



CURE CIVIL COMMITMENT NEWSLETTER

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PO Box 2310 WASHINGTON, DC 20013

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E-MAIL: CCN@CURENATIONAL.ORG

FROM THE EDITOR

It is both an honor and a pleasure to begin our second year of publication of the CURE Civil Commitment Newsletter. As the new Congress takes office in Washington and we observe President Obama's Second Inauguration, it is a time to look forward to 2013 and our on-going work of education and advocacy on your behalf. The first year of publication was an eye-opening experience for us in the Washington office as we could not believe how little is known by both the general public and policy-makers about civil commitment. We are doing our part to try and change this by bringing your voices and concerns to the groups and individuals we meet within the Washington, DC area and beyond.

I would remind everyone that the focus of this newsletter is to serve the interests and needs of those in civil commitment in both the Federal system and in the twenty states that have civil commitment. Our hope is both to educate and advocate. I want to remind our readers that there are really 21 civil commitment systems in the United States, so everything in every article may not be completely applicable to your particular situation. However, we are trying to present a real cross-section of what is happening with civil commitment at both the State and Federal level. Remember that even if you are in a state-run facility, that Federal rules and Federal dollars do have some sway in what happens in your facility.

In addition, you may now e-mail the Civil Commitment Newsletter staff at ccn@curenational.org. In addition, if you wish to receive an electronic version of the newsletter instead of the paper version, we would be happy to do that as it will save both paper and costs. Thank you for your interest and support! All of us on the newsletter staff hope that 2013 is a good year for all!

Thomas Chleboski
Editor

MORE PROBLEMS FOR CALIFORNIA IN CIVIL COMMITMENT PROCESS

California has experienced setbacks in the courts on the issue of civil commitment. In one case, a rural Northern California jury decided that an openly gay man who had served two years in prison for a forcible oral copulation of an acquaintance back in 2003 did not merit civil commitment. In another case, a California appeals court has overturned the civil commitment of a convicted sex offender for the

second time in a row due to egregious prosecutorial misconduct.

In the Northern California case, the prosecution's main witness was a lone government psychologist whose opinion rested on a hollow combination of homophobia, bogus psychiatric diagnoses, and trumped-up risk estimates. This witness cited the bogus disorder of "Paraphilia NOS (not otherwise specified) - nonconsent" as a legal basis for civil commitment and he used the Static-99R actuarial tool to present a highly inflated estimate of risk. Testifying for the defense were four psychologists, including the man's treating psychologist at Coalinga State Hospital, who testified in no uncertain terms that he is neither mentally disordered nor likely to reoffend.

The defense team had barely left the courthouse when the court clerk summoned them back, saying the jury had reached a verdict. Their astonishingly fast decision hints that the jurors agreed that this case was an egregious example of overzealous prosecution and a waste of their valuable time.

In the second case, a California appeal court wrote that the prosecutor had engaged in a "pervasive pattern" of misconduct and "flagrantly" violated the law by implying that jurors would become social pariahs if they did not vote to civilly commit. Prosecutor Jay Boyarsky, now the second in command of the district attorney's office in Santa Clara County (San Jose), also improperly impugned the reputation of the forensic psychologist who testified for the defense, according to the scathing opinion by the Sixth District Court of Appeal.

In this case the prosecutor engaged in a pervasive pattern of inappropriate questions, comments and argument, throughout the entire trial, each one building on the next, to such a degree as to undermine the fairness of the proceedings. The misconduct culminated in the prosecutor flagrantly violating the law in closing argument, telling the jury to consider the reaction of their friends and family to their verdict, implying they would be subject to ridicule

and condemnation if they found in favor of defendant.

The case revolves around the controversial diagnosis of *hebephilia*. At the civil commitment trial, two state evaluators testified that the Defendant suffered from *hebephilia*, thereby making him eligible for civil commitment. However, they admitted that *hebephilia* was highly controversial and had only come into vogue with the advent of civil commitment laws.

The appellate court chastised the prosecutor for stepping far over the line in his questioning of a psychologist who was called by the defense to rebut the diagnosis of *hebephilia*. Psychologist Ted Donaldson testified that *hebephilia* is not a legitimate mental disorder, and that socially unacceptable or immoral conduct does not constitute a mental illness.

The appellate opinion strongly rebuked trial judge Alfonso Fernandez for overruling repeated objections by defense attorney Patrick Hoopes. "Defense counsel objected to all of the prosecutor's improper questions, statements and arguments. We observe that not one of counsel's well-taken objections was sustained by the court. The court erred in overruling these objections."

As civil commitment is becoming more controversial in many parts of the country, it is becoming clear that in California in at least two recent cases, courts have found fault with the current commitment process.

NEW YORK REDUCES USE OF CIVIL COMMITMENT

New York's civil commitment program is taking in a smaller percentage of sex offenders and the percentage has steadily decreased since the program started in 2007, according to state data. That drop is helping the state temporarily avoid the excessive costs of creating new space for civil commitment. However, the state continues to bump up against its capacity at its psychiatric facilities for civilly confined sex offenders, records show.

Now, less than 3 percent of those who could be civilly committed are being judged to have a mental defect deserving of civil confinement and treatment. That's about a fourth of the percentage from the program's first year. The decline comes at the same time that legal challenges to New York's civil commitment are becoming more common. The Court of Appeals, New York's highest court, last month narrowly sided with the state in the challenge from one civilly committed sex offender — a challenge that could have put the institutionalization of others into question. The state's

commitment of the offender was upheld by a 4-3 vote. But the dissent in the case, written by Associate Judge Robert Smith, focused on one of the key claims from commitment critics: A belief that the program is designed to circumvent the criminal justice system and keep offenders locked away longer than penal laws allow.

State officials say that the program fits into the constitutional framework allowed by rulings from the U.S. Supreme Court. Those legal precedents dictate that sex offenders cannot be civilly confined without a determination that they have a mental disorder compelling them to commit sex-related crimes. Civil commitment of a sex offender costs about \$175,000 a year because of the mental treatment regimen. That's about four times the cost of imprisonment.

Civil confinement is, under the law, supposed to be a psychiatric — not criminal — process. The offenders are not publicly identified. They're permitted the same confidentiality provided to patients at state-run institutions like the Rochester Psychiatric Center.

There are close to 1,500 offenders in New York's prisons eligible annually for civil commitment. An initial review of records trims those numbers down to 100 and 150, who are then evaluated more rigorously by the Office of Mental Health. Ultimately OMH then determines which offenders to recommend for civil commitment. The legal process must determine that the offender suffers from a dangerous "mental abnormality" for commitment to go forward.

OMH statistics show that few confined offenders are near release. OMH uses a four-phase treatment program, with the final phase readying the offender for "community re-entry." The September OMH report said that of 265 people then confined, only one was in the fourth phase.

In its 2009 report OMH recommended alternatives other than civil commitment for the worst sex offenders. That included more intensive treatment in the prisons and community-based secure facilities.

"Absent such innovation, the state will bear the enormous fiscal burden of an ever-growing civil confinement population," the report warned.

APA Board of Trustees Approves *DSM-5*

The American Psychiatric Association (APA) Board of Trustees has approved the final diagnostic criteria for the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*. The trustees' action marks the end of the manual's comprehensive revision process, which has spanned over a decade and included contributions from more than 1,500 experts in psychiatry, psychology, social work, psychiatric nursing,

pediatrics, neurology, and other related fields from 39 countries. These final criteria will be available when *DSM-5* is completed and published in spring 2013. *DSM-5* is the guidebook used by clinicians and researchers to diagnose and classify mental disorders.

The manual will include approximately the same number of disorders that were included in *DSM-IV*. This goes against the trend from other areas of medicine that increase the number of diagnoses annually.

“We have sought to be conservative in our approach to revising *DSM-5*. Our work has been aimed at more accurately defining mental disorders that have a real impact on people’s lives, not expanding the scope of psychiatry,” said David J. Kupfer, MD, chair of the *DSM-5* Task Force. “I’m thrilled to have the Board of Trustees’ support for the revisions and for us to move forward toward the publication.”

In a blow to psychology's burgeoning sex offender industry, the novel diagnosis of "hebephilia" was rejected outright, not even being relegated to an appendix as meriting further study. The rejection follows the failure of two other sexual disorders proposed by the *DSM-5*'s paraphilias subworkgroup: paraphilic coercive disorder (or a proclivity toward rape) and hypersexuality. Also rejected was a proposed expansion of the definition of pedophilia. All three proposed sexual disorder expansions were widely critiqued by mental health professionals, especially those working in the forensic contexts in which they would be deployed. They led to a spate of critical peer-reviewed publications.

The unequivocal rejection sends a strong signal of the American Psychiatric Association's continuing reluctance to be drawn into the civil commitment quagmire, where pretextual diagnoses are being invoked as an excuse to indefinitely confine sex offenders who have no genuine mental disorders. In marked contrast with the field of psychology, psychiatry leaders have expressed consistent concerns about the use of psychiatric labels to justify civil detention schemes.

“At every step of development, we have worked to make the process as open and inclusive as possible. The level of transparency we have strived for is not seen in any other area of medicine,” said James H. Scully, MD, medical director and chief executive officer of APA.

Visit the APA at www.psychiatry.org.

SURVEY

We are still in the process of compiling the information from the many survey responses that we have received from you. We hope to have some feedback in the April newsletter. Thank you for your generous and insightful responses to the survey questions. Your feedback is both enlightening to us and will be helpful in our advocacy work.

INDIANA LAW OVERTURNED

A state law that bans registered sex offenders from using Facebook and other social networking sites that can be accessed by children is unconstitutional, a federal appeals court ruled Wednesday. The 7th U.S. Circuit of Appeals in Chicago overturned a federal judge's decision upholding the law, saying the state was justified in trying to protect children but that the “blanket ban” went too far by restricting free speech. The 2008 law “broadly prohibits substantial protected speech rather than specifically targeting the evil of improper communications to minors,” the judges wrote. “The goal of deterrence does not license the state to restrict far more speech than necessary to target the prospective harm,” they said in a 20-page decision.

The judges noted that the U.S. Supreme Court has also struck down laws that restricted the constitutional right to freedom of expression, such as one that sought to ban leafleting on the premise that it would prevent the dropping of litter. U.S. District Judge Tanya Walton Pratt ruled in June that the state has a strong interest in protecting children and found that social networking had created a “virtual playground for sexual predators to lurk.” She noted that everything else on the Internet remained open to those who have been convicted of sex offenses.

The American Civil Liberties Union of Indiana filed the class-action suit on behalf of a man who served three years for child exploitation and other sex offenders who are restricted by the ban even though they are no longer on probation. Courts have long allowed states to place restrictions on convicted sex offenders who have completed their sentences, controlling where many live and work and requiring them to register with police. But the ACLU contended that even though the Indiana law is only intended to protect children from online sexual predators, social media websites are virtually indispensable. The group said the ban prevents sex offenders from using the websites for legitimate political, business and religious purposes. The ACLU applauded the decision in *John Doe v. Prosecutor, Marion County, Indiana*.

Federal judges have barred similar laws in Nebraska and Louisiana. Louisiana legislators passed a new, narrower law last year that requires sex offenders to identify themselves on Facebook and similar sites. A federal judge struck down part of Nebraska's law last October.

MINNESOTA DIRECTED TO REFORM MSOP

Minnesota legislators will be compelled to address the subject of civil commitment as a result of the actions of a court-mandated task force examining the state's troubled civil commitment program. The 22-member Sex Offender Civil Commitment Advisory Task Force directed the Legislature to "provide adequate funding for less secure residential facilities, group homes, outpatient facilities and treatment programs" for individuals currently enrolled in the Minnesota Sex Offender Program (MSOP), as well as those who might be referred for civil commitment in the future. The task force, which is being chaired by former Minnesota Supreme Court Chief Justice Eric Magnuson, was created through a federal judge's order in August. It stems from a class-action lawsuit challenging the constitutionality of the conditions of confinement for individuals enrolled in the MSOP.

Minnesota has the highest per-capita rate of civil commitments in the country, with more than 650 men currently enrolled in the program at a cost of approximately \$120,000 annually per patient. Since MSOP's creation in 1994, only two individuals have been provisionally discharged from the program over two decades. One of them remains on the outside; the other violated the terms of his release and subsequently died while detained at the MSOP. Some argue that commitment amounts to a de facto life sentence.

Legislators on both sides of the aisle believe that the unprecedented threat of federal intervention should provide the impetus to make bipartisan progress on the issue in the Capitol. Sen. Tony Lourey, DFL-Kerrick, Chairman of the Health and Human Services Finance Committee stated "We don't want the feds to come in and take over our

program. We need to be adults and step up to the plate and do what needs to be done to give this program the proper policy and legislative underpinnings that make it meet constitutional muster." GOP Rep. Jim Abeler, a member of the Health and Human Services Finance Committee, expresses a similar sentiment.

The court directive to pursue less restrictive alternatives to civil commitment is just one piece of the mandate given to the task force. The panel is also charged with examining the overall civil commitment referral process and the means by which individuals who are already detained can have their level of supervision reduced.

Last year the Office of the Legislative Auditor released a report that harshly criticized the state's civil commitment program for providing disparate treatment to individuals across the state and inadequate treatment to MSOP clients. The vast majority of individuals detained in the program remain in the early stages of treatment. More than 600 are either not currently enrolled in treatment or are in the initial two phases of the four-phase program. The task force has a two-year window in which to operate, although its initial directive indicated that the body expects to finish its work by the end of next year.

We welcome your feedback on the newsletter as well as any articles, artwork or photographs that you may wish to submit. Indicate whether you would like your name to be published with your submission if it is selected for publication in an edition of the newsletter. Please understand that any submissions will remain in the CURE Civil Commitment Newsletter files and that the editorial staff reserves the right to edit any submission as needed. Thank you!

The CURE Civil Commitment Newsletter is published quarterly (January, April, July, and October) and is available, free of charge, to anyone wishing to receive it. The newsletter boasts an all-volunteer staff but there are costs to produce the newsletter including printing and postage. If you would like to donate to offset the costs of this project, please make out a check or money order to "CURE" and mail it to CURE Civil Commitment Newsletter, PO Box 2310, Washington, DC 20013. If you would like to receive the newsletter please send us your contact information at the same address:

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