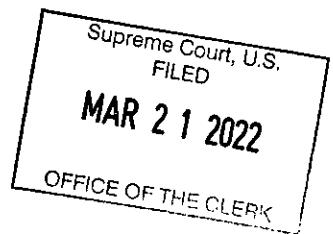


21-7452 ORIGINAL
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES



ANTHONY ATKINSON — PETITIONER
(Your Name)

MATTER OF STATE OF NEW YORK,
M.H.L. ACT. 10, et al. vs.
— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals, Second Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Anthony Atkinson
(Your Name)

STARC Oakview Campus, Psy. Center, BOX 300
(Address)

Marcy, NY 13403
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

1. Whether the state of New York, Attorney General along with psychiatric examiners should be required to produce sufficient medical proof to support their volitional impairment under Mental Hygiene Law 10.03(i).
2. Whether the state and psychiatric examiners neglect to provide sufficient medical evidence of a volitional impairment in support of their diagnosis of a mental condition under the statute.
3. Whether the Act's purpose is retributive because it does affix culpability for prior criminal conduct such as intent, the highest mental state.
4. Whether a finding of mental abnormality under the Act reduces the same criminal intent to reckless disregard for committing the sex act.
5. Whether a finding of mental abnormality under Mental Hygiene Law 10.03(i) suggest that at the time sex offense was committed the Petitioner would have lacked the criminal responsibility as a result of a mental disease or defect, Penal Law 40.15. Thus warranting a Criminal Procedure Law Section 730 evaluation prior to the criminal trial or plea.
6. Whether Family court Judge in civil confinement proceedings has legal jurisdiction to rule on Petitioner's Criminal Procedure law Section 440.10 Motion to criminal case.
7. Whether Petitioner may sue for mental harm after being held four (4) months past his penal term in the prison system without being physically injured.

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

State of New York, Attorney General;

Psychiatric examiner Jonathan Miljus;

Psychiatric examiner John A. Thomassen;

Suffolk County surrogate Judge Barbara Kahn;

Suffolk County surrogate Court Judge Richard Ambro;

Eastern District of New York, U.S. Court Judge Joanna Seybert;

United States Court of Appeals, Second Circuit Judges, Susan L. Carney, Richard J. Sullivan, Steven J. Menashi.

RELATED CASES

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

[x] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was December 9, 2021.

[] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 02-01-2022, and a copy of the order denying rehearing appears at Appendix A.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Article III of the Constitution of the United States and U.S. Const.,

Amend. 11.

[] For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Due process clause of the United States Constitution V, XIV; N.Y. Const.

Art. 1, 6.

Civil Rights Law 12.

Federal Constitution's Article 1, 10, cl 1.

STATEMENT OF THE CASE

1. On July 19th, 2018, the New York state Department of Correction and Community Service (DOCCS), Associate Commissioner Anne Marie McGrath submitted a notice to the state of New York, Attorney General's Civil Commitment Bureau Chief, Michael Connolly, in accordance with section 10.05(b) of the Mental Hygiene Law as added by the Sex Offender Management and Treatment Act (SOMTA), indicating that petitioner may be a "detained sex offender" who is nearing his anticipated release from the custody of the Department of Corrections on his maximum expiration date of September 28th, 2018.

2. August 29th, 2018, petitioner appeared in Suffolk county surrogate court for a risk assessment hearing before family court Judge Barbara Kahn. And during the proceedings petitioner tried to present the judge with a criminal procedure Law section 440.10 motion concerning the inconsistent verdict in violation of CPL 1.20(37); CPL 300.40(3)(b); CPL 300.50 which involves the very same sex offending case used for matters of the Article 10 case. Moreover, the New York state Appellate Division, Second Judicial Department clerk responded July 31, 2015, acknowledging the error of law and directed petitioner to file motion in criminal trial court. Judge Kahn indicated she could not accept the motion and indicated that Petitioner should report to the police department upon his release.

3. September 11, 2018, Associate Commissioner Donna Hall, from the Office of Mental Health (OMH), submitted a letter to petitioner indicating the case review team finds that respondent (Petitioner) is a sex offender requiring civil management as defined by (SOMTA), effective on and or after April 13, 2007.

4. The notice was received September 12, 2018, when petitioner returned from Suffolk county court to the Governor Correctional Facility.

5. September 13, 2018, Assistant Attorney General Jimmie C. McCurdy submitted a petition in the St. Lawrence county court for an order to detain the petitioner beyond his maximum expiration date of September 28, 2018, based on the state's finding that the person is a sexually violent predator based on the diagnosis of Psychiatric examiner Jonathan Miljus, and is eligible for civil commitment.

6. September 14, 2018, petitioner received an order along with a copy of the petition from St. Lawrence county court Judge Mary Farley, granting the state's petition to hold petitioner beyond his Penal term.

7. September 20, 2018, petitioner mailed his criminal procedure Law section 440.10 motion to the criminal court motion clerk in Suffolk county, Riverhead, N.Y. And September 28, 2018, petitioner maxed out on his 0-23 year sentence, June 21, 1996, from the very same Suffolk county criminal court.

8. In any event, when the court issues such an order, the probable cause hearing must commence no later than seventy-two hours from the date of respondent's (Petitioner's) anticipated release, M.H.L. 10.06(h). Otherwise the hearing must commence within thirty days of the filing of the petition, M.H.L. 10.06(g)-(k).

9. Petitioner received an order from Suffolk county, family court Judge Barbara Kahn dated December 4, 2018, denying petitioner's CPL 440.10 motion as self serving after she claimed she could not accept the motion August 29, 2018. The judge's conduct was unethical and misleading, possibly an abuse of discretion.

10. Then, on January 4, 2019, petitioner received a probable cause hearing approximately three (3) months after the expiration of his penal term in violation of M.H.L. 10.06(h); M.H.L. 10.06(g)-(k). And Suffolk county family court Judge Richard Ambro found in favor of the state's examiner Miljus.

11. Petitioner was never transferred from the prison until January 31, 2019, when he was transferred to the Manhattan Psychiatric Center (MPC), approximately four (4) months after his maximum expiration date of his 0-23 year penal term.

12. October 10, 2019, a bench trial was held before Suffolk county surrogate court Judge Ambro, who found in favor of psychiatric examiner Miljus who diagnosed petitioner with having an antisocial personality disorder, pedophilia disorder, boardline intellectual functioning disorder, and alcohol use disorder. Who suffer from a mental abnormality under M.H.L. 10.03(i). (Note, march 4, 2019, Judge Ambro indicated that Judge Barbara Kahn retired).

13. March 2, 2020, petitioner filed a 1983 law suit in the U.S. Southern District court under A. Atkinson v. In the Matter of State of New York M.H.L. Act 10, et al., 20-CV-2147 (UA). Reference to question(s) presented. Amended June 3, 2020.

14. March 9, 2020, a dangerousness hearing was held in Suffolk county court before Judge Ambro to determine if petitioner was eligible for (SIST). And the judge found that petitioner was a dangerous sex offender requiring confinement under M.H.L. 10.03(e).

15. September 14, 2020, the Southern District court issued an order transferring the case to the U.S. eastern District court, Central Islip, N.Y., and indicated that no summons from the court shall issue. Appendix A.

16. January 5, 2021, the U.S. Eastern District court issued a memorandum and order for the reasons that follow, the amended complaint is sua sponte dismissed without prejudice pursuant to 28 U.S.C. 1915(e)(2)(B)(ii), 1915 A (b) (1), and plaintiff is granted leave to file a second amended complaint. Docket N. 20-CV-4497 (JS)(ST), and January 25, 2021.

17. In a memorandum and order April 19, 2021, the judge indicated that plaintiff has not suffered any physical injuries as a result of the alleged delay in his probable cause hearing, leave to amend this claim would be futile. See, 28 U.S.C. 1997 e(e) ("No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." (cite omitted.)

18. The judge overlooked the fact that the State of New York had a due process obligation to hold a timely probable cause hearing under the Article 10 statute, whether plaintiff was injured or not.

19. The judge also overlooked law and fact that plaintiff was held in the prison system three (3) months past his penal term, had a liberty interest of being released, and was not a prisoner.

20. The judge overlooked the law pursuant to 28 U.S.C. 1915(h) [2006], defining "Prisoners,"... prisoners incarcerated as a result of a civil proceedings are not "prisoners" under the P.L.R.A. (See, Michau v. Charlston County S.C., 434 F.3d 725, 727-728, (Person civilly detained pursuant to sexually violent predator statute.)

21. April 20, 2021, petitioner appealed to the U.S. Court of Appeals, Second Circuit, No. 21-1244.

22. However, in a response dated June 4, 2021, the state of New York managing Assistant Solicitor General, Oren L. Zeve advised the court that the Attorney General's Office does not currently represent the State defendants, and thus cannot appear as counsel or file an appellee's brief. See N.Y. Pub. Officers Law ...17(4) (requiring proper service of "summons, complaint, process, notice, demand or pleading" before defendant may request representation from the office); Exec. Law ...63(1). In other words, the District Court never authorized issuance of summonses, see Fed. R. Civ. Proc. 4, because it sua sponte dismissed

the complaint for failure to state a claim. See, Attorney General's response attached to Appeal in Appendix A.

23. July 12, 2021, petitioner filed a motion to appeal in forma pauperis with a memo of law and for appointment of counsel. The petitioner also agreed with the Attorney General and requested that the Court vacate sua sponte dismissal and serve summons on the defendants.

24. December 9, 2021, the U.S. Court of Appeals, Second Circuit denied motions and dismissed the appeal because "it lacks an arguable basis either in law or fact." Citing, *Neizke v. Williams*, 490 U.S. 319, 325 (1989), see also, U.S.C. 1915(e).

25. January 24, 2022, petitioner filed a motion for reconsideration arguing that the U.S. Court of Appeals, Second Circuit also overlooked the law and facts and dismissed the plaintiff (petitioner's) motion under 28 U.S.C. 1915(e), prior to serving summons on any defendants.

26. February 1, 2022, the U.S. Court of Appeals denied reconsideration without opinion.

27. Where, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [it's] power, or employing it as an instrument of oppression."

REASONS FOR GRANTING THE PETITION

1. The categorization of a particular proceeding as civil or criminal is first of all a question of statutory construction; in determining whether a legislature intended to create a civil or a criminal proceeding, the United States Supreme Court, while recognizing that a civil label is not always dispositive, (1) will reject the legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate the legislature's intention to deem it civil, and (2) under such limited circumstances, will consider the statute to have established criminal proceedings for Constitutional purposes; the existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes; and the absence of such a requirement in a state's provision for civil commitment is evidence that confinement under the statute is not intended to be retributive. See, *Kansas v. Hendricks*, (521 U.S. 346 [1997]).

2. As a threshold matter, commitment under the Article 10 Act does implicate either of the two primary objectives of criminal punishment; retribution or deterrence. The Act's purpose is retributive because it does affix culpability for prior criminal conduct, such as intent, the highest mental state.

3. Where, the offender was convicted of knowingly and intentionally committing the sex act in his criminal case. Thus, a finding of mental abnormality under the Act, merely reduces the same criminal intent to recklessness disregard for committing the sex act.

4. "Such conduct is used solely for evidentiary purposes to support a finding of future dangerousness. Thus triggered by the commission of a sexual assault, revealing that evidence of the prior criminal conduct was used to punish

past misdeeds, and primarily to show the accused's criminal culpability and to predict future behavior, Intent."

5. Further, a finding of mental abnormality under Mental Hygiene Law 10.03(i), would suggest that at the time the sex offense was committed, plaintiff would have lacked the criminal responsibility as a result of a mental disease or defect. Penal Law 40.15; Criminal Procedure Law 730.

6. Otherwise, the Act does make a criminal conviction a prerequisite for commitment--persons not absolved of criminal responsibility and may nonetheless still be subject to confinement under the Act. Where the Act is "tied to criminal activity" "rendering the statute punitive."

7. More so because, the state and psychiatric examiners, neglect to "provide sufficient medical proof of a volitional impairment that supports a mental condition" in their Article 10 case. Sufficient medical proof of a "mental abnormality" or a "personality disorder" that prevents the offender from exercising adequate control over his behavior. Mental Hygiene Law 10.03(i).

8. While a finding that a person is dangerous, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment of that person; such definition requires a finding of both dangerousness and an inability to control that dangerousness. Mental Hygiene Law 10.03(e).

9. Whereas, the state and psychiatric examiners fail to provide sufficient medical evidence, which makes the person likely to engage in the predatory acts of sexual violence -- as a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others. See, Kansas v. Hendricks, (521 U.S. 346 [1997]).

10. In *Hendricks*, the court noted the importance of the "volitional element" in civil commitment proceedings.

11. "A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment. We have sustained civil commitment statutes when they have coupled proof of dangerousness with proof of some additional factor, such as a 'mental illness or' mental abnormality.'

12. Mental Hygiene Law 10.03(i) defines a mental abnormality as: "a congenital or acquired condition, disease or disorder that effects the emotional, cognitive, or volitional capacity of 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."

13. Article 10 authorizes civil confinement only of those sex offenders whose "mental abnormality" involves such a strong disposition to commit sexual misconduct and an inability to control behavior that the person is dangerous to society (M.H.L. 10.03[e], 10.07[f]).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Anthony Atkinson

Date: March 21, 2022