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Panel Upholds Detention Provision of Confinement Law

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A Bronx judge was wrong to order the release of a convicted sex offender awaiting trial on his possible civil confinement on the grounds that part of New York's Mental Hygiene Law is unconstitutional, a unanimous Appellate Division, First Department, panel has ruled.

In a Jan. 26 opinion by Justice James M. Catterson (See Profile) in *State v. Enrique T.*, 250306/11, the panel reversed Supreme Court Justice Colleen Duffy (See Profile) and held that pre-trial civil detention under Article 10 of the Mental Hygiene Law is constitutional. Moreover, it held that the judge never should have considered the issue in the first place because it was not before her.

Justices Peter Tom (See Profile), Leland G. DeGrasse (See Profile), Rosalyn H. Richter (See Profile) and Sallie Manzanet-Daniels (See Profile) concurred in the opinion.

Article 10, better known as the Sex Offender Management and Treatment Act of 2007, governs the "civil management" of sex offenders who have completed their criminal sentences. Under the law, if a court finds probable cause that a convicted offender remains a danger, the individual must be confined until a civil trial on what kind of civil management is necessary.

Justice Duffy ruled last summer that pretrial civil confinement violates the offender's right to due process and declared it facially unconstitutional. She ordered that Enrique T., a repeat sex offender being held pending a trial on civil management, be released (NYLJ, Aug. 9, 2011).

The New York Attorney General's office appealed.

Justice Catterson wrote that Justice Duffy's initial finding that there was "probable cause" to conclude that Enrique T. was still dangerous was a sufficient ground for pretrial civil confinement under the Constitution. He rejected an argument by Enrique's counsel that the state was obligated at that stage to consider less restrictive alternatives.

"We hold that a finding of probable cause to believe that an Article 10 sex offender requires civil management because of mental abnormality incorporates the necessary finding of a respondent's dangerousness," Justice Catterson wrote. "As a danger to society, all Article 10 sex offenders, therefore, come within the scope of those statutes upheld by the United States Supreme Court that authorize commitment or detention, even pretrial detention, without mandating consideration of a less restrictive alternative."

Justice Catterson said that any such alternative would be "a complex and individualized plan, primarily meant to safeguard the community into which the sex offender will be released," and that working out the details of such a plan was the purpose of the trial.

"It is thus not an alternative available at the probable cause stage of the judicial process which determines whether there is reasonable cause to believe that a detained sex offender has a mental abnormality rendering him a danger to society," he wrote.

Justice Catterson also said that Justice Duffy wrongly created two categories of sex offenders—dangerous and non-dangerous—and obligated the court to decide to which category a particular offender belongs before trial.

"Any view that there are dangerous and non-dangerous Article 10 sex offenders, or that there is no judicial determination of dangerousness at the probable cause stage is based on an essential misreading of the statute," he said.

He said that Justice Duffy incorrectly relied on a 1987 U.S. Supreme Court case, *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, which concerned the constitutionality of the Bail Reform Act of 1984. That law allowed people charged with certain serious crimes to be held without bail on the basis that they were dangerous to the community, rather than that they were flight risks. The Supreme Court ruled that it was constitutional. Justice Duffy said that, according to *Salerno*, a person could only be detained if they were shown to be dangerous.

But Justice Catterson said the *Salerno* decision, which applied to people only charged with crimes, was not applicable to Article 10 sex offenders, who had been convicted of crimes.

Finally, Justice Catterson acknowledged that an Article 10 sex offender's interest in personal liberty was "weighty."

"However, the risk of an erroneous deprivation of such interest is limited by the statutory requirement of two levels of review prior to commencing an Article 10 petition, and by the statutory requirement of a judicial finding of probable cause to believe the respondent is a sex offender requiring civil management," he said.

The panel heard arguments on Dec. 15, 2011.

Sadie Zea Ishee of Mental Hygiene Legal Service, counsel to Enrique T., could not be reached for comment.

Assistant Attorneys General Patrick J. Walsh and Steven C. Wu represented the office. A spokesperson for the office said, "Today's decision affirms the state's commitment to ensuring that convicted sex offenders receive the continued treatment they require, while protecting the public from danger."

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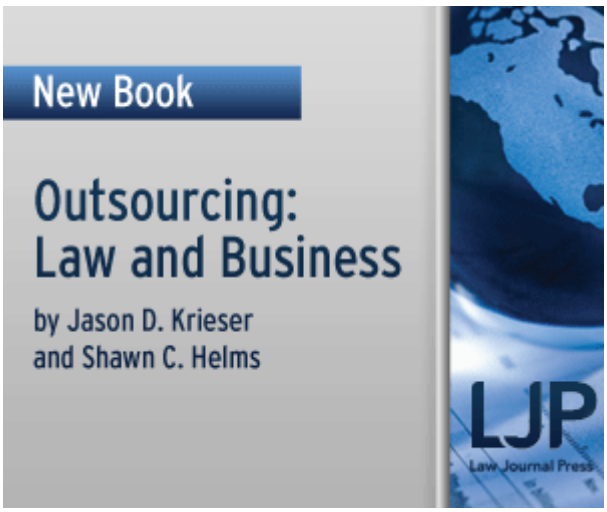

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