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Throwing Away the Key: An Examination of New York's Sex Offender Commitment Law

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“Throwing the Key Away:
An Examination New York’s Sex Offender Civil Commitment Law”

By
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In April 2007, the New York State Legislature passed Article 10 of the Mental Hygiene Law entitled Sex Offenders Requiring Civil Commitment or Supervision.² It was signed into law by Governor Eliot Spitzer. This article will examine the various enactments under this statute, which appears to be an intricate bundle of constitutionally dubious principles and procedures which will wreak havoc on the courts of this State.

The Sex Offender Management and Treatment Act

Section 10.01 of the Statute sets forth the various legislative findings concerning the need for this legislation. It predictably notes that ‘...recidivistic sex offenders pose a danger to

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²McKinney’s (2007)

society.”³ It notes that such offenders “have mental abnormalities” which “may require long-term specialized treatment modalities”, and that they “should receive such treatment while they are incarcerated...and continue to receive treatment when incarceration should come to an end.”⁴ This subsection further declares that in extreme cases “confinement of the most dangerous offenders will need to be extended by civil process in order to provide them such treatment and to protect the public from their recidivistic conduct.”⁵ To that end the Statute contends that “...the system should offer meaningful forms of treatment to sex offenders in all criminal and civil phases, including during incarceration, civil commitment, and out patient supervision.”⁶

Definitions and Eligible Offenders

Section 10.03 of the Statute provides the first breath-taking look at the expansive reach of the legislation.

Section 10.03(e) defines a “dangerous Sex Offender” as one “who is a detained sex offender suffering from a mental abnormality involving a strong predisposition to commit sex

³Section 10.01(a) of the Mental Hygiene Law (McKinney’s 2007 }

⁴*Ibid*, 10.01(b)

⁵*Id.*

⁶*Ibid.*, 10.01(f)

offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.”

Section 10.03(i) defines “Mental Abnormality” as any “congenital or acquired condition, disease or disorder that affects the emotional, cognitive or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct.

Section 10.03(g) defines “Detained sex Offender” as one “who is in the care, custody, control or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony, in that the person is either (1) a person who stands convicted of a sex offense as defined in subdivision (p) of this section, and is currently serving a sentence for, or subject to supervision by the division of parole, whether parole or on post-release supervision, for such offense or for a related offense; (2) a person charged with a sex offense who has been determined to be an incapacitated person with respect to that offense and has been committed pursuant to article seven hundred thirty of the criminal procedure law, but did engage in the conduct constituting such offense; (3) a person charged with a sex offense who has been found not responsible by reason of mental disease or defect for the commission of that offense; (4) a person who has been convicted of a designated felony that was sexually motivated and committed prior to the effective date of this article; (5) a person convicted of a sex offense who is, or was at any time after September first 2005, a patient in a hospital operated by the office of mental health, and who was admitted directly to such facility pursuant to article nine of this title or section four hundred two of the correction law upon release or conditional release from a correctional facility,

provided that the provisions of this article shall not be deemed to shorten or lengthen this time for which such person may be held pursuant to such article or section respectively; or (6) a person who has been determined to be a sex offender requiring civil management pursuant to this article.

The number and range of the offenses which are encompassed in this statutory scheme is even more breath-taking. In addition to the sex offenses in Article 130 of the Penal Law, Incest in the First or Second Degree set forth in Sections 255.56 and 255.57 of the Penal Law, Patronizing a Prostitute in the First Degree set forth in Section 230.06 of the Penal Law and conspiracy or an attempt to commit the same,⁷ as might be expected; the Statute in this section also references “designated felonies” under subsection (f) which are “motivated and committed prior to the date of this article.”⁸ The designated felonies enumerated in that particular provision include all of the felony assault charges contained in Article 120 of the Penal Law; the offenses of Manslaughter in the First and Second Degree⁹; all murder offenses; all felony kidnapping

⁷*Ibid*, Section 10.03(p).

⁸*Id.*

⁹Sections 125.20 and 125.10 of the Penal Law.

offenses; all burglary offenses; all robbery offenses; arson in the first degree;¹⁰ arson in the second degree;¹¹ promoting prostitution in the first degree;¹² promoting prostitution in the second degree;¹³ compelling prostitution;¹⁴ disseminating indecent material to minors;¹⁵ use of a child in a sexual performance;¹⁶ promoting an obscene sexual performance by a child;¹⁷

¹⁰Section 150.20 of the Penal Law.

¹¹Section 150.15 of the Penal Law.

¹²Section 230.32 of the Penal Law.

¹³Section 230.30 of the Penal Law.

¹⁴Section 230.33 of the Penal Law.

¹⁵Section 235.22 of the Penal Law.

¹⁶Section 263.05 of the Penal Law.

¹⁷Section 263.10 of the Penal Law.

promoting a sexual performance by a child;¹⁸ or any felony attempt or conspiracy to commit any of the foregoing offenses.

The statutory scheme also contains a provision entitled “Related Offenses” which is designed to include any offenses prosecuted as part of the same proceeding or part of the same criminal transaction or which are the bases of the inmate’s commitment to the Department of Correctional Services.¹⁹

Section 10.03(s) of the Statute defines an offense as being “sexually motivated,” when the Statute or Statutes of the designated felony were committed for the purpose of the direct sexual gratification of the actor.

Notice and Preliminary Review

Section 10.05 of the Statute sets forth the notice and case review procedures prefatory to the commencement of a commitment proceeding. This section empowers the Commissioners of Mental Health, Correctional Services, and Mental Retardation and Disabilities to create a fifteen member review panel, any three of which may sit, to review a particular case. It further provides that at least two members of each team shall be professionals in the field of mental health or mental retardation and disabilities, as appropriate, with experience in the treatment, diagnosis,

¹⁸Section 263.15 of the Penal Law.

¹⁹Mental Hygiene Law Section 10.03(l)

risk assessment, or management of sex offenders.

Section 10.05(b) provides that where it appears to an agency with jurisdiction that a person who may be a detained sex offender is nearing or eligible for release, such agency will notify the Attorney General and the Commissioner of Mental Health. Such notice is to be provided 120 days prior to the date of release, but failure to provide it within that time period does not affect any subsequent proceedings.

Among the items to be included in the notice is a description of the Statute or Statutes constituting the sex offense, the criminal history, the most recent sentence and any supervisory terms, the pre-sentence reports, and the person's institutional history, including participation in sex offender treatment.²⁰ Upon receipt of this information the Commissioner is authorized to designate "multidisciplinary staff, including clinical and other professional personnel" to conduct a preliminary review to determine whether the subject should be referred to a case review team for evaluation.²¹ The subject of such a review is entitled to notice of the referral. The case review team shall review all records and information accompanying the notice, and may seek a psychiatric evaluation of the respondent. Based upon that review and evaluation the case review team makes a determination whether the respondent is a sex offender requiring civil

²⁰Mental Hygiene Law Section 10.03(b)(3) and (5).

²¹Mental Hygiene Law Section 10.05(d).

management.²²

If the case review team determines that the subject is not a sex offender requiring civil management it shall notify the Attorney General and the respondent and no petition for civil commitment shall be filed.²³

If the case review team determines that the subject is a sex offender requiring civil management, it shall notify both the Attorney General and the subject. The notice must contain a written report from a psychiatric examiner, and where relevant, whether the subject suffers from a mental abnormality.²⁴ Where the respondent was charged or convicted of a designated felony, it shall also include the case review team's determination of whether the Statute was sexually motivated.²⁵ The case review team shall provide the Attorney General and the respondent its written notice within 45 days after the Commissioner receiving notice of the subjects anticipated release, however failure to comply with this time limitation shall not effect any subsequent proceeding.

²²Mental Hygiene Law Section 10.05(e).

²³Mental Hygiene Law Section 10.05(f).

²⁴Mental Hygiene Law Section 10.05(g).

²⁵*Ibid.*

Petition and Hearing

Section 10.06 (a) of the Statute provides that if the case review team determines that the respondent is a sex offender requiring civil commitment, the Attorney General may file such a petition in the Supreme Court or County Court where the subject is located. This section vests the Attorney General with discretion concerning the ultimate decision to commence such a proceeding by allowing him to take into account any continuing supervision the respondent is subject to in deciding whether there is a need for civil management. If the Attorney General elects to proceed, a copy of the petition containing evidentiary facts to support the determination must be served upon the respondent within 30 days of receipt of the case review team's findings. Failure to comply with this time requirement does not affect the validity of the proceeding.

Within 10 days after the filing of such a petition, the respondent may move to change venue to the county where the offense was committed. The Attorney General may, within 5 days of the motion, cross move to retain venue. If the Attorney General fails to cross move or that motion is denied, then venue is transferred to the county where the offense was committed. If the respondent fails to move for a change of venue, or the Attorney General's cross motion is granted, venue remains where the petition was filed.²⁶.

Upon either the filing of a petition, or a request for a pre-filing psychiatric examination of the respondent by the Attorney General, the Court must appoint counsel for an indigent

²⁶Mental Hygiene Law Section 10.06(b).

respondent. Such counsel, in the first instance, is to be the Mental Hygiene Legal Service, but if they are unable to take the assignment, counsel from the county's 18-B panel shall be appointed. Appointed counsel is entitled to copies of the case review team's notice, the petition, and any written reports of the psychiatric examiners.²⁷

If the Attorney General seeks a pre-filing psychiatric evaluation for the purpose of assisting in making the determination to file a petition, the court shall order such an evaluation and appoint counsel for the respondent.²⁸

At any time after the filing of the petition, and prior to trial, the respondent may request his own psychiatric evaluation. If the respondent is indigent the court shall order it with payment from public funds. If the respondent seeks such an evaluation, the report from the evaluation shall be furnished to the respondent, the Attorney General and the Court.²⁹

If it appears that the respondent may be released prior to the determination of the case review team, the Attorney General may file a securing petition to retain custody of the

²⁷Mental Hygiene Law Section 10.06(c).

²⁸Mental Hygiene Law Section 10.06(d).

²⁹Mental Hygiene Law Section 10.06(e).

respondent in the interest of public safety.³⁰ If such a securing petition is filed, no probable cause hearing will be held until the case review team has completed its determination. If the case review team determines that the respondent is not a sex offender requiring civil management, then the securing petition shall be dismissed.³¹

Section 10.06(g) provides that where a petition is filed, the court in which it is filed, must conduct a non-jury probable cause hearing to determine whether the respondent is a sex offender requiring civil management. The hearing must be held within thirty days unless the respondent consents to a longer period.

Section 10.06(h) provides that where the respondent has been released prior to the filing of the petition, the Court may order him or her returned to confinement for the purpose of the hearing. In that case, the probable cause hearing must be commenced within 72 hours of the recommitment. If the respondent is in custody but becomes eligible for release prior to the probable cause hearing, the court may stay his or her eligibility for release until the probable cause hearing is held. Again, the 72 hour time limit is applicable, unless the respondent seeks an extension of it, or the Attorney General does upon a showing of good cause. Like all other time periods in the Statute, the failure to abide by the 72 hour period does not affect the validity of the

³⁰Mental Hygiene Law Section 10.06(f).

³¹*Ibid.*

petition.

Section 10.06(i) provides the provisions of Section 10.08 (which are discussed below) shall apply to the hearing, and that the hearing should be conducted in one session. This latter requirement may be deviated from in the interest of justice.

Section 10.06(j) provides that the respondent's commission of a sex offense shall be deemed established and not relitigated at the probable cause hearing in three situations. First, where the respondent was convicted of the offense. Second, where the respondent was acquitted of the offense by reason of mental disease or defect. Third, where the respondent was indicted by a grand jury for such offense but was found to be incompetent pursuant to Article 730 of the Criminal Procedure Law.³² Where the petition alleges the commission of a designated felony prior to the date of the Statute, the court shall decide whether the offense was sexually motivated during the hearing.

Section 10.06(k) provides that at the conclusion of the hearing, the court shall determine whether the Attorney General has established probable cause to warrant holding the respondent for further proceedings. If probable cause is not established, the court shall dismiss the petition and discharge the respondent from custody. If probable cause has been established, the court shall take three actions. First, it shall direct the respondent be held in a secure treatment facility for care and treatment and control upon his release. Second, the court shall set a date for trial

³²McKinney's(1995).

pursuant to Section 10.07 of the Statute. Third, the respondent shall not be released until the completion of the trial. Interestingly, Section 10.13(a) and (b) of the Statute authorizes the Attorney General to seek a stay and appeal any adverse decision under this section. No corresponding right is afforded to the respondent.

Trials

Section 10.07 of the Statute governs the subsequent trial in these proceedings.

Section 10.07(a) of the Statute provides that within 60 days of the probable cause determination, the court, which conducted the hearing, shall also conduct a jury trial on the issue of whether the respondent is a detained sex offender who suffers from a mental abnormality, unless either the Attorney General has been granted a change of venue.

Section 10.07(b) dictates the procedures for jury selection. It purports to create a hybrid form of jury trial marrying Article Forty-one of the Civil Practice Law and Rules³³ to certain sections of the Criminal Procedure Law.³⁴ These sections of the Criminal Procedure Law insure that the respondent shall be afforded a jury of twelve, that a challenge may be made to the entire panel prior to jury selection, that voir dire shall be judicially supervised and involve questioning

³³McKinney's 2007.

³⁴Criminal Procedure Law Sections 270.05, 270.10, 270.15, 270.20, 270.25(1), and 270.35(1)
McKinney's 2002.

by the court and both parties. It further provides that challenges are to be exercised at the conclusion of each pass, and that each party may challenge jurors peremptorily and for cause. Each side shall have 10 peremptory challenges and two for each alternate. The right to a jury trial may be waived by the respondent.

Section 10.07(c) incorporates the provisions of Section 10.08 of the Statute and Article 45 of the Civil Practice Law and Rules,³⁵ which sets forth the rules of evidence governing proceedings conducted pursuant to the CPLR. It further provides that the jury may hear evidence of the degree in which the respondent cooperated in the psychiatric evaluation, and shall be instructed on the fact of the respondents refusal to submit to the same. The respondent's commission of the sex offense shall be deemed established and not relitigated in two situations. First, where the respondent was convicted of the offense. Second, where the respondent was acquitted of the offense by reason of mental disease or defect. This subsection further provides that where the petition alleges the commission of a designated offense, the issue of whether the offense was sexually motivated shall be a jury question.

Section 10.07(d) provides that the jury or the court, where the jury is waived, shall make the determination whether the respondent is a detained sex offender suffering from a mental abnormality by clear and convincing evidence. The burden of proof shall be borne by the Attorney General. If the trial is conducted with a jury, the verdict must be unanimous. In

³⁵ McKinney's 2007.

charging the jury, the court must instruct that it may not find that the respondent is such an offender solely on the basis of the commission of the sex offense. It further requires that where the respondent is committed pursuant to Article 730 of the Criminal Procedure Law and charged with the commission of a sex offense, the Attorney General must prove by clear and convincing evidence that the respondent committed the offense.

Section 10.07(e) provides that where the court or a jury has unanimously found that the Attorney General did not satisfy its burden of proof, the petition must be dismissed and the respondent discharged from custody. If the jury is unable to render a unanimous verdict, the respondent may be re-tried within 60 days. If that also results in a less than unanimous verdict, the court must dismiss the petition.

Section 10.07(f) declares that where the respondent has been found to be a sex offender suffering from a mental abnormality, the court must then determine whether the respondent is a dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision. The parties may further litigate that issue. If the court finds by clear and convincing evidence that the respondent has a mental abnormality involving a strong predisposition to commit sex offenses, an inability to control such behavior, and is likely to be a danger to others and commit sex offenses if not confined to a secure facility , then the court must find the respondent to be a dangerous sex offender requiring confinement. In that case, the respondent must be so confined for care, treatment., and control until confinement is no longer required. If the court does not find the respondent to be aa dangerous sex offender requiring confinement

then the court must declare the respondent to be sex offender requiring strict and intensive supervision, and the respondent shall be subject to a regimen of strict and intensive supervision and treatment pursuant to Section 10.11 of the Statute. In making a disposition the court must consider the conditions that would be imposed upon the respondent if subject to strict and intensive supervision, as well as all information about the respondent's re-entry into the community.

Section 10.08 spells out various procedures under this Statute.

Section 10.08(a) provides that any statement made by the respondent to a psychiatric examiner pursuant to an order issued by the court shall not be admissible against the respondent in any other proceeding but may be used in the proceedings under this Statute.

Section 10.08(b) guarantees access to the respondents relevant medical, psychiatric, criminal, or other records, to psychiatric examiners in these proceedings, irrespective of which party has retained them. It provides that no identifying information concerning the victims shall be provided, and for the redaction of such information.

Section 10.08(c) authorizes access to the respondent's relevant records from any agency or department of the State for the Commissioner of Mental Health, the case review panel, and the Attorney General. It further restricts further dissemination of the information in the records.

Section 10.08(d) requires the Attorney General to provide complete disclosure to the respondent of any records it possesses which are relevant to the proceeding, provided that no identifying information concerning the victims shall be disclosed.

Section 10.08(e) authorizes the court to change venue to any county for good cause including convenience of the parties, the witnesses, or the condition of the respondent.

Section 10.08 (f) provides that all time periods set forth in the Statute are goals, and failure to meet the limitations, shall not invalidate the agency's action unless explicitly provided.

Section 10.08(g) sets forth the right to counsel by the respondent, the self-authentication and admissibility of certified psychiatric reports, plea minutes and trial minutes from previous proceedings. Admissibility of other records requires the showing of the author's unavailability. It further guarantees the right to examine and cross-examine witnesses, and produce evidence. It limits the right of the respondent to subpoena the victim absent good cause. It also requires a showing of good cause before the courtroom may be closed.

Section 10.08(h) Recites that the procedures and standards set forth in the Statute are the minimum required to protect the public and treatment of the respondent. It also does not require the availability of specific forms of treatment or supervision other than those which the Statute specifically requires.

Annual Examinations and Petitions for Discharge

Section 10.09(a) requires the Commissioner to provide the respondent and respondent's counsel with annual written notice of the right to seek a discharge.

Section 10.09(b) requires the Commissioner to undertake an annual examination for evaluation of the respondent by a psychiatric examiner in writing concerning whether the respondent is currently dangerous, and requires confinement. It provides the respondent with a

corresponding right to have an evaluation and provides for appointment of an examiner if the respondent is indigent. Following such an evaluation the psychiatric examiner shall report the findings in writing to the Commissioner, who shall review it with other relevant information, and make a determination whether the respondent is still dangerous and requires confinement.

Section 10.09(c) requires the Commissioner to forward the reports and the written determination to the court where the respondent is located.

Section 10.09(d) provides for an evidentiary hearing to be held within 45 days in three situations. First, where the respondent has petitioned for discharge. Second, where the respondent has not affirmatively waived his or her right to discharge. Third, where the respondent has waived the right to petition for discharge, but information contained in one of the submissions in the foregoing subsection raises a substantial question concerning whether the respondent is a dangerous sex offender requiring confinement. In any evidentiary hearing on that issue, the Attorney General bears the burden of proof.

Section 10.09(e) provides that if the Commissioner, at any time, determines that the respondent is not a dangerous sex offender requiring confinement, the Commissioner shall petition the court for discharge of the respondent or for the imposition of a regimen of strict and intensive supervision and treatment. Upon the filing of the petition in the supreme or county court where the respondent is located, the court, upon review, shall either grant the relief requested or order an evidentiary hearing. In any such hearing the Attorney general bears the burden of proof.

Section 10.09(f) affords the respondent the right at any time to petition for discharge and/or release to the community under a regimen of strict and intensive supervision and treatment. Upon review of such a petition, other than in connection with annual reviews set forth in the foregoing sections, the court may order an evidentiary hearing or deny the petition summarily, if it finds that the petition is frivolous, or does not provide a sufficient basis for re-examination before the next annual review. If the court orders an evidentiary hearing, the Attorney General bears the burden to prove that the respondent is a dangerous sex offender requiring continued confinement.

Section 10.09(g) authorizes the court, in connection with any evidentiary hearing conducted pursuant to the foregoing subsections, at the request of either party or upon its own motion, to direct the submission of evidence, and may order a further psychiatric examination if the available reports are not current or sufficient.

Section 10.09(h) provides that at the conclusion of any evidentiary hearing, if the court finds by clear and convincing evidence, that the respondent is still a dangerous sex offender requiring confinement, it shall continue such confinement and treatment. Otherwise, the court, unless it finds that the respondent no longer suffers from a mental abnormality, shall order the discharge of the respondent to a regimen of strict and intensive supervision and treatment pursuant to Section 10.11 of the Statute.

Treatment and Confinement

Section 10.10 of the Statute spells out the requirements of treatment and confinement.

Section 10.10(a) provides that where the respondent is found to be a dangerous sex offender requiring confinement to a secure treatment facility, the facility shall provide care, treatment and control until the court discharges the respondent.

Section 10.10(b) requires the Commissioner to develop treatment programs for individuals committed pursuant to the Statute. It also requires acknowledgment of the standards, guidelines, and best practices recommended by the Office of Sex Offender Management.

Section 10.10(c) authorizes the various departments having custody and control over the respondents to employ appropriate safety and security measures for the safety of the public during court proceedings and during transit to and from such proceeding, together with training for their employees in these measures.

Section 10.10(d) authorizes the commissioner to enter into agreements with the Department of Correctional Services for security services.

Section 10.10(e) requires the Commissioner to segregate respondents subject to the Statute from others in the custody and control of the Department of Mental Health, although they need not be segregated from other sex offenders. It further requires that dangerous sex offenders confined to facilities within the Department of Correctional Services must be segregated from that Department's inmates. Occasional supervised contacts between those required to be segregated are not considered a violation of these requirements.

Section 10.10(f) authorizes escorted furlough privileges for those confined pursuant to the Statute for the purposes of seeking medical or dental treatment, visiting an ill family member,

or attending the funeral of a family member. It further requires that such persons will be the subject of constant supervision during these escorted furlough.

Section 10.10(g) sets forth the procedures and notifications required to be made when a person confined pursuant to the Statute escapes.

Section 10.10(h) authorizes the apprehension, restraint, transport, and return of an escapee by any peace officer or police officer to the facility from which the escape occurred. It further charges peace and police officers with the duty of assisting employees of the Commissioner in the return of an escapee.

Section 10.10 (I) mandates the Commissioner to file annual reports with the Governor and the Legislature concerning the implementation of the Statute, including the census of each facility, the number of reviews by the case review teams, the number of commitments together with their criminal convictions, and projected future capacity needs.

Supervision and Treatment

Section 10.11 spells out the requirements for supervision and treatment under the Statute.

Section 10.11(a)(1) provides that before the court may release a person to regimen of strict and intensive supervision and treatment, it shall order the Division of Parole to recommend conditions of the supervision. These conditions may include electronic monitoring, global positioning satellite tracking, polygraph monitoring, specification of residence and type of residence, prohibition of contact with past and potential victims, strict supervision by a parole

officer, and any other lawful conditions imposed by the court. In addition, after consultation with a psychiatrist, psychologist, or other mental health professional, the Commissioner shall recommend a specific course of treatment, which shall be provided to the Attorney General, the respondent and his or her counsel, before the court issues such an order.

Section 10.11(a)(2) additionally provides that prior to issuing its order, the court shall entertain any submissions by the parties, and afford them an opportunity to be heard concerning the proposed conditions. The Court shall then issue an order specifying the of supervision and treatment. The order shall specify the conditions and the course of treatment.. A written statement of the conditions shall be provided to the respondent, and his or her counsel, any designated service providers or treating professionals, the Commissioner, the Attorney General, and the supervising parole officer. The court shall direct the Division of Parole to implement the conditions of the treatment and supervision. The regimen of intensive supervision does not toll the running of any other form of supervision in criminal cases, including post-release and parole.

Section 10.11(1)(b)(1) provides that persons subject to a regiment of strict supervision and treatment shall be subject to a minimum of six face-to-face supervision contacts and six collateral contacts per month unless subsequently modified by the court or parole.

Section 10.11(1)(b)(2) provides for the submission of reports every four month by any treatment agency or provider to the court, the Commissioner, the Attorney General, and the supervising parole officer concerning the person's conduct in supervision and treatment.

Section 10.11(c) provides that any person ordered into supervision and treatment shall be

subject to the Division of Parole and such conditions set by the court and that agency.

Section 10.11(d)(1) provides that supervision and parole may be revoked for any violation of the conditions. If a parole officer has reasonable cause to believe that a person has violated such conditions, or a treatment professional orally or in writing, reports the person may be a dangerous sex offender requiring confinement, he may be taken into custody utilizing the same procedures applicable to parolees. This requires the parole officer to apply to the Board of Parole for a warrant authorizing the taking. Upon the execution of the warrant, the individual may be transported to a secure treatment facility or local correctional facility for a psychiatric evaluation, which must be conducted within five days. A parole officer may take the individual to a psychiatric center for a prompt evaluation and at the conclusion, return the person to a place of lodging. A parole officer may also direct a peace officer, police officer, or sheriff's deputy, to take the individual into custody and transport the person to one of the places of lodging previously specified, in accordance with this sub-section, and such officer or deputy is obligated to do so. Once an individual is taken into custody pursuant to this sub-section, the Attorney General and Mental Hygiene Legal Services must be notified. No requirement in this section shall preclude the Division of Parole from proceeding with a revocation hearing.

Section 10.11(2) authorizes the Attorney General to file a petition for confinement or to modify the conditions of supervision and treatment for a person taken into custody pursuant to this section. The petition shall be filed with the court which imposed the conditions of supervision and treatment. The petition must be filed within five days of the person having been

taking into custody for evaluation. Failure to file within that period requires the release of the respondent subject to the existing conditions. Failure to file within that period will not bar any subsequent petition or action.

Section 10.11(3) provides that any petition filed pursuant to this section (i.e. for re-confinement or modification of conditions), shall be served upon the respondent and the Mental Hygiene Legal Services. The court shall also appoint counsel for the respondent in accordance with the provisions of Section 10.06(c) of the Statute. Counsel for the respondent shall be furnished with a copy of any report of a psychiatric evaluation conducted pursuant to this section.

Section 10.11(4) sets forth the requirements for a petition for re-confinement. It requires that the parole officer allege sworn allegations providing reasonable cause that the sex offender violated the conditions of supervision and treatment. It shall be accompanied by any evaluations or reports by a treating professional demonstrating that the respondent may be a dangerous sex offender requiring confinement. If the petition is filed within the five day period seeking the respondent's confinement, the court shall review the petition and determine if there is probable cause justifying confinement. If probable cause exists, the respondent may be retained in a local correctional facility or secure treatment facility pending the outcome of the proceedings. In the absence of probable cause justifying confinement, the respondent shall be released, but the court may impose new conditions of supervision and treatment pending completion of the hearing.

Within thirty days of the filing of a petition pursuant to Section 10.11(2) of the Statute, the court

shall conduct a hearing to determine if the respondent is a dangerous sex offender requiring confinement. Any failure to meet this time limitation shall not affect the validity of the petition or the hearing. The court shall make its determination utilizing the same standards set forth in Section 10.07(f) of the Statute. If the court finds that the Attorney general has not met the burden of proving that the respondent is a dangerous sex offender by clear and convincing evidence, but finds the respondent to require supervision and treatment, it shall release the respondent pursuant to the previous order but may also impose new conditions pursuant to subsection (f) of this section discussed hereinafter. If the court finds that the Attorney General has met its burden of clear and convincing evidence that the respondent is a dangerous sex offender, it shall commit the respondent to a secure treatment facility. The respondent shall not be released pending the conclusion of the hearing.

Section 10.11(e) declares that if the Attorney General files a petition seeking only a modification of the conditions, the court shall release the respondent with revised conditions of supervision and treatment pending completion of the hearing. Within five days of the filing of such a petition, the court shall conduct a hearing to determine whether the respondent's conditions of treatment and supervision should be modified. The Attorney General bears the burden of showing that the conditions should be modified and if the burden is met, the court shall modify the conditions accordingly.

Section 10.11(f) provides that the court may modify or terminate the conditions on the petition of the supervising parole officer, the Commissioner or the Attorney General. Such a

petition shall be served on the respondent and his or her counsel. A person subject to treatment and supervision conditions may petition for modification or termination no earlier than two years after the regimen of treatment and strict supervision has commenced, by serving such a petition on the Attorney General, the Division of Parole and the Commissioner. Upon receipt of such a petition, the court may require the Division of Parole and the Commissioner to provide a report concerning the person's conduct while subject to treatment and supervision. If more than one petition is filed they may be resolved in a single hearing.

Section 10.11(g) authorizes the court to hold a hearing on a petition seeking modification and the person seeking the modification bears the burden of demonstrating those modifications are warranted.

Section 10.11(h) provides that where a petition for termination is filed, the court may conduct a hearing. When the petition is filed by the respondent, the Attorney general bears the burden of demonstrating that the respondent is currently a dangerous sex offender requiring treatment by clear and convincing evidence. If the burden is not met, the court shall discharge the respondent from treatment and strict supervision. If the burden is met, the court shall continue the regimen of treatment and strict supervision but may revise the conditions if warranted.

Appeals

Section 10.13(a) authorizes the Attorney General to seek a stay of any order of release in the appropriate Appellate Division of New York State Supreme Court of any order authorizing the release of a person under this Statute.

As noted previously, Section 10.13(b) grants the Attorney General the right to appeal from any adverse decision concerning the lack of probable cause and the dismissal of a petition pursuant to Section 10.06 of the Statute. While the respondent has no reciprocal right in that instance, either party may appeal from a final determination. The provisions of Articles 55, 56 and 57 of the Civil Practice Law and Rules shall govern appellate practice.

Section 10.13(c) provides for the appointment of counsel for an appellant who becomes financially unable to obtain counsel. It further provides that the Mental Hygiene Legal Service is the preferred appellate counsel in such case, but the court may appoint counsel from the County law 18-B panel if the Mental Hygiene Legal Service is unable to pursue the appeal.

Discussion

In 1997, the United States Supreme Court in *Kansas v. Hendricks*,³⁶ found that the civil commitment statute adopted by the State of Kansas for the continued detention and treatment of dangerous sexual offenders satisfied the Due Process Clause of the Fourteenth Amendment. In so ruling the Court declared that the Kansas enactment was not punitive, thereby precluding a violation of the Double Jeopardy Clause or the prohibition concerning *ex post facto* laws. It reaffirmed this position in *Seling v. Young*,³⁷ in which it examined the State of Washington's

³⁶521 U.S. 346.

³⁷531 U.S. 250.

civil commitment statute. Both prior to, and in the wake of these determinations, many states enacted civil commitment schemes. Notwithstanding this *imprimatur* on civil commitment statutes of this sort in general, the Court does not appear to have passed upon the specific provisions contained within these legislative schemes. An examination of several provisions of the New York statute raises various constitutional and legal concerns.

Eligibility

The first area under the Statute which appears to be problematical is the eligibility of certain classes of respondents. As noted above, Section 10.03(g) defines the various classes of individuals falling under the definition “Detained Sex Offender.” Section 10.03(g)(1) encompasses a person convicted of a sex offense as defined in Section 10.03(p) that is currently serving a sentence, or under the supervision of the Division of Parole, either on parole or post-release supervision for such offense or a related offense. Section 10.03(g)(2) includes those individuals who have charges pending but are incapacitated and committed to the Department of Mental Health pursuant to Article 730 of the Criminal Procedure Law, but did engage in the conduct constituting the offense charged. Section 10.03(g)(3) includes those persons charged with a sex offense but have been found not responsible by reason of mental disease or defect.

It seems clear that there is no issue which can be raised concerning the class of respondents included in Section 10.03(g)(1) since they are convicted sex offenders, whose status has been determined by a plea of guilty to a sex offense or whose guilt has been proven beyond

a reasonable doubt. Thus all attendant constitutional safeguards the judicial system allows have been afforded to them.

Issues involving Double Jeopardy and *ex post facto* laws may arise under this section because it also includes conviction for “a related offense.”

A “related offense” as defined in section 10.03(1) is “any offenses that are prosecuted as part of the same criminal action or proceeding, or which are part of the same criminal transaction, or which are the bases of the orders of commitment received by the department of correctional services in connection with an inmate’s current term of incarceration.” Thus one who is charged in a multi-count indictment with both sex and non-sex offenses, and is acquitted of the former but convicted of the latter could find himself, or herself, still eligible for civil commitment. At first blush, this would certainly seem to offend the Double Jeopardy Clause but, as the Supreme Court has said in Both *Hendricks, supra* and *Seling, supra*, this principle has no application to these statutes since the proceedings are civil not criminal. Similarly, the contention that commitment could be barred in this situation based upon the principles of either collateral estoppel or *res judicata* also fails since the standard of proof in civil commitment proceedings i.e. “clear and convincing evidence” is lower than that of “beyond a reasonable doubt” required for conviction in the criminal proceedings.

The most common scenario likely to be presented in these situations concerning “related offenses” is a proceeding predicated upon an offense deemed to be “sexually motivated” which was dismissed in a criminal proceeding based upon a plea of guilty having being entered to a

non-sexually motivated offense. The application of the principles of collateral estoppel and *res judicata* are likely to result in the same outcome just discussed.

Likewise, one could argue that those members of the class of respondents included in Section 10.03(g)(3) who have been acquitted by reason of mental disease or defect, have also received these maximum protections. Implicit in an acquittal by reason of mental disease or defect is the finding that the underlying offense has been proven beyond a reasonable doubt, otherwise the judge or the jury would not be rendering such a verdict.³⁸

Section 10.03(g)(2) however presents a whole host of different problems due to the class of respondents included in it.

As noted above, Section 10.03(g)(2) embraces that class of respondents who have been committed pursuant to Article 730 of the Criminal Procedure Law, *but did engage in the conduct constituting such offense.*(emphasis added) Article 730 of the Criminal Procedure Law governs the procedures to be utilized for those that are unable to proceed with a criminal prosecution because they are incapacitated by a mental disease or defect. Indeed, Section 730.10(1) defines an “incapacitated person” as a “...defendant who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense.” Based upon that definition, one has to ask if a defendant “lacks the capacity to understand the proceedings against him or assist in his own defense” how could he or she have capacity to understand the

³⁸See, C.J.I Pattern Jury Instruction Penal Law Section 40.05.

civil commitment proceedings initiated under this Article or assist in his own defense ? Surely one who is incapacitated in one proceeding must be similarly incapacitated in the other. Compounding this infirmity is the additional language in the section which designates a respondent “charged with a sex offense,” who is nevertheless incapacitated, “but did engage in the constituting the offense.” This language raises the question of how one can be found to have “engaged in the conduct constituting the offense” if there has been no prior prosecution establishing the same because the defendant is incapacitated ?

Section 10.03(g)(4) similarly presents a series of unique issues concerning those included in the class of eligible respondents. This section covers those “...who stand convicted of a designated felony that was sexually motivated and committed prior to the effective date of this article.” As outlined previously, Section 10.03(f) sets forth a vast laundry list of felonies which are separate and apart from those enumerated sex offenses contained in Section 10.03(p) of the article but which will be evaluated by a panel of examiners to ascertain whether there was a sexual motivation for its commission. Initially, one might think that this eligibility requirement might run afoul of the Supreme Court’s holding in *Apprendi v. New Jersey*.³⁹ There, the Supreme Court held that an individual could not be confined beyond the statutory maximum period based upon facts that were not found beyond a reasonable doubt by a jury or were admitted as part of the criminal proceeding. However as discussed above, since the Court has

³⁹530 U.S. 466 (2000).

made clear that these statutes are civil rather than criminal, *Apprendi* has no application.

Retroactive Application

The most significant flaw in the statute might be its retroactive application to those inmates serving sentences for a sex offense, or a related offense, and is currently incarcerated,, or are under the supervision of the Division of Parole because they are on parole or post-release supervision as provided by Section 10.03(g)(1) of the Statute. The question arises whether eligibility for civil commitment is a direct consequence of a defendant's plea of guilty to a sex offense, or a sexually motivated designated offense, that requires the defendant to be advised of such a possibility at the time of the plea. In *People v. Catu*,⁴⁰ the Court of Appeals determined that post-release supervision was a direct consequence of the plea, and that a defendant must be advised of it at the time of the plea. In arriving at this decision, Chief Judge Kaye observed;

⁴⁰,4 N.Y. 3d 242 (2005).

“While a trial court has no obligation to explain to defendant’s who plead guilty the possibility that collateral consequences may attach to their criminal convictions, the court must advise a defendant of the direct consequences of the plea (see *People v. Ford*, 86 N.Y. 2d 397[1995]). Collateral consequences ‘are peculiar to the individual and generally result from actions taken by agencies the court does not control (*id.* At 403). A direct consequence is ‘one which has a definite, immediate and largely automatic effect on the defendant’s punishment.’(*id.*)’”⁴¹

She went on to observe;

⁴¹4 N.Y. 3d at 244.

“post-release supervision is a direct consequence of a criminal conviction. In eliminating parole for all violent felony offenders in 1998, the Legislature enacted a scheme of determinate sentencing to be followed by periods of mandatory post-release supervision....imposition of supervision is mandatory and thus ‘has a definite immediate and largely automatic effect on defendant’s punishment.’”⁴²

One could make the argument that under this explanation, civil commitment might not be a direct consequence of the respondent’s plea of guilty and that advisement of such a possibility is not required. The Supreme Court’s determinations that such proceedings are civil and not criminal militate in favor of such a conclusion. The determination that such proceedings do not violate the Double Jeopardy Clause, and that the statutes authorizing such commitment are not

⁴²*Ibid.*

ex post facto laws⁴³ offer further support for this premise. Under the New York statute a separate agency, the Office of Sex Offender Management, has been created within the New York State Division of Criminal Justice Services, to administer the statute, which Judge Kaye noted, was additional evidence that this might be a collateral consequence rather than a direct one.⁴⁴ As compelling as this conclusion might be, it is not a certain one.

It can hardly be gainsaid that a respondent's conviction for one of the sex offenses set forth in Section 10.03(p) of the Statute is what triggers review under Section 10.05 of the Statute, thus making the consequence of the plea, a seemingly direct one. To a lesser extent one could argue the same where a respondent has been convicted of a designated felony or related offense pursuant to Sections 10.03(f) and (l) of the Statute. To be sure, a case review panel must find that such an offense is a sexually motivated one, but nevertheless it is the conviction for such an offense that triggers the respondent's eligibility for civil commitment review. Moreover, in considering whether a respondent should be the subject of a civil commitment proceeding, the review panel must make its assessment based upon records and documents that flow directly from the person's conviction, such as pre-sentence investigations, the accusatory instruments and

⁴³*Hendricks v. Kansas, supra.*

⁴⁴4N.Y. 3d, at 244.

the respondent's criminal history.⁴⁵ Additionally, the respondent's institutional history, particularly any participation in any sex offender treatment program appears to be a very significant factor in deciding whether civil commitment proceedings should be initiated.⁴⁶ It therefore appears that the conviction itself, and the reports, documents, and records of confinement which flow from the criminal prosecution and are entwined in the determination, lends further support for the conclusion that civil commitment is a direct consequence of the conviction for which a defendant must be advised at the time of the plea.

A further complication in resolving this dilemma is the Legislature's contemporaneous enactment of Section 70.08, 130.91 and 130.92 of the Penal Law.⁴⁷

Section 70.08 dramatically increases the punishment for sex offenses as well as predicate sex offenses. Moreover it creates a class of "violent felony sex offenses" where the sex offense is

⁴⁵Section 10.05(4).

⁴⁶Section 10.05(5).

⁴⁷McKinney's (2007)(effective April 12, 2007)

deemed a violent felony offense pursuant to Section 70.02 of the Penal Law.⁴⁸

Section 130.91 of the Penal Law creates the class of “sexually motivated” felonies, defined as being a “specified offense” committed “for the purpose, in whole or in substantial part, of his or her own sexual gratification.”⁴⁹ Subdivision 2 of this section sets forth the various felony offenses which are “specified offenses.” The list is identical to those “designated” felonies set forth in Section 10.03 of the Sex Offender Management and Treatment Act.

Section 130.92 (1) of the Penal Law provides that a person convicted of a “sexually motivated offense” which is a violent felony defined in Section 70.02 of the Penal Law must be sentenced as a violent felony offender. 130.92(2) provides that one who is convicted of a sexually motivated felony shall be deemed to be the same offense level as the specified offense the defendant committed. Subdivision (3) of this statute provides that one who is convicted of a sexually motivated felony must be sentenced pursuant to Section 70.80 of the Penal Law.

Subdivision 2 of Section 70.80 of the Penal Law further provides that in imposing a sentence pursuant to this section the court may consider;

“...in particular ...the defendant’s criminal history, if any, including any history of sex offenses, any mental illness or mental abnormality from which the defendant

⁴⁸Section 70.80(1)(b).

⁴⁹Penal Law Section 130.91(1) (McKinney’s effective April 12, 2007).

may suffer; the defendant's ability or inability to control his sexual behavior; and, if the defendant has difficulty controlling such behavior, the extent to which that difficulty may pose a threat to society."

It is obvious that these considerations mirror those which define a "Dangerous sex offender requiring confinement" set forth in subdivision 10.03(e) of the Civil Commitment Statute.⁵⁰

While such a finding by the sentencing court may not have preclusive effect to the relitigation of this criteria in the civil commitment proceeding, it almost certainly will have a major impact on the determination whether to commence such a proceeding so that it might be considered a direct consequence of the conviction.⁵¹

While the New York courts have not addressed the issue at the time of this writing, a sister state, New Jersey, has. The New Jersey Supreme Court's decision in *People v. Bellamy*,⁵²

⁵⁰*Ibid.*

⁵¹An interesting question is posed where the sentencing court expressly finds that the defendant does not suffer from such a "mental illness or abnormality." Might the respondent then argue in a civil commitment proceeding that the bar to relitigating the conviction upon which it is based extend to this determination by the sentencing court, thereby thwarting the proceeding ?

⁵²178 N.J. 127, 835 A. 2d 1231 (2003)

offers a mixed result in deciding this issue. On the one hand, the Court decided that civil commitment is not a direct consequence of the plea and conviction. On the other hand, it declared that due process and fundamental fairness required that the defendant be advised of the prospect of civil commitment at the time of a plea of guilty. In deciding that civil commitment was not a direct consequence of the plea, the court noted that commitment itself does not flow from the plea, since the evidence might not be sufficient to support the finding of the condition essential for it pursuant to the statute.⁵³ Nevertheless, in deciding that “fundamental fairness” requires that the defendant be informed of the possibility at the time of the plea, the court noted that commitment could extend far beyond the maximum period of the sentence.⁵⁴

Once the New Jersey Supreme Court made its determination in *Bellamy*, it was faced with another difficult issue. How should it be applied ? The Court noted that it had insufficient data to determine the effect of complete retroactivity.⁵⁵ It further recognized that complete

⁵³178 N.J., at 138.

⁵⁴*Id.*

⁵⁵178 N.J. 127, 142.

retroactive effect could “...undermine the validity of a large number of convictions.”⁵⁶ Therefore, the Court decided to give it limited retroactivity and determined it should be applied in only those cases which were still on direct appeal.

In response to the author’s Freedom of Information request, the Department of Correctional Services has advised that on June 23, 2007, shortly after the Act took effect, it had 6040 inmates in custody for offenses under Article 130 of the Penal Law or attempts to commit the same.⁵⁷ Moreover if “designated felonies” are added to this figure, the potential universe of inmate that could be subject to commitment rises to 39,746 should their crimes or related offenses are determined to be sexually motivated under the statute.⁵⁸ Likewise, the Division of Parole, in response to a Freedom of Information request reported that 547 parolees under its supervision for conviction pursuant to Article 130 of the Penal Law and Sections 255.26⁵⁹ and

⁵⁶178 N.J., at 141.

⁵⁷See Appendix A.

⁵⁸*Ibid.*

⁵⁹Insert offense.

Sections 255.27⁶⁰ of the Penal Law⁶¹. It further reported that it had an additional 12,452 persons under its supervision for designated felony offenses or attempts to commit the same.⁶² While certainly not all of these individuals will be eligible for civil commitment, the number will undoubtedly be significant and could result in a large number of prosecutions having to be recommenced, with all the attendant problems that result, such as missing complainants and witnesses, if the pleas have to be vacated. On October 14, 2008 the Division of Criminal Justice Services reported that since the Act came into effect, 1,925 sex offenders had been screened for possible civil commitment and treatment. 49 had been confined to secure psychiatric facilities, 43 willingly and 7 pursuant to court order. 23 cases were tried with the State prevailing in 18.⁶³ Whether this represents a substantial number of those who are potentially eligible is difficult to assess. Given the number of inmates and parolees who have been convicted of designated

⁶⁰Insert offense.

⁶¹See Appendix B.

⁶²*Ibid.*

⁶³New York Law Journal, “Unreliable Statements Excluded From Civil Commitment Trial,” October 14, 2008, p.1, col. 5.

felonies set forth in the Appendices that could be deemed sexually motivated, it seems unlikely.

Equal Protection Issues

As previously discussed, there are a number of different classes of individuals that are eligible for commitment under the Statute. Because of their differing status, different procedures have been devised which govern the proceedings leading to their commitment.

At the beginning of the proceedings, Section 10.06 of the Statute provides for a preliminary hearing before the court to determine whether there is probable cause for the respondent to be held for further proceedings. Section 10.06(j) provides that in the case of a respondent who has been convicted of a sex offense or found not responsible pursuant to Section 40.15 of the Penal Law, the offense shall be deemed established and not be relitigated. However, in the case of a respondent who has been determined to be incompetent pursuant to Article 730 of the Criminal Procedure Law, probable cause may be established by proving that the respondent was indicted for the offense.

Similarly Section 10.07(c) of the Statute, governing the civil commitment trial, provides that the commission of an offense shall not be relitigated where the respondent has been convicted of the offense, or found to be not responsible pursuant to Section 40.15 Of the Penal Law but in the case of a respondent determined to be incompetent pursuant to Article 730 of the Criminal Procedure Law, the Attorney General must prove by clear and convincing evidence that

the respondent engaged in the conduct constituting the offense.

Initially these two provisions might appear to provide greater protection to respondents already under Article 730 orders. In reality, they allow these respondents to be detained and committed civilly based upon a lesser burden of proof, giving rise to equal protection objections. As discussed above, the two classes of respondents who may not relitigate the commission of their offenses have already been the subject of full criminal proceedings in which their offenses have been established by either a plea of guilty or by proof beyond a reasonable doubt. In contrast the class of respondents who are under Article 730 commitment orders have received no prior protection. Article 730 respondents, depending on the stage of the proceedings, may be being detained on the strength of a felony accusatory instrument, or at best, upon the finding of a grand jury that reasonable cause exists to believe that a crime has been committed.⁶⁴ Thus, the Statute allows for this class of respondents to be civilly committed upon a showing of clear and convincing evidence whereas the other two class of respondents have had their culpability established by proof beyond a reasonable doubt.

Impact on the State's Judicial System

In addition to the apparent legal and constitutional flaws in the statutory scheme, the Statute is going to severely impact the resources and the functioning of the State's judicial

⁶⁴Section 190.65(1) of the Criminal Procedure Law (McKinney's(1993).

system. As previously discussed, attempting to civilly commit respondents who were not advised at the time they pled guilty to their offenses could result in a substantial number of convictions being vacated and re-prosecutions having to be commenced. In addition, some counties in the State will have their courts overwhelmed with these proceedings because of the number of correctional institutions located within them.

Section 10.06(a) of the Statute provides that the venue for a civil commitment proceeding shall be in the county where the respondent is located. While the venue might be changed upon motion of the parties for certain specific reasons, the preferred venue will be in the county where the respondent—most likely an inmate—is located. A review of the New York State Department of Correctional services web site discloses that the Department has seventy correctional facilities spread throughout the state. It is no secret that during the last quarter century many of these facilities were located in economically distressed upstate counties. Certain counties have as many as five facilities located within it.⁶⁵ It therefore appears that some of these economically strapped counties will bear a very heavy caseload in handling these matters.

Judicial Treatment

The New York courts were dealing with the issue of civil commitment of sex offenders

⁶⁵Franklin and Dutchess each have five, Erie and Oneida each have four, and Clinton, St. Lawrence, and Westchester each have three.

even before the passage of the Sex Offender Management and Treatment Act. In 2005 the New York State Office of Mental Hygiene instituted proceedings in which certain sex offenders who were nearing completion of their prison terms were evaluated to determine whether they suffered mental conditions which rendered them dangerous to themselves or others which warranted commitment to a state psychiatric facility.⁶⁶ Upon a challenge by the New York State Mental Hygiene Legal Service, the New York Court of Appeals held that the use of Article 9 of the Mental Hygiene Law which governed the commitment of the mentally ill was improper and that the inmates were entitled to the greater protection of Section 402 of the Corrections Law which governed the transfer of mentally ill prisoners to the Department of Mental Hygiene. Unlike Article 9 this latter section required that before a prison superintendent could transfer a mentally ill inmate there must be an examination by two physicians appointed by a court who certify that the inmate is in need of psychiatric care and treatment, notice of the petition must be served upon the inmate who is entitled to a hearing before a judge.⁶⁷

Almost one year later the inmates, who had been transferred to a secure psychiatric facility, brought a second challenge to their confinement.⁶⁸ In *Harkavy II*, the Court of Appeals

⁶⁶*Harkavy v. Consilvio*, 8 N.Y. 3d 645, 648.

⁶⁷*Harkavy v. Consilvio*, 7 N.Y. 3d 607, 612.

⁶⁸*Harkavy v. Consilvio*, 8 N.Y. 3d 645.

noted that the Sex Offender Management and Treatment Act constituting Article 10 of the Mental Hygiene Law had been enacted, and remitted the matter to the trial court where commitment hearings would be conducted pursuant to Article 10.

In April of 2007, the Mental Hygiene Legal Service and an individual subject to the Act, Shawn Short, brought an action against various state officials in United States District Court for the Southern District of New York challenging the constitutionality of certain provisions of the Act.⁶⁹ Plaintiffs sought a temporary restraining order and a preliminary injunction against enforcement of these provisions. The challenged provisions of the Act were MHL Sections 10.06(f) which authorizes detention upon completion of imprisonment but prior to the probable cause hearing without notice or opportunity for review; 10.06(k) which mandates civil detention pending the commitment trial after the probable cause hearing upon the finding that the individual may have a mental abnormality, without a finding of current dangerousness; 10.06(j)(ii) which denies an individual who is indicted, but determined to be incompetent pursuant to Article 730 of the Criminal Procedure Law, the right to contest the commission of the acts constituting the elements of the crime at the probable cause hearing; 10.07(d) which authorizes the commitment of individuals determined to be incompetent pursuant to Article 730

⁶⁹*Mental Hygiene Legal Services and Shawn Short v. Elliott Spitzer, Andrew Cuomo, Michael Hogan, Diana Jones Ritter, and Brian Fischer*, 07 Civ. 2935 (GEL), 2007 U.S. Dist. Lexis 85163.

of the Criminal Procedure Law upon clear and convincing evidence, despite the fact they have not been convicted of a crime; 10.07(c) which authorizes the fact finder at the commitment trial to make a retroactive determination by clear and convincing evidence that certain non-sex crimes were committed with a “sexual motivation;” and 10.05(e) which authorizes certain pre-hearing psychiatric examinations, in the absence of counsel, of individuals subject to the Act.

On November 16, 2007, following oral argument, Judge Gerard E. Lynch granted a preliminary injunction against enforcement of Sections 10.06(j) and 10.07(d) of the Act based upon the likelihood of the Plaintiffs success at trial and granted the state officials motion to dismiss the challenge to Section 10.06(f)(iii) of the Act. All other requests for relief were denied pending the outcome of the trial.

Although these rulings were only a preliminary stage of the litigation, Judge Lynch’s reasoning concerning the constitutionality of the challenged provisions is interesting and worth reviewing.

In denying the Plaintiffs request for injunctive relief concerning Section 10.06(f) which authorizes detention at the conclusion of imprisonment prior to the probable cause hearing without notice or opportunity to review, Judge Lynch noted that, because the Plaintiffs contended it was facially unconstitutional, they bore a heavy burden,. He went on to observe;

“...while plaintiffs have raised serious and legitimate concerns about the potential operation of section 10.06(f), they have not established that they are likely to succeed in establishing facial invalidity of this provision. It is not possible to conclude on the basis of the present record that the statute will necessarily

function in an unconstitutional manner. In the first six months of the statute's operation, the parties agree, securing petitions have only been used twice."

He further declared that as a matter of "equitable discretion" it would be inappropriate to grant injunctive relief due to the newness of the statute and the lack of opportunity for the New York courts to interpret the statute to date.

Turning to Section 10.06(k) of the Act which mandates civil detention pending the commitment trial, after the probable cause hearing, upon the finding that the individual may have a mental abnormality, without a finding of dangerousness, Judge Lynch wrote;

"The Supreme Court has never held that an individual can be detained for a substantial period of time based upon mental incapacity alone. See, e.g. O'Connor, 422 U.S. at 575 ('A finding of "mental illness" alone cannot justify a State's locking up a person against his will and keeping him indefinitely in simple custodial confinement') Those civil commitment statutes that the Supreme Court has upheld require a specific 'finding of dangerousness either to one's self or to others' that 'links that finding to the existence of a "mental abnormality" or "personality disorder" that makes it difficult, if not impossible for the person to control his dangerous behavior' *Crane* 534 U.S. at 410, citing *Hendricks*, 521 U.S. at 357-58. Due process "does not tolerate the involuntary confinement of the nondangerous individual" *Project Release*, 722 F.2d at 972(citations and internal quotation marks omitted)."

The Judge then proceeded to analyze the practical effect of the provision, noting; "In practice the automatic detention provisions operate as a precise tool to determine who is dangerous enough to be committed pending trial, and more as a hammer to coerce individuals to enter into plea arrangements with the State, and thereby accept both designation as a sex offender and intensive ongoing treatment in order to avoid spending what may be more than 60 days in involuntary confinement. A respondent as to whom post-trial detention is not sought will have an overwhelming incentive to agree to an adjudication that he is a sex offender in need of treatment, and to accept continuous community supervision, rather than contest the State's case, in order to avoid a potentially lengthy period of detention

pending trial, even if he believes he may avoid any adverse consequence by going to trial.”

Ultimately he concluded;

“Detention will be warranted in some cases; however it should be triggered, as the Legislature notes, ‘[i]n extreme cases’ and only for “the most dangerous offenders’ *MHL section 10.01(b)*. In contrast *section 10.06(k)* extends automatic detention to all individuals who may be subject to *Article 10*, without a judicial proceeding to determine dangerousness, and with no rational basis for determining whether the particular individual would pose a danger to the community if released. New York may not automatically detain any individual who may be subject to the statute for a significant period of time without proving that there is at least probable cause to believe that he is dangerous.”

Judge Lynch then turned to Section 10.06(j)(iii) of the Act which forbids individuals committed to the Department of Mental Health pursuant to Article 730 of the Criminal Procedure Law after having been found incompetent for trial, from contesting the underlying allegations of a sex crime, based upon the indictment at the probable cause hearing. This claim was predicated upon both Due Process and Equal Protection grounds.

Turning to the due process argument, the Judge noted;

“Article 730 defendants, like other persons subject to the Act, will have the opportunity to contest the State’s case against them at the commitment trial. So long as they are detained pending trial based on an individualized finding of dangerousness and mental abnormality (see discussion above regarding *MHL Section 10.06(k)*) due process requires no more than a probable cause finding with respect to the underlying alleged offense.”

He likewise disposed of the equal protection argument by observing;

“New York has not had the opportunity to try Article 730 defendants in advance of the Article 10 proceedings. Their inability to stand trial, however, should not

prevent Article 730 defendants from being committed pursuant to an otherwise constitutional sexual offender commitment scheme. Persons who are unable to stand trial may still have committed violent sex crimes, be mentally ill, and pose a danger to the community. New York also has a strong interest in detaining and treating such individuals. New York also has a strong interest in preventing the probable cause hearing, intended as an efficient screening mechanism, from turning into the first of two trials. That some persons have been guilty of crimes while others have not does not deny equal protection to either group.”

While this reasoning, at first blush, has a certain amount of surface appeal, it becomes increasingly incongruous when considered in the light of the Court’s next ruling.

The Court next considered, and granted injunctive relief to the Plaintiff’s challenge to Section 10.07(d) of the Act, which allowed civil commitment by clear and convincing evidence of individuals who had been deemed to be incompetent in their criminal proceedings pursuant to Article 730 of the Criminal Procedure Law.

Citing *Mathews v. Eldridge*,⁷⁰ the Judge opined;

“Under the *Mathews v. Eldridge* standard the severity of these consequences, normally resulting from criminal conviction, argues for the imposition of the highest standard of proof. The second *Eldridge* factor, the risk of erroneous adjudication, point in the same direction, as the risk is particularly high in the case of 730 defendants. The reason these defendants have not been put on trial for the acts that form the basis of the criminal charges against them is that they have been found incompetent to participate in their own defense. To put them on trial on the criminal charge would have violated due process. *Cooper*, 517 U.S. at 354 (“A defendant may not be put on trial unless he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding,,,[and] a rational as well as factual understanding of the proceedings against him.’) quoting

⁷⁰424 U.S. 319 (1976)

Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct 788, 4 L.Ed. 2d 826 (1960). Even at a criminal trial, with a standard of proof beyond a reasonable doubt and all the other attendant protections of the criminal process, the risk of an erroneous conviction is too great when the defendant lacks the ability to assist his attorney in defending the case.”

Turning to the class of Article 730 defendants, he noted;

“Every other category of ‘offender’ to whom the law applies has been found guilty of conduct constituting a crime beyond a reasonable doubt, at a criminal trial at which the defendant was fully able to participate in his defense. To reduce the burden of proving guilt for Article 730 defendants perversely heightens the risk of erroneous conviction. The unique circumstances of these defendants, who were adjudicated to have been unable to participate in their own defense, suggest a need for stronger, not reduced, procedural protections against conviction.”

He went on to underscore the importance of an enhanced standard of proof, observing;

“...A weakened standard of proof represents, by definition, the tolerance of a greater likelihood of error. When combined with the inherently greater risk of error implicated in trying a defendant who is unable to defend himself due to incompetence, the risk of erroneous adjudication becomes too great to permit the imposition of the stigma of ‘sex offender’ label and the attendant long-term deprivation of liberty.”

With that said, Judge Lynch concluded;

“...Without question, the government interest involved here is of the highest order, involving the protection of the public safety against serious imposition. It is precisely that interest that permits the State, in effect, to put the incompetent on trial at all: given the importance of protecting potential victims against repeat sexual offender, the difficulties that prevent a criminal trial of the incompetent cannot preclude the State from taking preventive steps to provide necessary treatment. But the requirement of proof beyond a reasonable doubt that the respondent is an offender is not an obstacle to the statutory scheme. Indeed, a finding of criminal conduct beyond a reasonable doubt is a prerequisite to ‘civil management’ proceedings for every other category of person subject to the scheme other than Article 730 defendants. There is no plausible reason to suggest

that the governmental interest supporting Article 10 commitments would be undermined if the same requirement is imposed with respect to the category of defendants least able to defend themselves.

Due Process therefore requires that when an individual is subject to the stigma of being labeled a ‘sexual offender’ and of a finding that he violated a criminal law triggering the possibility of institutional confinement, proof that he in fact committed the acts that form the basis for being labeled an ‘offender’ must be made beyond a reasonable doubt. Plaintiffs have demonstrated a likelihood that of success in prevailing on their claim that the ‘clear and convincing’ burden of proof does not afford the protections of that due process requires in determining that Article 730 defendants are in fact ‘offenders’ subject to the Act.”

Implicit in Judge Lynch’s analysis of those sections of the Act dealing with Article 730 defendants is the apparent suggestion that there is a lesser standard of competency required for a civil commitment trial rather than a criminal trial otherwise an Article 730 defendant would be equally incompetent for a trial pursuant to this Act. In language construing Section 10.07(c) later in the decision that seems to illuminate this view, he wrote;

“Because of the respondent’s incompetence, a lawyer representing the respondent would have little or no understanding of her client’s version of the events, and thus would be enormously hampered in investigating the facts, selecting a defense, and challenging what may be a fundamentally mistaken understanding of the case.”

Yet nowhere is any support found for this apparent anomaly. As previously noted, Section 730.10(1) defines an “Incapacitated person” as one “...who as a result of mental disease or defect lack the capacity to understand the proceedings against him or assist in his own defense.” In elevating the burden of proof from “clear and convincing” evidence to “proof

beyond a reasonable doubt” in order to afford the defendant greater protection, the Judge appears to have transformed the civil commitment trial concerning the sexual acts contained in the indictment into the identical proceeding for which the defendant has been determined to be unable to understand or assist in. However laudatory the Judge’s intentions are in affording this greater protection, we are still left with the question posed earlier; how could the defendant here be competent to proceed ?⁷¹

Turning to the issue presented in the Plaintiff’s challenge to Section 10.07 (c), which authorizes the factfinder at the civil commitment trial to make a retroactive determination that certain non-sex crimes were “sexually motivated” by clear and convincing evidence, the Judge observed;

“The same constitutional difficulty that undermines *Section 10.07(d)* affects *Section 10.07(c)*, albeit in a different way that presents a closer question.”

Resolving this claim against the Plaintiff’s Judge Lynch held;

“In this regard, however, individuals covered by *MHL Section 10.07(c)* differ importantly from Article 730 defendants covered by *MHL Section 10.07(d)*. The persons covered by *Section 10.07(c)* have already been found, beyond a reasonable doubt, to have committed a serious felony, while incompetent defendants covered by *Section 10.07(d)*, although accused of crimes, have never been tried or found guilty, and continue to be presumed innocent of any crime. To designate the latter ‘sex offenders’ requires that persons who have never been convicted of a crime nevertheless be declared functionally guilty of serious felonies- - which in turn will subject them to a scheme of extended detention or

⁷¹*Ante*, at p.26.

other supervision not imposed on any other person who has not been found beyond a reasonable doubt to have committed the conduct constituting such a felony. The defendants covered by *Section 10.07(c)*, in contrast have already been formally condemned as felons based on proof beyond a reasonable doubt. The further determination that their crimes had a sexual motivation is surely a serious matter that must be weighed in the *Elderidge* balance. But the interest in question is not quite as strong as the Article 730 defendants in avoiding a declaration of criminal guilt.”

The Judge went on to observe;

“...the narrowness of the issue presented reduces the chance of erroneous condemnation. Since the Article 730 defendants have never been found guilty of any crime, all of the elements of the underlying offense would be in play in an Article 10 trial. The respondent would have the full panoply of criminal defenses, including mistaken identity, alibi, and challenges to the witnesses’ or victim’s version of events available. Because of the respondent’s incompetence, a lawyer representing the respondent would have little or no understanding of her client’s version of events, and thus would be enormously hampered in investigating the facts, selecting a defense, and challenging what may be fundamentally mistaken understanding of the case. In the case of a defendant who has been found guilty of a non-sexual serious felony, however, there is no chance of error about the perpetrator’s identity, or about whether the basic underlying crime was in fact committed; those facts have already been found by a jury beyond a reasonable doubt. In many cases, the sexual aspect of the case may be apparent, or, conversely, clearly absent. As compared with the cases covered by *Section 10.07(d)*, there will thus be fewer *Section 10.07(c)* cases in which the burden of proof will likely make a difference, and in those, the respondent will be able to mount a defense. The extent to which the reduction of the burden of proof increases the risk of error is thus less in *Section 10.07(c)* than in the case of *Section 10.07(d)*.

Judge Lynch further noted that *In re Winship*,⁷² which imported the beyond a reasonable

⁷²397 U.S. 358 (1970).

doubt standard into juvenile delinquency proceeding, was the only case in which the U.S. Supreme Court mandated such a standard other than at a criminal trial. He went on to observe that the present legislative scheme was more analogous to the civil commitment of the mentally ill by clear and convincing evidence sanctioned by the Supreme Court in *Addington v. Texas*⁷³. He denied injunctive relief pending the development of a fuller record at trial.

Turning to the claim that plaintiffs should be entitled to counsel during pre-hearing psychiatric examinations pursuant to Section 10.05 (e), he noted that the U.S. Second Circuit court of Appeals in *Project Release*⁷⁴ declined to extend that right to Article 9⁷⁵ civil commitment proceedings. After recounting that the Act permitted the respondent in a civil commitment proceeding to request a psychiatric examination, he observed that;

⁷³ 441 U.S. 418 (1979).

⁷⁴ 722 F2d 960 (1983).

⁷⁵ Mental Hygiene Law (McKinney's 2006).

“Though there are differences between the two civil commitment provisions⁷⁶ it is unlikely that these differences are sufficiently significant to require a different constitutional mandate.”

Moreover, after noting that a respondent could obtain a psychiatric examination after counsel had entered the proceedings, he declared;

“Practically speaking, the most effective counter to an improperly-conducted psychiatric examination is not the presence of counsel, but a more professional examination by another psychiatrist. Based on both the statutory structure as well as the presence of cases from this circuit suggesting otherwise, plaintiffs are unlikely to demonstrate a likelihood of success on the merits of this constitutional claim.”

At the time of this writing, the New York Court of Appeals has not addressed the constitutionality of any of the provisions of Article 10. Subsequent to the commencement of the litigation in *Matter of Mental Hygiene Legal Services et ano. V. Spitzer et al.*, the Court did comment briefly on the Act in *Harkavy II*. In a footnote to its opinion, Judge Graffeo noted;

⁷⁶ He was referring to Article 9 and Article 10 of the Mental Hygiene Law.

“We express no view on the propriety of the standards or procedures adopted in the new legislation. Petitioners are free to raise any objections they deem appropriate upon remittal.”⁷⁷

⁷⁷8 N.Y. 3d, at 652 fn.3.

As the various trial courts of New York have been called upon to effectuate the provisions of the Article 10, the issue which has generated the most discussion has been what is the definition of “probable cause” at the preliminary hearing stage authorized by Section 10.06(g) of the Act. In State v. Junco,⁷⁸ the Court , after noting that the Legislature failed to provide such a definition,⁷⁹ found that the threshold for determining probable cause was not very high and probable cause existed even where the testimony was weak. Other courts have found that probable cause should be the same standard as that used in the criminal arena i.e.

7816 Misc. 3d 327 [Supreme Court Washington County(May 3, 2007)].

7916 Misc. 3d at 333, Fn. 1.

“merely information sufficient to support a reasonable belief that an offense has been committed or that evidence of a crime may be found in a certain place...(and the) legal conclusion is to be made after considering all of the facts and circumstances together.”⁸⁰

Other issues the trial courts have been called upon to address include whether a

⁸⁰*State v. J.T.* __ Misc. 3d __, 851 N.Y.S. 2d 74 {Supreme Court New York County (November 5, 2007)} see also; *State v. S.S.* __ Misc. 3d __, 851 N.Y.S. 2d 73, [Supreme Court Schuyler County (November 6, 2007)]; *State v. Pedraza*, 18 Misc. 3d 261 [Supreme Court Suffolk County (November 9, 2007)] rejecting a “clear and convincing evidence” test.; *State v. K.A.* __ Misc 3d __, 856 N.Y. S. 2d 503 [Supreme Court, New York County (January 16, 2008)]; and *State v. J.J. Jr.*, 19 Misc. 3d 196 {Supreme Court, Nassau County (January 31, 2008)};

respondent may be subjected to successive examinations. In *State v. C.B.*,⁸¹ the respondent objected to being re-examined because he had been one of the inmates that were part of the class covered by both *Harkavy* cases and had previously examined for an Article 9 proceeding. The Court rejected the claim, holding that multiple examinations were contemplated by Article 10 and that there was no "good cause" requirement in Section 10.06(d) as urged by the respondent.

In *State v. J.J. Jr.*,⁸² the trial court departed from the preliminary injunction issued by the Court in *Mental Hygiene Legal Services v. Spitzer*⁸³ which enjoined enforcement of the pre-trial detention provisions of Section 10.06(k) of the Act absent a finding of dangerousness and ordered the respondent confined to the Nassau Correctional Center. The Judge found that the testimony of the examining expert establishing probable cause that the respondent needed management and treatment implicitly determined that the respondent was dangerous and should be confined pending trial. In directing that the respondent be confined to the Correctional Center, rather than a secure treatment facility, as contemplated in Section 10.06(k), the Judge held that it

8118 Misc. 3d 1136(A), [Supreme Court Bronx County (February 22, 2008)].

8219 Misc. 3d 196 [Supreme Court Nassau County (January 31, 2008)]

83*Ante* at p.

was authorized by Section 500-a(1)(f) of the Corrections Law.⁸⁴

In *State v. Soto*,⁸⁵ the trial judge determined that the Attorney general should be allowed to attend and videotape a psychiatric examination of the respondent conducted pursuant to Section 10.06(d) and (e) of the Act. The court noted that the statute was silent on both the issues but extrapolating from the Court of Appeals holding in *Matter of Lee v. County Court of Erie County*,⁸⁶ which authorized the prosecution to conduct a psychiatric examination of a defendant who interposes a defense of mental disease or defect. The decision is noteworthy because illustrates the varying positions of other trial courts trying to fill in the blanks on this issue. It notes that one court permitted the videotaping but denied the Attorney General's right to attend as unnecessary.⁸⁷ Another permitted the videotaping but barred the Attorney General the right to attend because it would be too intrusive.⁸⁸

At least one court has held that statements made to an examining psychiatrist during the

⁸⁴ *McKinney's* 2003.

⁸⁵ 20 Misc. 3d 679 [Supreme Court Bronx County (May 1, 2008)].

⁸⁶ 27 N.Y. 2d 432 (1971).

⁸⁷ *State v. Hall*, 17 Misc. 3d 1124(A), (Supreme Court Dutchess County)

⁸⁸ *State v. Pedraza*, Ind. #24026/2007 [Supreme Court Suffolk County (January 28, 2008)].

case review process do not violate the Sixth Amendment right to counsel.⁸⁹ The court noted that the Act only authorized the appointment of counsel after a petition had been filed and expressly precluded such appointment at any earlier time.⁹⁰

The legislative scheme has spawned case law on ancillary issues as well. Since one of the seminal documents relied upon by the case management team, conducting its initial review, is the Pre-Sentence investigation required at the time of sentencing pursuant to Section 390.10 of the Criminal Procedure Law,⁹¹ counsel for defendants, who appear to be potentially eligible for civil commitment at the end of their sentences, are requesting hearings to challenge the accuracy of information contained in the pre-sentence report.⁹² At least one trial court has found that hearsay information lacking corroboration contained in the pre-sentence report is insufficient and excluded it from the civil commitment trial.⁹³

⁸⁹*State v. Davis*, 17 Misc. 3d 433 [Supreme Court Bronx County (September 18, 2007)].

⁹⁰Mental Hygiene Law Sections 10.08 and 10.06(c).

⁹¹See, *People v. Pedraza*, 18 Misc 3d 261, *supra*; and Mental Hygiene Law Section 10.03(b) and (5)

⁹²*People v. Irwin*, 19 Misc 3d 1118(A), [Onondaga County Court (April 1, 2008)].

⁹³“Unreliable Statements Excluded From Civil Commitment Trial”, New York Law Journal, Tuesday October 14, 2008, p1, col. 5.

Finally, it should be noted that the trial courts are engaged in determining whether prior convictions for felonies other than designated sex offenses⁹⁴ are “sexually motivated.”⁹⁵

Conclusion

While the Governor and the Legislature trumpeted the passage of this legislation at the time of its enactment, it is clear that neither gave careful consideration to the issues it would present or its impact on the State’s judicial system in terms of both resources and validity of the underlying convictions that could be affected by its implementation. It appears that both parties wanted to pass a civil commitment statute in the worst way. And they did.

⁹⁴See Article 130 of the Penal Law (*McKinney’s* 2004)

⁹⁵See, *State v. Davis*, 18 Misc. 3d 1135(A), [Supreme Court Queens County (February 22,

Appendix A

2008)].

UNDERCUSTODY AS OF JUNE 23, 2007

MOST SERIOUS CRIME	COMPLETED	ATTEMPTS
MURDER 1ST	504	0
MURDER 2ND	8,598	0
AGGRAVATED MURDER	3	0
MANSLAUGHTER 1ST	2,488	0
MANSLAUGHTER 2ND	404	0
RAPE 1ST	1,872	335
RAPE 2ND	409	47
RAPE 3RD	288	0
ROBBERY 1ST	5,851	0
ROBBERY 2ND	3,510	0
ROBBERY 3RD	1,420	0
ASSAULT 1ST B FELONY	1,717	0
ASSAULT 2ND	1,967	0
GANG ASSAULT 1ST	86	0
GANG ASSAULT 2ND	58	0
BURGLARY 1ST	986	0
BURGLARY 2ND	3,302	0
BURGLARY 3RD	2,141	0
ARSON 1ST	39	0
ARSON 2ND	165	0
PROMO PROSTI 1ST	2	0
PROMO PROSTI 2ND	25	0
SODOMY 1ST	960	145
SODOMY 2ND	99	4
SODOMY 3RD	24	0
SEXUAL ABUSE 1ST	898	121
AG SEX ABUSE	2	0
AG SEX ABUSE 1ST	21	0
AG SEX ABUSE 2ND	29	0
AG SEX ABUSE 3RD	8	0
SEX CONDUCT CHILD 1ST	293	0
SEX CONDUCT CHILD 2ND	83	0
PERSIST SEXUAL ABUSE	7	0
AGG SEX ABUSE 4TH	1	0
CRIM SEX ACT 1ST	226	0
CRIM SEX ACT 2ND	75	0
CRIM SEX ACT 3RD	36	0
PREDATORY SEXUAL ASLT	1	0
PRED SEXUAL ASLT/CHILD	1	0
DIS INDEC MAT MIN 1ST	9	0
USE CHILD SEX PERF.	35	0
PROMO OBSCENE SEX PERF CHILD	8	0
PROM SEX PERF CHILD	17	0
KIDNAPPING 1ST	171	0
KIDNAPPING 2ND	245	0
JO-RAPE 1ST	6	0
JO-SODOMY 1ST	4	0
TOTAL	39,094	652

Appendix B



STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF PAROLE
97 CENTRAL AVENUE
ALBANY, NEW YORK 12206

ELIOT SPITZER
GOVERNOR

Received
Chambers
Joseph E. Fahey

JUL 05 '07

County Court
Onondaga County

GEORGE B. ALEXANDER
CHAIRMAN

July 2, 2007

The Hon. Joseph E. Fahey
County Court Chambers, Suite 360
Criminal Courts Building
505 S. State Street
Syracuse, NY 13202

RE: FOIL Request.

Dear Judge Fahey:

This is in response to your letter dated June 14, 2007 in which you requested statistics.

We looked at the number of parolees on either Intensive or Regular supervision status as of May 31, 2007.

There were 547 parolees with convictions for any violation of Article 130 of the Penal Law and sections 255.26 and 255.27 of the Penal Law, including attempts to commit these offenses.

Our data does not allow us to determine convictions for Conspiracy to commit individual offenses, and therefore these numbers do not reflect those cases.

There were 12,452 with convictions for committing or attempting to commit sections 120.05, 120.10, 120.06, 120.07, 120.60, 125.15, 125.20, 125.25, 125.26, 125.27, 135.20, 135.25, 140.20, 140.25, 150.15, 150.20, 160.06, 160.10, 160.15, 230.30, 230.32, 230.33, 235.22, 263.05, 263.10, 263.15 of the Penal Law.

Eighty-six parolees had convictions for crimes in both categories.

Hopefully this information will assist you in this matter.

Sincerely,

Mark Johnson
Director of Media Relations and Public Affairs

