of state law through the application of state law rules of statutory construction, and no federal or state constitutional question was there generated or

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*668 (Me. 1974), assuming that there was a crucial question of state law to be certified here. Thus, counsel's suggestion that an appropriate resolution of the issue here could be to certify the question to the Maine Law Court is poorly grounded. It is unlikely, on this record, that the Law Court would accept the case and, further, the issue is one of federal constitutional law not of the substantive state law of Maine. Certification will not work.*

considered by the court in reaching its holding on the application of the statute to the facts of that case. No reason is to be found on this record that the Maine courts, Superior or Law, will be hostile to the application in Plaintiff's circumstances of the proper principles of federal constitutional law, based on the Foucha decision or any other relevant authority. Plaintiff's counsel's argument that requiring Plaintiff to afford the state court system a chance to entertain and consider his constitutional challenge would be futile is without any foundation whatever. That challenge apparently has never been specifically generated in any Maine court.

It is interesting to consider that Plaintiff's case in terms of ripeness or justiciability might be much stronger if he had presently pending in the Maine judicial system a proceeding in which the Roberts rule was likely to be applied to his disadvantage. However, if that were the case, it is almost certain that Younger abstention would bar this Court from granting by injunction the very relief Plaintiff had previously sought in this case. See Younger v. Harris, 401 U.S. 37 (1971); see also Bettancourt v. Board of Registration in Medicine of the Commonwealth of Massachusetts, 904 F.2d 772, 776-77 (1st Cir. 1990) (counseling deference of federal courts to state court judicial proceedings involving significant state interest which provide adequate opportunities for assertion of federal constitutional challenges).

The Court of Appeals for the First Circuit has recognized forcefully that a federal trial court's grant of declaratory relief alone under the Declaratory Judgment Act, 28 U.S.C. § 2201, is discretionary. El Dia v. Hernandez Colon, 963 F.2d 488, 492 (1st Cir. 1992). I conclude that for this Court to offer up a declaration, in a practical vacuum, on the constitutionality of a state statute which never previously has been subjected to any constitutional challenge, is unnecessary and unwise in the circumstances of this case. This Court has no well-grounded, articulated record on the seminal issue in the case. Its ruling would clearly affect a profoundly important area of state interest -- the preservation of the public safety. If the ruling were adverse to constitutionality of the statute, it would impinge severely upon principles and interests of comity within the federal system in a highly adverse manner. Moreover, under these circumstances, no practical effect of positive significance to Plaintiff will result from such a ruling whatever it might be.

Accordingly, I decide, in the exercise of discretion, that a declaratory judgment should not be made in this case. Since this is the only relief that is now sought, it is hereby ORDERED that Plaintiff's Complaint be, and it is hereby, DISMISSED.

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GENE CARTER  
Chief Judge

Dated at Portland, Maine this 8<sup>th</sup> day of January, 1996.