# Victory in Supreme Court of Virginia against out-of-control prosecution

## Justices declare effort targeting leading advocate illegal, ending 5-year court battle

On Thursday, the highest court in Virginia ended the Commonwealth's 13-year campaign to indefinitely detain a prominent advocate on criminal justice matters, Galen Baughman. In a victory for justice the Supreme Court ruled that the petition filed against Baughman in 2017 was illegal.

Baughman has been targeted by the Virginia attorney general's office under the state's civil confinement scheme since 2009 when prosecutors filed a petition to send him to Virginia's shadow prison in Burkeville shortly before his release from a seven-year prison sentence for consensual adolescent sexual conduct. That initial petition went to trial in 2012 and a jury voted unanimously in his favor. Baughman describes that trial in a 2015 TED Talk. In 2017, less than 24 hours before his release from a 20-month sentence for an alleged first-time technical violation, the attorney general's office petitioned a *second* time to have Baughman indefinitely detained past his release date. The Virginia Supreme Court's ruling last week dismissed that 2017 petition because it was based on the testimony of an expert who was prohibited from testifying under "the plain language of the statute."

Virginia legislator Patrick Hope (D–Arlington) described the situation in an op-ed published immediately before Baughman's second trial in 2019: "The [Virginia Department of Behavioral Health and Developmental Services (DBHDS)]-hired psychologist found Baughman did not meet the criteria and recommended his release. The attorney general's office ignored that finding, went outside the law and hired a second expert. This expert did not interview Baughman, but nonetheless claims that Baughman meets the statutory criteria. At trial, Baughman's defense attorneys may not present the results of the 2012 civil commitment trial or the results of the DBHDS psychological assessment, nor can they present qualified psychological expert testimony. His trial… serves as a prime example of how the SVP laws are unjust and unfair."

The Baughman case was closely watched by lawyers, activists, and civil and human rights organizations. Amicus briefs were filed by the National Association of Criminal Defense Lawyers (NACDL) joined by Del. Patrick Hope (D–Arlington), law professors and scholars, as well as a coalition of LGBTQ+/HIV rights advocates and organizations. Baughman was represented by a pro bono team from KaiserDillon PLLC, a notable boutique firm in Washington D.C. (Jonathan Jeffress, Emily Voshell, and William Zapf), supported by the Washington Lawyers' Committee for Civil Rights & Urban Affairs.

Catherine Hanssens, founder and then-executive director of Center for HIV Law & Policy (CHLP), was especially instrumental in bringing this issue to the forefront by organizing an LGBTQ+ sign-on letter to attorney general Mark Herring (D-Virginia) very early in this case. KaiserDillon also sent successive letters to AG Herring (in 2018 and 2020) asking him to stand down from this obviously illegal action — on the same grounds that the Supreme Court ultimately used to dismiss the petition. CHLP's amicus brief "describes the deep homophobic bias embedded in an already-Orwellian civil commitment assessment process, and in the drive to confine him as a dangerous predator in the absence of credible evidence."

The Court also addressed claims by the attorney general's office that a judge could find probable cause that someone suffers from a "mental abnormality or personality disorder" based on conviction history alone. "As the trial court had no evidence regarding Baughman's mental state, it could not have found that there was probable cause to believe that he was a sexually violent predator," the Supreme Court said. "Accordingly, the trial court should have dismissed the Commonwealth's petition."

Because the second petition was unlawful from its inception, the Court decided "the other matters that Baughman raised in his appeal (i.e., the trial court's decision to exclude the testimony of his expert witnesses, its denial of his motion for summary judgment and its failure to dismiss the petition based on res judicata) are… rendered moot." Regrettably, the justices declined to address these other important issues that might have made a significant difference in the lives of other individuals targeted by Virginia's pre-crime preventative detention program — those questions remain unsettled by the court.

The Baughman case is a stunning win that beats back a disturbing attempt by the Virginia attorney general and an activist judge to dramatically expand the scope of involuntary civil confinement. If the state had gotten its way, prosecutors would be able to shop for experts until they find someone willing to give whatever opinion they wanted and judges would be encouraged to proceed with a putatively "mental health" commitment case absent any psychological evidence.

Virginia is one of 20 states (and the federal government) with laws allowing for the indefinite 'civil' confinement of persons after the completion of a prison sentence for a sex-related crime. At least 7,000 people in the U.S. are presently held in prison-like facilities under the guise of involuntary psychiatric confinement based on a past sex-related conviction. While many facilities have begun to release people to an Orwellian form of "conditional release" as states begin hitting the practical ceiling that comes from a system designed to lock up more people every year without ever letting anyone out; for many, "civil commitment" for the purposes of "treatment" remains a life sentence.

Systems of pre-crime preventative detention have been under fire since their inception in 1990. The American Psychiatric Association formally opposes so-called "sexually violent predator" laws and has described these legislative schemes as a "misuse of psychiatry" designed to "preventively detain a class of people for whom confinement rather than treatment was the real goal." In 2015, legal scholar David Post quipped for the Washington Post, "If you're looking for a sustained and systematic constitutional violation to get outraged about, may I suggest this one?"

This decision from the Virginia Supreme Court makes plain that the attorney general's office flagrantly violated the "plain language of the statute." Even with top-notch lawyers, it took Baughman 5 years to reverse this unlawful action — resulting in 40 months of unnecessary incarceration past his release date in an punitive carceral setting at the Arlington County Detention Facility (ACDF), and another year and a half of draconian conditions including being restricted from leaving Arlington County and house arrest for up to 18 hours per day.

Baughman is a leading advocate bringing to light the flawed rationale and human rights implications of efforts to lock up people prospectively for what they might do in the future. Baughman's case should be a warning to any defenders of due process and freedom that so-called "sexually violent predator" laws lend themselves to wild misuse by unscrupulous government officials. The fact that Virginia was able to very nearly get away with committing someone who clearly does not suffer from any volitional impairment-causing psychological conditions — but had no trouble finding and using an expert willing to cavalierly misrepresent the psychological literature for pay — should be terrifying to us all.

In 2021, Virginia became the first state in the U.S. to consider abolishing its system of post-sentence 'civil' confinement. Baughman v. Commonwealth clearly illustrates the need to abandon laws and policies designed to incarcerate people for imaginary future crimes based on deeply dubious predictions by "experts."

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