11-1539 - CV

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MENTAL HYGIENE LEGAL SERVICES,

Plaintiff-Appellee,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, ANDREW CUOMO, in his official capacity as Governor of the State of New York, MICHAEL HOGAN, in his official capacity as Commissioner of the New York State Office of Mental Health, and BRIAN FISCHER, in his official capacity as Commissioner of the New York State Department of Correctional Services, COURTNEY BURKE, in her official capacity as Commissioner of the New York State Office of Developmental Disabilities,

Defendants-Appellants,

ELIOT SPITZER, in his official capacity as Governor of the State of New York, DIANA JONES RITTER, in her official capacity as Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities, MAHMOUD A. MAMDANI, ATOOSA P. MAMDANI, SHAWN SHORT, DAVID A. PATERSON,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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CONSENT OF THE PARTIES

All parties have consented to the filing of this *amicus curiae* brief by the Association of the Bar of the City of New York.

The Association of the Bar of the City of New York respectfully submits this brief *amicus curiae* in support of the district court's judgment in *M.H.L.S. v. Cuomo*, 785 F. Supp. 2d. 205 (S.D.N.Y.), and in support of Appellee's challenge to the Sex Offender Management and Treatment Act, ch. 7, 2007 N.Y. Laws 107.

INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York was founded in 1870 and has been dedicated since that date to maintaining the highest ethical standards of the profession, promoting reform of the law, and providing service to the profession and the public. From the 1980s onward, the Association has focused on access to justice initiatives to expand representation for vulnerable populations. With its nearly 23,000 members, the Association is among the nation's oldest and largest bar associations.

The Sex Offender Management and Treatment Act of 2007 ("SOMTA"), requires involuntary commitment without an individualized judicial assessment of dangerousness and without permitting less restrictive alternatives.

Although a primary concern addressed by the parties and other *amici* is whether SOMTA comports with due process in requiring pretrial detention,[1] this

[1] Other briefs also address the District Court's rulings finding M.H.L. § 10.07(c) and M.H.L. § 10.07(d) unconstitutional. We agree with those rulings and this brief does not repeat those arguments.

brief focuses on the impact of pretrial detention on the integrity of the judicial system and the accuracy of outcomes at trial. Prosecutors, judges, defense attorneys, and the public all share an interest in ensuring that individuals receive a full and fair adjudication on the unique facts of their case. Unnecessary detention undermines the accuracy and integrity of the trial process.

The Criminal Law Committee and the Sex and Law Committee of the Association have been continuously monitoring the development of SOMTA. On January 19, 2006 and March 13, 2007, the Association issued statements, urging legislators drafting SOMTA to consider the due process rights, physical and mental health needs and right to counsel of indigent sex offenders. See attached, Appendix A. The Association now submits this brief, as a friend of the Court, in support of Appellee and the March 29, 2011 Decision by the District Court striking down sections 10.06(k), 10.07(c), and 10.07(d) of SOMTA as unconstitutional.

PRELIMINARY STATEMENT

The Sex Offender Management and Treatment Act creates not just a risk of unnecessary deprivation of liberty, but the certainty of that result. More than 40 percent of individuals subject to mandatory pretrial confinement under the Act are released upon disposition of their cases.

The Act requires a judge to confine a respondent to a secure treatment facility upon a finding that "there is probable cause to believe that the respondent is a sex offender requiring civil management." M.H.L. § 10.06(k). The statute precludes a court from releasing a respondent pending trial – even when less restrictive conditions could allow the respondent to be at liberty pending adjudication. *See State v. Enrique T.*, 929 N.Y.S.2d 376, 380 (Sup. Ct. Bronx County 2011). In enjoining § 10.06(k) as unconstitutional, Judge Deborah Batts found that the section "provides for the automatic detention of all individuals subject to Article 10, without a judicial proceeding to determine dangerousness." *M.H.L.S. v. Cuomo*, 785 F. Supp. 2d. 205, 226 (S.D.N.Y. 2011). Such automatic detention is required even when the Attorney General seeks only post-trial Strict and Intensive Supervision and Treatment ("SIST") in the community. *M.H.L.S. v. Spitzer*, 2007 WL 4115936 at *29 (S.D.N.Y. Nov. 16, 2007) (unreported decision).

Individualized determination of dangerousness is the touchstone of both preventive pretrial detention and civil commitment. *United States v. Salerno*, 481 U.S. 739, 748-49 (1987); *Addington v. Texas*, 441 U.S. 418, 423 (1979). Such determination is not only important to the individual whose liberty is at stake, but also affects the integrity of the judicial process. Pretrial incarceration deprives the fact-finder of a full and accurate factual record, undermines respondents' mental well-being and demeanor, interferes with access to counsel, and creates enormous coercive pressure to accept an incorrect designation as a "sex offender requiring civil management"[2] and community supervision in order to avoid prolonged pretrial detention in secure treatment facilities.

Taken together, these factors interfere with the accuracy and integrity of the judicial system and create a significant likelihood of erroneous sex offender designations.

[2] M.H.L. § 10.03(q) (defining term as "a detained sex offender who suffers from a mental abnormality").

ARGUMENT

I. SOMTA Creates a Certainty of Unnecessary Pretrial Detention.

The record over the last four years demonstrates that a substantial number of SOMTA respondents are subject to prolonged unnecessary pretrial detention under § 10.06(k). As of October 31, 2010, *more than 40 percent* of individuals referred for civil management under SOMTA (106 of 250) were adjudicated and released post-disposition, either under Strict and Intensive Supervision and Treatment ("SIST"), or because they were found not to suffer from a mental abnormality. 2010 Annual Report on the Implementation of Mental Hygiene Law Article 10: Sex Offender Management and Treatment Act of 2007, New York State Office of Mental Health, July 2011, at 3 ("2010 SOMTA Annual Report").[3] Nonetheless these individuals were subject to mandatory pretrial detention under §10.06(k).

Although the statute provides that the civil sex offender commitment trial should take place within sixty days of the probable cause hearing,[4] pretrial detention typically averages "over one year to disposition." 2010 SOMTA Annual Report at 11. In 2009, fewer than 20 percent of cases were resolved within the sixty days provided by statute, fewer than 60 percent within one year, and at the

[3] An additional 93 respondents were being held pretrial under § 10.06(k). 2010 SOMTA Annual Report at 11.

[4] M.H.L. § 10.07(a).

two-year mark, more than 20 percent of cases were still pending. 2009 Annual Report on the Implementation of Mental Hygiene Law Article 10: Sex Offender Management and Treatment Act of 2007, New York State Office of Mental Health, Feb. 2010, at 13 ("2009 SOMTA Annual Report"). Because a substantial proportion of respondents consent to civil management which presumably leads to prompter dispositions,[5] it is likely that those who do opt for trials are among the individuals with the longest periods of pretrial detention.[6]

Although four of ten SOMTA respondents are released after final disposition, SOMTA requires a judge to commit a respondent to a secure treatment facility upon a finding that "there is probable cause to believe that the respondent is a sex offender requiring civil management." M.H.L. § 10.06(k). Respondents in need of civil management include both those who require confinement and those who require only SIST. M.H.L. § 10.06(q). In enjoining § 10.06(k) as unconstitutional, Judge Deborah Batts found that the section "provides for the automatic detention of all individuals subject to Article 10, without a judicial

[5] Nearly half of all SOMTA respondents whose cases have reached final disposition consented to sex offender designation and confinement or SIST. John Caher, *Few Sex Offenders Are Choosing Trial Before Confinement*, N.Y.L.J., Aug. 8, 2011.

[6] Undoubtedly, some part of this delay is at the request of defense counsel because of the challenge of preparing for a case when the client is incarcerated. Where the detention is unnecessary, this is not a point that excuses pretrial detention, but one that highlights the manner in which it undermines the integrity of the judicial process. *See infra*, Point II.B.

proceeding to determine dangerousness." *M.H.L.S. v. Cuomo*, 785 F.Supp.2d.205, 226 (S.D.N.Y. Mar. 29, 2011).

Such automatic detention is required even when the Attorney General seeks only post-trial strict and intensive supervision in the community. *State v. Enrique T.*, 929 N.Y.S.2d 376, 380 (Sup. Ct. Bronx County, Aug. 4, 2011); *M.H.L.S. v. Spitzer*, 2007 WL 4115936 at *14 (S.D.N.Y. Nov. 16, 2007) (unreported decision). As Judge Lynch observed:

> [B]y mandatory operation of the statute, [the intervenor will] be deprived of more liberty *before* he is adjudicated in need of treatment, based on a mere showing of probable cause to believe treatment is required, than New York seeks to impose *after* he is shown by clear and convincing evidence to need treatment. This is perverse, and at oral argument the State was unable to give any rational explanation of how this furthers any government interest.

M.H.L.S. v. Spitzer, 2007 WL 4115936 at *14 (emphasis in the original).

The large proportion of pretrial detainees for whom civil confinement is found to be unnecessary reflects the breadth of SOMTA's coverage. SOMTA covers sex offenses that require no violence and, in some instances, do not even involve contact. Assoc. of the Bar of the City of New York, *Statement on New York Sex Offender Management and Treatment Act* at 2 (March 13, 2007) (noting that a consensual sexual relation between a 22-year-old and a 16-year-old, and the non-violent offense of "disseminating indecent materials to minors" would be sex

offenses under SOMTA). When SOMTA was passed, the Association noted that dangerousness and recidivism were not required, stating that, "[o]ne can only hope that mental health officials, and the Attorney General, will use their wide discretion wisely and sparingly, applying the law only to the worst, clear-cut cases of 'dangerous mental-abnormality.'" *Id.*

Since the passage of SOMTA, however, the profile of those referred for civil management does not show such sparing application of the statute. The average number of sexual convictions (misdemeanors or felonies) of those recommended for civil management was 2.4. 2009 SOMTA Annual Report at 3. A substantial percentage of individuals recommended for civil management had a single felony (23.8%), a single sexual conviction (23.8%), less than three years in prison (42.9%), or only one prison sentence (36.5%). *Id.* at 10. Despite the lack of substantial records of recidivism, sex offenses, or imprisonment, § 10.06(k) mandates commitment to a secure treatment facility with no individualized judicial determination that less restrictive conditions of release cannot safeguard the community.

Thus, SOMTA creates not just a risk of erroneous confinement decisions, but the certainty that a significant proportion of respondents will be unnecessarily confined.

II. Unnecessary Pretrial Detention Undermines the Accuracy and Integrity of the Judicial System.

In the typical criminal trial, pretrial release is a major predictor of trial outcomes. *See, e.g.* U.S. Dep't of Justice, Bureau of Justice Statistics Bull., *Felony Defendants in Large Urban Counties*, 2002, Table 24 at 24 (Feb. 2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc02.pdf (noting that released defendants were convicted in 60 percent of cases, and detained defendants in 81 percent of cases). As early as the 1950s, research has focused on the effect of pretrial detention on the fairness of trials. *See* Charles E. Ares et al, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U. L. Rev. 67 (1963); Caleb Foote, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693 (1958). Although pretrial detention generally correlates with severity of charges, prior record, and other factors that may lead to worse outcomes, regression analysis has demonstrated an independent effect on both the likelihood of conviction and the length of sentence. *See, e.g.,* Mary T. Phillips, *Pretrial Detention and Case Outcomes, Part 2: Felony Cases*, New York City Criminal Justice Agency (March 2008); *see also* Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. Rev. 641 (1964) (analyzing the adverse effect of pretrial detention on sentencing). In commenting on this

phenomenon, courts and researchers note that pretrial incarceration impedes the ability for the defendant to assist in developing evidence, adversely affects the demeanor and morale of defendants, and interferes with access to counsel. *See United States v. Gallo*, 653 F. Supp. 320, 337 (E.D.N.Y. 1986); *Campbell v. McGruder*, 580 F.2d 521, 531-32 (D.C. Cir. 1978). Most importantly, pretrial detention undermines the accuracy of fact-finding. *See* Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 Am. Crim. L. Rev. 1123, 1130-31 (2005).

Pretrial release is particularly important in the SOMTA context because the central factual inquiry at a SOMTA hearing is whether the respondent can control his behavior in the community at the time of adjudication. Thus where a judge determines that pretrial detention is unnecessary, each day in the community provides relevant information for the SOMTA trial. By contrast, in a criminal trial, the fact finder is primarily concerned with whether a crime was committed and the harm caused by that crime – both of which focus on past, rather than present and future, conduct.

Finally, in cases where the Attorney General seeks only SIST, prolonged mandatory pretrial detention may coerce respondents who are not "sex offenders

requiring civil management" to consent to that designation to obtain immediate release, despite the stigma of the designation and the onerous nature of SIST.

A. Unnecessary Pretrial Incarceration Deprives the Fact-Finder of the Best Evidence on Factual Issues in SOMTA Trials.

The Supreme Court has recognized that the "inability of a defendant to prepare his cases skews the fairness of the entire system." *Barker v. Wingo*, 407 U.S. 514, 532 (1972). By contrast, pretrial release "permits the unhampered preparation of a defense . . . ." *Stack v. Boyle* 342 U.S. 1, 4 (1951).

Where access to relevant factual information is enhanced by a defendant's release, release under appropriate conditions is favored. *See United States v. Reese*, 463 F.2d 830 (D.C. Cir. 1972) (reversing a conviction for failure to grant temporary pretrial release for a defendant to locate witnesses in a murder case). As the Court recognized in *Reese*, release serves an important function in terms of the fairness and *accuracy* of the system:

> There has been increasing awareness of the importance, in fairness terms, of assuring the ability of a defendant to elicit and marshal evidence exculpating him. The adversary system cannot serve as an instrument for truth unless there is some reasonable provision to assure presentation of the defendant's case.

Reese, 463 F.2d at 833. Release under supervision for SOMTA enhances the ability of respondents to marshal relevant evidence for trial.

As a general rule, there is only a single factual question presented in a SOMTA trial conducted to determine whether an individual is a "sex offender requiring civil management."[7] That question is whether a respondent suffers from a mental abnormality. *See* M.H.L. § 10.03(i). Specifically, the jury or judge must determine whether a respondent is "predispose[d] [ ] to the commission of conduct constituting a sexual offense and that results in that person having serious difficulty in controlling such conduct." *Id.*

Because the focus of a SOMTA trial is on predicting a respondent's ability to exercise control and not reoffend, pretrial detention in the SOMTA context compromises the integrity of the judicial system more significantly than pretrial detention in standard criminal cases, where the facts to be determined are in the past. In the SOMTA context, the very best and most relevant evidence that can be offered on the issue of whether a respondent suffers from an uncontrollable predisposition to commit sex offenses is evidence about how he conducts himself at present, in the community. Under SOMTA's pretrial detention provisions, however, the jury or judge is deprived of this evidence even when pretrial release conditions could permit release and supervision in the community.

[7] Except in rare cases, the criminal record will establish that an individual has been convicted of an eligible sex offense. *See* M.H.L. § 10.03(p).

It must first be noted that while SOMTA applies to "detained sex offenders,"[8] most SOMTA respondents become eligible for release from corrections before a probable cause hearing.[9] For individuals who would otherwise have been released, release is typically delayed until the probable cause hearing. M.H.L. § 10.06(a),(g),(h). Thereafter, 99 percent are subject to mandatory commitment pursuant to Section 10.06(k).[10] For these individuals, the last relevant information about their ability to exercise self-control in the community is their pre-incarceratory behavior. This information may be years out of date,[11] and may reflect the impact of substance abuse, untreated mental illness, or a myriad of other factors that can be avoided by pretrial supervision. Nor will the pre-incarceration conduct reflect the benefits of treatment and rehabilitation services received during incarceration.

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[8] M.H.L. § 10.03.

[9] The Case Review Team ("CRT") typically refers individuals to the Attorney General's Office less than 30 days prior to their scheduled release. 2009 SOMTA Annual Report at 10. The Attorney General then files a petition which detains the respondent for up to 30 days or up to 72 hours past his release date for a probable cause hearing. M.H.L. § 10.06(h). Most respondents will therefore be eligible for release by the time the probable cause hearing is held.

[10] Probable cause was found in 410 of 413 probable cause hearings under § 10.06(k). A Report on the 2007 Law That Established Civil Management for Sex Offenders in New York State, at 20, (April 13, 2011) (annexed to State's Brief).

[11] On average, respondents served about six years on a SOMTA conviction with the Department of Corrections prior to referral for civil management under SOMTA. 2009 SOMTA Annual Report at 10. About 57 percent served at least three years prior to the referral. *Id.*

If individuals deemed by a judge not to require confinement were released pretrial under conditions of supervised release, the conduct of respondents in the community would demonstrate whether they indeed lack volitional control or not. Conditions of supervision could include tracking, treatment, and reporting requirements that assure the control of the supervising authority while permitting the respondents to demonstrate their appropriateness for release to the community. Respondents could show not only the ability to refrain from unlawful conduct, but also affirmative steps to continue treatment, obtain employment, and be active participants in their communities, which would demonstrate that civil management is not needed. On the other hand, a respondent who might seem law-abiding under conditions of confinement could demonstrate a lack of volitional control by violating a judge's conditions of release, supporting the need for long-term civil management. Although there is always some risk that individuals may reoffend, judges are accustomed to making such determinations and could tailor pretrial release conditions to minimize such risks.[12] The alternative is to make trial and post-trial determinations about the risk of re-offense with little relevant evidence on the conduct of the respondent when not in secure confinement.

[12] There is strong evidence that the marginal risk of reoffense is low. Of those eligible for civil management who were reviewed and then released, over 97% did not reoffend sexually in the two years following release, and less than half of one percent committed serious offenses. 2009 SOMTA Annual Report, at 12.

OMH has itself recognized the value of supervised release as a means of making more accurate recommendations about the need for civil management. In 2009, OMH assigned "increased weight [in the] OMH review protocols . . . [to] the protective factor of parole supervision." 2009 SOMTA Annual Report at 6. Thus, where an offender scored 7 or above on the STATIC 99, he would be referred for screening for civil management except if "the offender had at least one year of parole supervision remaining on his term, and had not, in the past exhibited improper sexual behavior while under probation or parole supervision." *Id.* Upon completion of parole, OMH can assess the need for civil commitment. *Id.* Similarly, the months between probable cause hearing and trial can provide valuable information about the necessity of civil management if the judge were permitted to release the respondent under pretrial supervision.

In the criminal context, as practicing attorneys, Association members have long counseled and assisted clients to get treatment, jobs, and stable housing in order to demonstrate that incarceration is not necessary. Prosecutors have taken into consideration pretrial conduct in deciding appropriate charges and making sentencing recommendations to fulfill their obligation to see that justice is done. Mandatory pretrial incarceration deprives all parties of relevant factual

information on the respondent's ability to live under supervision in the community.

B. Pretrial Detention in Secure Treatment Facilities Significantly Impairs Access to Counsel, Thus Undermining the Adversarial System.

Courts have long recognized that pretrial detention in the criminal context has a strongly negative effect on the development of a detained client's ability to work with counsel. *Gallo*, 653 F. Supp. at 337. Even when individuals are detained in local jails in close proximity to their lawyers, their ability to meet with counsel, develop an attorney-client relationship, and assist in the preparation of a defense is substantially impaired by incarceration. *United States v. Speed Joyeros*, 204 F. Supp. 2d 412, 419-20 (E.D.N.Y. 2002) (finding defendant's incarceration in the Manhattan Detention Center substantially impaired defendant's ability to assist in her defense).

Under SOMTA this problem is exacerbated because the majority of pretrial detainees are confined in either the Central New York Psychiatric Center (CNYPC), near Utica[13], or at the St. Lawrence Psychiatric Center, near

[13] This facility is 246 miles from New York City, 135 miles from Rochester, and 95 miles from Albany.

Ogdensburg on the Canadian border.[14] While there are twenty beds in the Manhattan Psychiatric Center, OMH has no duty to locate a pretrial respondent near the venue of his trial. *See Matter of State of New York v. Carmelo M.*, 901 N.Y.S.2d 648 (2d Dep't 2010) (overturning a Brooklyn trial court's order transferring a pretrial detainee from St. Lawrence to CYNPC to facilitate access to counsel).

Testimony from *Matter of D.S. v. Hogan*, 874 N.Y.S.2d 711 (Sup. Ct. Bronx County 2008), shows that technology cannot effectively compensate for the physical distance between lawyer and client. Counsel in that case affirmed that:

> In order to meet with [D.S.] while he is at CNYPC, we are dependent on video-conferencing which requires at least ten days to two weeks notice for CNYPC to arrange.[15] The medium generally impedes communication due to lag-time during speaking, and limits our capacity to react with immediacy to a developing situation or even to be spontaneous, thus compromising our ability to build a relationship of trust and confidence. Telephone access is difficult and not private . . . . Even when they do speak, the conversation must be limited due to lack of privacy.

Matter of D.S., 874 N.Y.S.2d at 716. Even the most diligent of lawyers cannot maintain adequate contact with a client who is 250 to 350 miles away.

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[14] This facility is 377 miles from New York City, 190 miles from Rochester, and 225 miles from Albany.

[15] CNYPC disputed this claim. *Matter of D.S.*, 874 N.Y.S.2d at 716.

As a group of former prosecutors stated in an amicus brief supporting litigation to provide better defender services in New York State:

> Prosecutors rely on zealous defense counsel in myriad ways . . . . [B]ecause defense attorneys can speak freely with their clients, they are sometimes the only parties in the justice system in the position to identify and introduce exculpatory evidence, a credible defense, or mitigating information during sentencing.

Brief of Amici Curiae Former Prosecutors, 2010 WL 1775135, at *7 (filed in *Hurrell-Harring v. State*, 15 N.Y.3d 8 (2010)). Attorneys who are not able to meet and speak freely with their clients and interview treatment providers face-to-face cannot effectively perform this function.[16] Thus, mandatory SOMTA detention undermines the guarantee of effective advocacy and the promise of accuracy in our adversarial system.

C. The Effect of Pretrial Confinement on the Demeanor of Respondents May Lead to Erroneous Determinations of Mental Abnormality.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court recognized that demeanor may adversely affect jurors' fact finding.[17] Thus, "[m]entally

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[16] This process takes time and face-to-face interaction. In order to learn the facts, an attorney must meet with a client on multiple occasions in order to gain trust and to explore sensitive issues. *See* Anthony G. Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* § 89 (1984).

[17] Research with mock jurors indicates that an accused individual's anxious demeanor weighs heavily in favor of conviction when the evidence is weakest. Sarah H. Hendry et al., *On Testifying in One's Own Behalf: Interactive Effects of Evidential Strength and Defendant's*

(continued...)

retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320-21.

As Judge Weinstein commented in regard to pretrial detention in 1986:

> [T]he morale and demeanor of the detainee are bound to deteriorate substantially, reflecting his or her idleness, isolation, and exposure to the vagaries of prison and the jailhouse crowd. It is not surprising that such detainees are suspectible to heightened anxiety, depression, hostility and bitterness over their being kept from their family and social life. They are subjected to great stress, and invariably faced with social stigmatization.

Gallo, 653 F. Supp. at 336-37 (citations omitted).

In the context of the SOMTA trial, the pretrial detainee who approaches the end of his criminal sentence, only to be committed indefinitely pending a SOMTA trial, may not demonstrate the good morale and positive demeanor that would lead a fact finder to conclude that he is an appropriate candidate for release to the community. Such a conclusion would not necessarily be based on probative evidence, but rather on a distortion caused by the continued detention of the individual without due process. It is still more troubling to consider that the same individual could likely demonstrate entirely different behavioral qualities had he experienced successful re-entry, reunion with family, and reintegration to society.

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[17](...continued)
Testimonial Demeanor on Mock Jurors' Decisions, 74 J. Of Appl. Psych. 539, 539 (1989).

D. Pretrial Detention Coerces Individuals to Accept a Sex Offender Designation and Community Supervision, Resulting in Erroneous Designations and Compromising the Accuracy and Integrity of the Judicial System.

Pretrial detention without an individualized determination of dangerousness further compromises the judicial system by placing a Hobson's Choice upon respondents: either agree to sex offender designation, consent to SIST, and forgo trial rights, *or* remain incarcerated. *Accord M.H.L.S. v. Spitzer*, 2007 WL 4115936 at *14 (noting that mandatory pretrial detention acts "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.").

In the criminal context, courts have long recognized the coercive effect of pretrial detention on plea agreements. In *United States v. Speed Joyeros*, the court warned of "the danger of due process violations by intensive pressure on defendants to plead guilty because of lengthy pretrial incarcerations and the offer of advantageous deals for lesser terms of imprisonment." 204 F. Supp. 2d at 417. Where a guilty plea is all that stands between a detained individual and release, guilty pleas are likely. Jamie Fellner, *The Price of Freedom: Bail and Pretrial*

Detention of Low Income Felony Defendants in New York City, 31 Human Rights Watch Report (December 2010).

Courts have also noticed that pretrial detention decreases the morale of defendants, effectively wearing down their will to contest their charges. Defendants awaiting trial in prison are not only much less able to assist in their own defense, *see supra* Point II.B, but "the effects of detention on the defendant's demeanor and defense . . . probably accounts for part of the correlation between detention before trial and conviction rates. Certainly, the depression and general deterioration of morale resulting from long-term pretrial incarceration is likely to increase the pressure to plea bargain in order to 'get it over with.'" *Gallo*, 653 F. Supp. at 337 (*citing* Note, *A Study of the Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693, 726 (1958)).

In finding M.H.L. § 10.06(k) unconstitutional, Justice Duffy recognized that the provision, because it mandates confinement, presents the individual with a "Morton's Fork – he must either choose to enforce his right to a jury trial and continue to be detained for an unknown period of time in a psychiatric facility awaiting trial on this matter or surrender his right to trial and consent to a finding of mental abnormality so that he may be immediately released back to the community under SIST." *State v. Enrique T.*, 929 N.Y.S.2d at 937.

Likewise, Judge Lynch recognized that "if [respondents] know that they will be detained pending trial, where the pre-trial consequences are more severe than the post-trial consequences even were they to be adjudicated at the commitment trial to be a sex offender in need of civil management, then there is overwhelming and enormous pressure for an individual to accept the designation of sex offender and related treatment rather than face the 60 days of involuntary confinement." *M.H.L.S. v. Spitzer*, 2007 WL 4115936 at *15.

Nor are there procedural safeguards to alleviate this pressure on individuals to accept their "sex offender requiring civil management" designation. Although the Attorney General has 60 days from the date of the probable cause hearing to bring the civil commitment trial, this deadline is aspirational and not mandatory. *See supra* Point I (noting that fewer than 20 percent of cases were resolved within 60 days of the probable cause hearing), *M.H.L.S. v. Spitzer*, 2007 WL 4115936 at *24 n. 13, M.H.L. §§ 10.06(k); 10.07(a); 10.08(f). Because the chances that an individual would be subjected to pre-trial detention for more than 60 days are great, there is a real likelihood that respondents who are not "sex offenders requiring civil management" under the Act would consent to an erroneous designation and to SIST to avoid the certainty of prolonged confinement to a secure treatment facility.

In the four years that SOMTA has been in effect, nearly 70 percent of those placed on community supervision consented to the "sex offender requiring civil management" designation. John Caher, *Few Sex Offenders Are Choosing Trial Before Confinement*, N.Y.L.J. Aug. 8, 2011. In total, SIST has been imposed on 103 individuals, 70 of whom consented to this supervision.[18] *Id.* While we cannot be certain what considerations go into each individual's decisions to consent to designation under SOMTA and SIST, the alternatives facing the respondents are clear. As the first Director of the Office of Sex Offender Management at the Division of Criminal Justice Services observed, "It did not surprise me that individuals would consent to [strict supervision by parole authorities] because they . . . avoid the possibility of confinement**.**" *Id.* (parenthetical in the original). Because Section 10.06(k) mandates that courts confine SOMTA respondents before trial, individuals for whom SIST is recommended or offered must weigh the certainty of months of confinement against the guarantee of immediate release. It is not unreasonable to believe that a number of these individuals consented to the finding of mental abnormality and the designation of sex offender in need of civil

[18] Though not as onerous as civil confinement in a secure facility, SIST still significantly curtails an individual's liberty. *See* M.H.L. § 10.11 & 2010 SOMTA Annual Report at 4 (laying out SIST's probation-like requirements, including GPS monitoring, polygraph monitoring, curfews, periodic reporting, and other specific requirements set by the court). Moreover, consenting to SIST carries the risk of confinement if any of the conditions are not met.

management and agreed to participate in SIST, even if they would have prevailed at trial.

The pressure to consent to SIST to assure immediate release undermines the integrity of the judicial system by circumventing the adversarial process and avoiding the careful testing and weighing of evidence that process entails. Where an individualized judicial determination of dangerousness does not necessitate pretrial detention, creating a choice between liberty and a full adversarial trial undermines both the integrity and accuracy of the judicial system.

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

Dated: New York, New York
October 31, 2011

Respectfully Submitted,

Criminal Law Committee
Sex and Law Committee
The Association of the Bar of the
City of New York

By: /s/ Allison Caffarone

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APPENDIX

Statement on Civil Commitment of Sex Offenders:
Senate Bill S6325 and Assembly Bill A09282

Legislation permitting civil commitment of some sex offenders following completion of their prison sentences, under statutes directed at sex offenders specifically rather than general civil commitment laws, has been passed or is on the verge of being passed this year by both the New York State Assembly (A09282) and the Senate (S6325). The undersigned committees of the Association of the Bar of the City of New York[1] are extremely concerned about these measures. Our committees do not believe, on balance, that such legislation is necessary or well-advised. Instead, we remain of the view that both civil rights and public safety are best protected by appropriate, but aggressive use of extant civil commitment statutes, combined with good post-release supervision and treatment plans. We also are concerned that this legislation would exacerbate the venomous and discredited[2] stigma associating mental illness with violence, thereby effectively deterring people from seeking mental health treatments that are available in their communities.

However, we do share the Legislature's concern for community safety, and its doubts that incarceration and currently available sex offender treatment are adequate to prevent some number of sex offenders from committing future acts of sexual violence. We also recognize that

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[1] The Association of the Bar of the City of New York (the "Association") is a professional association with more than 22,000 members, including judges, prosecutors and defense attorneys.

[2] See The MacArthur Violence Risk Assessment Study; Steadman HJ, Mulvey EP, Monahan J, et. al. Violence by people discharged from acute psychiatric impatient facilities and by others in the same neighborhoods. *Archives of General Psychiatry 55:393-401, 1998*; *Mental Health: A Report of the Surgeon General* on December 13, 1999.

there is a substantial body of opinion to the effect that some form of civil commitment statute for sex offenders is one important mechanism for preventing some types of recidivism.

It cannot be overstated how readily sex offender civil commitment laws may be abused. Unwarranted community fears can produce statutes that allow civil commitment of sex offenders who in fact have no diagnosable mental illness or mental abnormality, or who do not present a real risk of serious sexual re-offense. The same misplaced fears can easily cause massive overuse of such statutes, effectively incarcerating many offenders for years past expiration of their criminal sentences, when community based-treatment and effective post-release monitoring could serve the same purpose at a far lower cost in dollars and civil liberties.[3] Should a statute ultimately enacted by the Legislature lack the necessary standards and procedural protections to prevent such abuses, it will surely be successfully challenged in the state and federal courts. The toll in uncertainty, time and money misspent, not to mention lost liberty, will be significant. Any measure the Legislature enacts should meet tests of constitutionality and sound policy at the outset. In order to assist the Legislature in crafting a sex offender civil commitment statute that meets these standards, the undersigned committees offer the following comments on A09282 and S6325.

At the outset, both bills are seriously flawed in a most basic respect: their definitions of offenders eligible for civil commitment are too sweeping to meet state or even the broader federal due process standards. Loosely modeled on a statute held constitutional by the United States Supreme Court in Hendricks v. Kansas, 521 U.S. 346 (1997), both bills target as

[3] We question the extent to which funds currently allocated to the State Office of Mental Health (OMH) will be used to house and care for these offenders, many of whom may lack any treatable diagnosis under the DSM-IV-R. The limited resources the Legislature has allocated to OMH currently are insufficient to provide community-based services and treatment for people with mental illnesses.

candidates for commitment "sexual predators,"[4] who are persons suffering from a "mental abnormality," who have committed a predicate sex offense.

S6325 defines "mental abnormality" as "a congenital or acquired condition, disease or disorder that affects the emotional or volitional capacity of a person in a manner that predisposes him or her to the commission of an act or acts constituting a sexually violent offense and that results in serious difficulty in controlling behavior to a degree that the person is a menace to the health and safety of others." The predicate sex offense that is a threshold requirement for commitment is, under S6325, a "sexually violent offense," which, in turn, is simply any felony sex offense under Article 130 or other provisions of the Penal Law (including low level felonies such as statutory rape or surreptitiously recording someone in a dressing room), or another designated violent felony found to have been "sexually motivated," which term is not further defined.

A09282 has a similar definition of "mental abnormality," the standard being that a mental disease or disorder "creates serious difficulty for the person to control his or her unlawful sexual behavior [so that it is] likely that he or she will commit a felony sex offense in the future." Like the Senate bill, the Assembly version makes the predicate conviction a conviction for any Article 130 felony offense or a designated felony that was sexually motivated. There is some attempt to define "sexually motivated," and, unlike the Senate bill, youthful offender findings do not qualify.

First, it is doubtful that committing people with a personality disorder, but no other diagnosable mental illness, is permissible under New York State law, and even less clear whether

[4] We do not approve of the pejorative term "sexual predator", because it is both vague and unnecessarily defines a person by behavior which may be correctable. We suggest, instead, that the term "sexual offender" or "serial sexual offender" (where appropriate) be used.

an "emotional impairment" will suffice. The Court of Appeals has stated that dangerous propensity is an insufficient basis for commitment. In re Torsney, 47 NY2d 667, 684 (1979).

Moreover, although the language of these bills is identical in large part to that in the Kansas statute upheld in Hendricks v. Kansas, the Supreme Court has subsequently made clear that in order to meet due process standards, the offender must suffer from a "special and serious lack of ability to control" his or her unlawful behavior that "must be sufficient to distinguish the dangerous sexual offender...from the dangerous but typical recidivist convicted in an ordinary criminal case." Kansas v. Crane, 534 U.S. 407, 413-414 (2002). While the language of a "predisposition to commission" of a sexually violent offense or "likely" to commit a felony sex offense may, on its face, be minimally adequate to pass this test, it is also clearly susceptible to much looser interpretation. Many jurisdictions have responded to this concern by employing more restrictive language, such as "substantially probable," in describing the likelihood that, as result of the mental abnormality, the offender will commit a dangerous sex offense. New York's statute should do the same, in order to remove any doubts about its constitutionality in this respect.

Nor are the predicate crimes that serve as the commitment threshold sufficiently narrowed, under either version, to demonstrate the requisite dangerousness or threat to safety. A number of the crimes of conviction that could result in commitment proceedings involve no violence or abuse of children at all. For instance, a 22 year-old first felony offender who was convicted of the statutory rape of his 16 year-old girlfriend would be a candidate for civil commitment, notwithstanding that his real likelihood of reoffense was non-existent, and the conduct entirely consensual. Even the Kansas statute in Hendricks involved a far more nuanced listing of predicate offenses; New York's should do the same.

Having noted our objection to the basic definition of an eligible offender in both versions of the sex offender commitment statute, we find A09282 preferable in many respects to the Senate version. A09282 is a comprehensive statute that, while affording potential committees necessary procedural protections, is crafted to ensure that it targets those dangerous offenders who require treatment in restrictive settings and it provides for such treatment. Its failure to make any provision for discharge procedures and planning is very troubling, however, both from a public safety and a civil liberty standpoint, and should be remedied. It is also problematic that A09282 permits the Attorney General to file a commitment petition even where a case review committee composed primarily of mental health experts has recommended against it, and we urge that such unjustifiable discretion be eliminated. We are concerned that in light of the Attorney General's expansive authority to file over the recommendation of professional with expertise in this area, the "strict and intensive supervision" alternative to residential commitment may be used to assure restrictive monitoring of the majority of sex offenders after completion of their sentences, even though they do not in fact meet constitutional standards for commitment.

Nonetheless, in (1) mandating pre-commitment in-prison treatment, governed by professional standards; (2) providing for pre-commitment assessment by independent qualified professionals and for use of scientifically validated tools for that purpose; (3) establishing a comprehensive post-commitment treatment regimen subject to widely recognized mental health standards; (4) providing for counsel with expertise in this specialized area, at an early, pre-petition phase of the proceedings, and according the offender important rights in respect of discovery and presence, the Assembly bill represents, in many ways, a serious effort to balance the need for civil commitment of dangerous sex offenders who suffer from a mental illness with constitutional safeguards and appropriate treatment for such offenders.

S6325 is contrastingly deficient in these areas. It contains no provision at all for treatment of convicted sex offenders while they are still serving their sentence, one important way of avoiding, through early intervention, unnecessary post-sentence restrictions on liberty as well as unnecessary expenditure of money. The process for assessing offenders to determine if a petition should be filed is strikingly tilted toward a law enforcement rather than a mental health professional perspective. The initial notification is made by corrections authorities rather than OMH. The bill establishes "multidisciplinary teams" to review each cases, but the professional composition of those teams is completely unspecified as is the method they are to use to make the evaluation. The final decision whether to recommend that a petition be filed is made by a committee of prosecutors (the "prosecutors review committee"). Psychiatric examination of the offender is conducted not by a court-appointed expert, but by one chosen by the prosecuting agency, the Attorney General. Counsel is not provided until the petition is filed, and there is no requirement and no funding to ensure that counsel has specialized expertise in this area should MHLS not serve as counsel. Venue is established in the county of incarceration rather than of conviction, depriving potential committees of support from their families and community members. Once committed, a person has no right to be present at subsequent proceedings. While the bill contains detailed provisions for security at the newly established facilities that will house committees, it is devoid of any reference to the treatment to be provided them. This omission alone is an invitation to successful litigation. See Selig v. Young, 531 U.S. 250 (2001).

There are many other objectionable features in S6325.[5] Without enumerating them all in detail, their combined effect is to undermine the constitutionality of the proposed legislation, and

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[5] For instance, as noted above, S6325 provides that at any time after receiving notice that the agency with jurisdiction believes a person to be a sexually violent predator, the attorney general may request that the court in which the petition could be filed order the person to submit to an evaluation by a psychiatric examiner "chosen by

to cast serious doubt on it as a legitimate tool for identifying the small group of genuinely dangerous offenders. By dramatically weakening, if not eliminating, the role of experts in favor of law enforcement officials and by unjustifiably refusing to accord committees basic procedural protections and qualified counsel, this version of a civil commitment statute is a recipe for failure.

Respectfully Submitted,

Sex & Law Committee
Mental Health Law Committee
Criminal Law Committee
Criminal Justice and Operations Committee

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the attorney general" (§ 10.05[e]). A09282, which provides that the case review team may, during its assessment, order a psychiatric evaluation of the person at issue by a qualified psychiatrist, who "shall not be employed by the state or the person being evaluated" (§ 10.05[e][3]), is much more in keeping with procedural fairness and would likely result in more reliable findings.

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This week, after a series of closed-door sessions among legislators and the Governor's office, the Legislature adopted the Sex Offender Management and Treatment Act (Assembly Bill A6162 and Senate Bill S3318), which permits civil commitment of some sex offenders following completion of their prison sentences. The undersigned committees of the Association of the Bar of the City of New York[1] recognize that this Act addresses many of the issues raised in our March 6, 2006 Statement[2] opposing prior versions of this legislation. Unfortunately, legislators and the Governor's office negotiated the details of the Act without the opportunity for public comment, and the Association continues to have concerns about the legislation as adopted by the two houses.

The Association commends the Legislature for improving on previous proposals in many significant ways. For example, the Act mandates that convicted sex offenders have access to treatment from the outset of their sentences; gives mental health officials, rather than law enforcement officers, the primary role in selecting offenders for possible civil confinement, and states that except in "extreme" cases involving the "most dangerous" offenders, judges presiding in civil commitment proceedings should impose conditions of "strict and intensive supervision"

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[1] The Association of the Bar of the City of New York (the "Association") is a professional association with more than 22,000 members, including judges, prosecutors and defense attorneys.

[2] Statement on Civil Commitment of Sex Offenders: Senate Bill S6325 and Assembly Bill A09282, New York City Bar, January 2006 (signed by the Sex & Law Committee, Mental Health Law Committee, Criminal Law Committee and Criminal Justice and Operations Committee) (attached as Exhibit A).

rather than confinement in secure institutions. In addition, the legislation looks to the future by providing stiffer, determinate sentences for felony sex offenses committed after the bill becomes law, followed by much longer periods of strict post-release supervision by parole officers. These provisions respond to the public's feeling that sex offenses are so damaging to victims, and so frightening to potential victims, that offenders should be sternly punished and closely watched for many years, even if the offenders are emotionally disturbed, otherwise law-abiding individuals.

Although the drafters did a commendable job in addressing many of the problems with prior drafts of the legislation, the Association remains concerned about a number of aspects of the Act. For example, the Act applies not only to (a) persons who are repeat offenders, (b) persons who commit "sexually violent" crimes as defined in the Sex Offender Registration Act, and (c) persons who committed crimes against young children, but the Act also permits civil commitment proceedings to be applied to first-time offenders whose crimes are not violent, such as a 22-year-old who has consensual sexual relations with a 16-year-old. The Act further permits civil commitment of persons who commit non-sexual crimes like robbery, or non-violent offenses like "disseminating indecent materials to minors," if a jury finds, often well after the fact, that the offense was motivated by a desire for the actor's "sexual gratification." In other words, if a person sends indecent material to a minor's computer for profit, he cannot be committed beyond the end of his sentence, but if he does so to satisfy a sexual impulse, he can be. One can only hope that mental health officials, and the Attorney General, will use their wide discretion wisely and sparingly, applying the law only to the worst, clear-cut cases of "dangerous mental abnormality."

In addition, the Act allows a person already released from his prison sentence to be re-detained and held for more than 60 days without any finding that he is a dangerous sex offender. This is too long to detain a person, otherwise entitled to liberty, without a judicial determination that he is dangerous, or a flight risk. The Act also permits civil commitment of currently imprisoned offenders who never had the opportunity for the comprehensive in-prison treatment that the new law now mandates for newly-committed prisoners.

While the State's newly vigorous commitment to treat sex offenders is laudable, the critical importance of co-operation in treatment, by a prisoner or committee who hopes for release, raises an additional concern. The bill provides that statements made by Respondents during court-ordered psychiatric examinations are inadmissible in evidence against them in a criminal action or proceeding. However, no such explicit protection is given to statements made in the course of sex offender treatment, and existing law on this subject is not entirely clear. Given that, (a) refusal to participate in treatment is likely to have highly adverse consequences; (b) participants in treatment are expected to admit all of their past sexual offenses, whether charged or uncharged, and (c) the Legislature recently repealed the Statute of Limitations for serious sex offenses, making prosecutions possible even if the crime occurred many years in the past, there should be an explicit provision that admissions made in treatment may not be used in criminal prosecutions. Otherwise, there will be a self-defeating incentive for many offenders not to co-operate in treatment.

Another important concern is the inadequacy of the provisions for appointment of counsel to indigent offenders facing commitment proceedings. As the Association has stated previously, attorneys handling these specialized proceedings should have specialized expertise in the field. Knowledge of both mental health law and criminal law is needed. While the Mental

Hygiene Legal Service has expertise in its field, its attorneys may not have the requisite criminal-law experience. Moreover, in contrast to last year's Assembly bill (A09282), the Act as adopted contains no assurance that attorneys who are appointed will be adequately trained and experienced in cases where MHLS cannot undertake representation. To address this concern the State should either greatly expand MHLS's capacity, fund a separate office to undertake this representation, or create a funding arrangement in which criminal defense attorneys would act as co-counsel with MHLS.

Finally, advocates must keep close watch on the implementation of this legislation to ensure that the State keeps two important promises: to conduct cutting-edge research, through the new "Office of Sex Offender Management," into the best methods for assessing, monitoring and treating sex offenders, and, to meet its substantial new financial commitment without dipping into funds allocated to maintain the mental health of persons who are not involved in the criminal justice system. There remain urgent unmet needs for mental health services, particularly in New York's poorer communities, and these needs must not be sacrificed to the more attention-getting goal of addressing the dangers posed by sex offenders.

Respectfully submitted,

Sex & Law Committee
Mental Health Law Committee
Criminal Law Committee
Criminal Justice Operations Committee

March 13, 2007

CERTIFICATE OF COMPLIANCE

(1) Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)B)(I) because it contains 5,320 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count feature of the word processing program used to prepare it.

(2) This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) & (6) because it has been prepared in a proportionately spaced typeface using Wordperfect X4® 14-point font Times New Roman.

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