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# Throwing Away The Key: An Examination of New York's Sex Offender Civil Commitment Law

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

By  
Joseph E. Fahey<sup>1</sup>

This past spring, the New York State Legislature passed Article 10 of the Mental Hygiene Law entitled Sex Offenders Requiring Civil Commitment or Supervision.<sup>2</sup> 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 society.”<sup>3</sup> It notes that such offenders “have mental abnormalities” which “may require long-term

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<sup>2</sup>McKinney’s (2007)

<sup>3</sup>Section 10.01(a) of the Mental Hygiene Law (McKinney’s 2007)

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.”<sup>4</sup>

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.”<sup>5</sup> 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.”<sup>6</sup>

#### 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 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

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<sup>4</sup>*Ibid*, 10.01(b)

<sup>5</sup>*Id.*

<sup>6</sup>*Ibid.*, 10.01(f)

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,<sup>7</sup> 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.”<sup>8</sup> 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 Degree<sup>9</sup>; all murder offenses; all felony kidnaping offenses; all burglary offenses; all robbery offenses; arson in the first degree;<sup>10</sup> arson in the second degree;<sup>11</sup> promoting prostitution in the first degree;<sup>12</sup> promoting prostitution in the second degree;<sup>13</sup> compelling prostitution;<sup>14</sup> disseminating indecent material to minors;<sup>15</sup> use of a child in a sexual performance;<sup>16</sup> promoting an obscene sexual performance by a child;<sup>17</sup> promoting a sexual performance by a child;<sup>18</sup> 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.<sup>19</sup>

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<sup>7</sup>Ibid, Section 10.03(p).

<sup>8</sup>Id.

<sup>9</sup>Sections 125.20 and 125.10 of the Penal Law.

<sup>10</sup>Section 150.20 of the Penal Law.

<sup>11</sup>Section 150.15 of the Penal Law.

<sup>12</sup>Section 230.32 of the Penal Law.

<sup>13</sup>Section 230.30 of the Penal Law.

<sup>14</sup>Section 230.33 of the Penal Law.

<sup>15</sup>Section 235.22 of the Penal Law.

<sup>16</sup>Section 263.05 of the Penal Law.

<sup>17</sup>Section 263.10 of the Penal Law.

<sup>18</sup>Section 263.15 of the Penal Law.

<sup>19</sup>Mental Hygiene Law Section 10.03(1)

Section 10.03(s) of the Statute defines an offense as being “sexually motivated,” when the act or acts 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, 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 act or acts 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.<sup>20</sup> Upon receipt of this information the Commissioner is authorized to designate “multidisciplinary staff, including clinical and other professional personnel” to conduct

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<sup>20</sup>Mental Hygiene Law Section 10.03(b)(3) and (5).

a preliminary review to determine whether the subject should be referred to a case review team for evaluation.<sup>21</sup> 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 management.<sup>22</sup>

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.<sup>23</sup>

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.<sup>24</sup> Where the respondent was charged or convicted of a designated felony, it shall also include the case review team's determination of whether the act was sexually motivated.<sup>25</sup> 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.

#### Petition and Hearing

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<sup>21</sup>Mental Hygiene Law Section 10.05(d).

<sup>22</sup>Mental Hygiene Law Section 10.05(e).

<sup>23</sup>Mental Hygiene Law Section 10.05(f).

<sup>24</sup>Mental Hygiene Law Section 10.05(g).

<sup>25</sup>*Ibid.*

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.<sup>26</sup>

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 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.

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<sup>26</sup>Mental Hygiene Law Section 10.06(b).

Appointed counsel is entitled to copies of the case review team's notice, the petition, and any written reports of the psychiatric examiners.<sup>27</sup>

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.<sup>28</sup>

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.<sup>29</sup>

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 respondent in the interest of public safety.<sup>30</sup> 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.<sup>31</sup>

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

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<sup>27</sup>Mental Hygiene Law Section 10.06(c).

<sup>28</sup>Mental Hygiene Law Section 10.06(d).

<sup>29</sup>Mental Hygiene Law Section 10.06(e).

<sup>30</sup>Mental Hygiene Law Section 10.06(f).

<sup>31</sup>*Ibid.*

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 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.<sup>32</sup> Where the petition alleges the commission of a designated felony

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<sup>32</sup>McKinney's(1995 ).

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 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 or the respondent 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 Rules <sup>33</sup> to certain

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<sup>33</sup>McKinney's 2007.

sections of the Criminal Procedure Law.<sup>34</sup> 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 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,<sup>35</sup> 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.

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<sup>34</sup>Criminal Procedure Law Sections 270.05, 270.10, 270.15, 270.20, 270.25(1), and 270.35(1)

McKinney's 2002.

<sup>35</sup> McKinney's 2007.

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 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 a 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 a variety of different 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 taken 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*,<sup>36</sup> 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*,<sup>37</sup> in which it examined the State of Washington's 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

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<sup>36</sup>521 U.S. 346.

<sup>37</sup>531 U.S. 250.

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(l) 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 been 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.<sup>38</sup>

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<sup>38</sup>See, C.J.I Pattern Jury Instruction Penal Law Section 40.05.

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 civil commitment proceedings initiated under this Article or assist in his or her 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*.<sup>39</sup> 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 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*,<sup>40</sup> 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;

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<sup>39</sup>530 U.S. 466 (2000).

<sup>40</sup>,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.*)’”<sup>41</sup>

She went on to observe;

“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.’”<sup>42</sup>

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4 N.Y. 3d at 244.

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*Ibid.*

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

*ex post facto* laws<sup>43</sup> 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.<sup>44</sup> As compelling as this conclusion might be, it is not a certain one.

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<sup>43</sup>*Hendricks v. Kansas, supra.*

<sup>44</sup>4N.Y. 3d, at 244.

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 the respondent's criminal history.<sup>45</sup> 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.<sup>46</sup> 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.

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<sup>45</sup>Section 10.05(4).

<sup>46</sup>Section 10.05(5).

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.<sup>47</sup>

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 deemed a violent felony offense pursuant to Section 70.02 of the Penal Law.<sup>48</sup>

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."<sup>49</sup> 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.

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<sup>47</sup>McKinney's ( 2007 ) (effective April 12, 2007)

<sup>48</sup>Section 70.80(1)(b).

<sup>49</sup>Penal Law Section 130.91(1) (McKinney's effective April 12, 2007).

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 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.<sup>50</sup>

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.<sup>51</sup>

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<sup>50</sup>*Ibid.*

<sup>51</sup>An 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

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*,<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>

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

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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?

<sup>52</sup>178 N.J. 127, 835 A. 2d 1231 (2003)

<sup>53</sup>178 N.J., at 138.

<sup>54</sup>*Id.*

data to determine the effect of complete retroactivity.<sup>55</sup> It further recognized that complete retroactive effect could “...undermine the validity of a large number of convictions.”<sup>56</sup> 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, at the time of this writing, it has 6040 inmates in custody for offenses under Article 130 of the Penal Law or attempts to commit the same.<sup>57</sup> 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.<sup>58</sup> 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 255.26<sup>59</sup> and

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<sup>55</sup>178 N.J. 127, 142.

<sup>56</sup>178 N.J., at 141.

<sup>57</sup>See Appendix A.

<sup>58</sup>*Ibid.*

<sup>59</sup>Insert offense.

Sections 255.27<sup>60</sup> of the Penal Law<sup>61</sup>. It further reported that it had an additional 12,452 persons under its supervision for designated felony offenses or attempts to commit the same.<sup>62</sup> 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.

#### 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

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<sup>60</sup>Insert offense.

<sup>61</sup>See Appendix B.

<sup>62</sup>*Ibid.*

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.<sup>63</sup> Thus, the Statute allows for this class of respondents to be civilly committed upon a showing of clear and

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<sup>63</sup>Section 190.65(1) of the Criminal Procedure Law (McKinney's(1993 ).

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 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.<sup>64</sup> It therefore appears that some of these economically strapped counties will bear a very heavy caseload in handling these matters.

#### 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.

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<sup>64</sup>Franklin and Dutchess each have five, Erie and Oneida each have four, and Clinton, St. Lawrence, and Westchester each have three.

## Appendix A

UNDERCUSTODY AS OF JUNE 23, 2007

MOST SERIOUS CRIME	COMPLETED	ATTEMPTS
MURDER 1ST	504	0
MURDER 2ND	8,588	0
AGGRAVATED MURDER	3	0
MANSLAUGHTER 1ST	2,488	0
MANSLAUGHTER 2ND	404	0
RAPE 1ST	1,872	335
RAPE 2ND	408	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	83	0
GANG ASSAULT 2ND	58	0
BURGLARY 1ST	985	0
BURGLARY 2ND	3,302	0
BURGLARY 3RD	2,141	0
ARSON 1ST	39	0
ARSON 2ND	185	0
PROMO PROSTI 1ST	2	0
PROMO PROSTI 2ND	25	0
SODOMY 1ST	950	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	25	0
AG SEX ABUSE 3RD	8	0
SEX CONDUCT CHILD 1ST	203	0
SEX CONDUCT CHILD 2ND	83	0
PERSIST SEXUAL ABUSE	7	0
AGG SEX ABUSE 4TH	1	0
CRIM SEX ACT 1ST	225	0
CRIM SEX ACT 2ND	75	0
CRIM SEX ACT 3RD	33	0
PREDATORY SEXUAL ASLT	1	0
PRLD SEXUAL ASLT/CHILD	1	0
DIS INDEC MAT MIN 1ST	9	0
USE CHILD SEX PERF.	25	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
<b>TOTAL</b>	<b>39,094</b>	<b>652</b>

## Appendix B





STATE OF NEW YORK  
EXECUTIVE DEPARTMENT  
**DIVISION OF PAROLE**  
97 CENTRAL AVENUE  
ALBANY, NEW YORK 12208

Record  
Clerk  
Joseph E. Foley

JUL 05 '07

County Court  
Orangetown County

ELIOT SPITZER  
GOVERNOR

GEORGE B. ALEXANDER  
CHAIRMAN

July 2, 2007

The Hon. Joseph E. Foley  
County Court Chambers, Suite 364  
Criminal Courts Building  
505 S. State Street  
Syracuse, NY 13202

RE: TOIL Request.

Dear Judge Foley:

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

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

There were 147 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 12,412 with convictions for committing or attempting to commit sections 120.35, 120.10, 120.06, 120.07, 120.60, 125.15, 125.20, 125.25, 125.26, 125.27, 135.20, 135.25, 143.20, 143.25, 150.15, 150.20, 150.05, 160.10, 160.15, 230.30, 230.32, 230.35, 235.22, 260.05, 260.10, 260.15 of the Penal Law.

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

Hopfully this information will assist you in this matter.

Sincerely,

Mark Johnson  
Director of Media Relations and Public Affairs

