

From My Vantage Point

On Sex Offender Hysteria

by Jonathan E. Gradess*

Politics, Not Policy-Making, is Driving Civil Commitment

In the last year the Legislature passed a bill that forbids certain sex offenders from being present within 1000 feet of a school. The effect of this bill is to make thousands of men pariahs in their own communities. It will force them into the gray outskirts of metropolitan areas where, further marginalized, they will be forced underground, unable to travel freely. Then, but a few months ago, yielding to the political attractiveness of the idea, the Legislature made all level 2 and 3 sex offenders register for life on the Sex Offender Registry. We can tell the politicians are polling on this issue because they are not looking for strategies that make sense or are effective and reformative. Sex offenders are the new lepers; the Legislature is dithering over civil commitment in the same way Hawaii dithered over making Molokai a prison for lepers 150 years ago.

Sexual abuse treatment providers, advocates opposing sexual assault, mental health providers, the families of the mentally ill, families of sex offenders, and the legal and civil liberties communities all believe civil commitment of dangerous sex offenders is a misguided policy. Why then have both houses of the State Legislature passed competing draconian civil commitment bills? Answer: November 7, 2006—Election Day. It is election-year *polling* on the electoral problem of sex offenders, not *policy making* about the problem of sex offenders, driving this ill-founded idea in Albany.

Civil Commitment Erodes Rather Than Promotes Safety

Sexual abuse treatment professionals believe that the best way to treat sex offenders is to prevent their behavior, closely monitor them in the community, and provide meaningful, ongoing treatment. Up against this common sense proposition are the politicians. They like to say sex offenders have high recidivism rates, can't be treated, and must be locked up to protect the public. The truth is the majority of sex offenses involve people who know or are related to each other and the offenders are never even arrested. Many sex offenses occur between family members; in such cases the threat of civil commitment may actually run the risk of causing victims not to report crimes for fear of the lifetime civil commitment of those family members.

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Proposals Based on Myths, Overreaching, and Fiscal Irresponsibility

It is a myth that sex offenders cannot be rehabilitated. Sex offenders represent a wide range of behaviors, many of which are successfully treated. Contrary to popular mythology, the re-offense rates for sex offenders are substantially lower than the rates for many other offenders, lower than that of persons convicted of robbery, burglary, car theft, and weapons offenses, and among the lowest recidivism rates of criminal offenders generally. Success has been demonstrated with intensive community treatment in those states that have a multidisciplinary, aggressive system of monitoring, supervision and treatment.

BREAKING NEWS

As this edition of the *REPORT* was going to press, the Appellate Division, 1st Department upheld the Governor's authority to use existing provisions of the Mental Hygiene Law to civilly commit sex offenders scheduled to be released from prison. In *People ex rel Harkavy v Consilvio* (3/30/06), the Court held such inmates can be civilly committed on the certification of two physicians employed by the Department of Correctional Services, and the concurrence of a third employed by the Department of Health. This decision, while certainly not the final word in this legal controversy, eliminates any need for the Legislature to pass specialized sex offender civil commitment legislation this session. It offers lawmakers breathing room to now study the issue. Hopefully, they will reject the wasteful and unproven strategy of civil commitment, and embrace more comprehensive and cost-effective initiatives to reduce sexual assault crime.

The majority of American states—68 percent—do not have civil commitment laws. Yet touting the “national move toward these laws” (i.e., a minority of 16 states, 2 of which are retreating from the idea already), New York's Governor and Legislature have proposed the broadest and most expensive civil commitment law in the country. The Assembly and Senate bills are both so broad they encompass statutory rape, youthful sexual experimentation, and behaviors that are not likely to be repeated. Unless these bills are more carefully limited, they potentially threaten the lifetime incarceration of thousands of people.

The incarceration of sex offenders in a specialized facility, where treatment, according to the Governor, will cost \$200,000 per year per offender, is a waste of money. People who have sexually offended should be monitored and treated along a continuum of care that includes treatment in the community, treatment in prison, and

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was established. *People v Dunn*, 155 AD2d 75, 80 *aff'd* 77 NY2d 19 *cert den* 501 US 1219. Summary denial of suppression of a pistol and bullets not described in the warrant or warrant application, and of items described in or seized pursuant to a warrant to search the defendant's work locker, was improper. A hearing is required to decide the "disputed issue of whether the pistol and bullets were seized in plain view as part of the lawful search" of the defendant's home and upon his admission that the gun was unregistered. *See gen Horton v California*, 496 US 128, 136-137 (1990). The application for the warrant to search the defendant's work locker failed to establish probable cause, necessitating a hearing on the issue of whether the defendant consented to that search. At the hearing, the prosecution bears the burden of establishing voluntary consent. *See gen Bumper v North Carolina*, 391 US 543, 548-549 (1968). Judgment reversed, plea vacated, matter remitted for hearing. (County Ct, Ontario Co [Reed, J])

Accusatory Instruments (General)

ACI; 11(10)

People v Waid, No. KA 04-03067 (4th Dept 2/3/2006)

Holding: The defendant's contention that his waiver of indictment was jurisdictionally defective did not require preservation for review, but lacks merit. After the defendant was indicted for several offenses relating to a single transaction, the prosecution filed a felony complaint charging those offenses and a new first-degree sexual abuse charge. Having waived a preliminary hearing and been held for action of the grand jury, the defendant then waived indictment and consented to prosecution by superior court information (SCI) on all charges in the complaint. The waiver of indictment and SCI with respect to the sexual abuse charge (to which the defendant eventually pled guilty) was not jurisdictionally defective. *See People v D'Amico*, 76 NY2d 877, 879. The statutory prerequisites for waiver were met. *See CPL 195.10(1)(a)*. County Court's failure to sign an order approving the waiver of indictment was a mere ministerial error not requiring reversal. *See gen People v McKenzie*, 221 AD2d 743, 744. Where the record shows the court was satisfied that the waiver was sufficient and all statutory requirements were met, the court had no discretion to withhold approval of the waiver. *See Preiser Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 195.30*. Judgment affirmed. (County Ct, Niagara Co [Broderick, Sr., JJ]) ☞

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treatment on parole in the community. Sex offender experts say that the group most talked about—"dangerous sexual predators"—is the least amenable to treatment.

Yet in the six Conference Committee hearings held so far to "resolve differences between the Assembly and Senate bills," the proponents of lifetime commitment for "dangerous sexual predators" will have none of this truth. Each house outdoes itself urging how little their members know about treating sex offenders and how much each should be willing to spend on this rogue idea, how critical this bill is, and how important—in an election year—public safety is to each of them.

With only eight months left to election, both houses would do well to recognize that even people who want civil commitment and the enhanced treatment of sex offenders find these bills conceptually defective. While the Assembly bill moves toward treatment goals, neither bill assures professionalism in treatment decisions. In the Governor's bill the decision to seek commitment is left exclusively in the hands of law enforcement, while in the Assembly bill law enforcement can override the medical decision recommending against civil commitment. Why the Legislature fears leaving the decision in the hands of professionals can be explained by the power of the tabloids and the banner they carry for this unwise legislation. Far broader than their rhetoric, these bills which pretend to cover only a "small handful of dangerous offenders" actually cover every felony sex offense in the Penal Law.

Even if the bill worked right it would be wrong. Isolating a small handful of generally untreatable people in an expensive facility where they will be held for life on the theory they must be treated skews precious, limited resources that should otherwise be available for treatment of a broader category of sex offenders.

Coalition Calls for Careful Evaluation

Civil commitment is a very bad, wasteful, reactionary idea. That is why a coalition consisting of NYSDA, the New York Civil Liberties Union, the New York State Alliance of Sex Offender Service Providers, the New York State Coalition Against Sexual Assault, the Mental Health Association in New York State, the New York Association of Psychiatric Rehabilitation Services, Prison Families of New York, Inc., Prisoners' Legal Services of New York, The Innocence Project, and the New York State Association of Criminal Defense Lawyers has called upon the Legislature to slow down, resist politics, and critically evaluate civil commitment. ☞

Court of Appeals Update (*continued from p. 18*)

CAPITAL APPEALS PENDING

People v John Taylor — Appeal as of right directly to Court of Appeals from Queens County conviction for capital offense. The defendant was convicted in the "Wendy's" slayings. Appellant's brief due June 2006. Issues to be determined. ☞