Unreported Disposition
11 Misc.3d 1053(A), 814 N.Y.S.2d 892 (Table), 2006 WL 346534 (N.Y.Sup.), 2006 N.Y. Slip Op. 50191(U)

THE STATE OF NEW YORK ex rel. STEPHEN J. HARKAVY on behalf of JOHN DOES 13 - 22, Petitioners,
v.
EILEEN CONSILVIO, Executive Director, Kirby Forensic Psychiatric Center, Respondent.

404172/05
Supreme Court, New York County
Decided on February 8, 2006

CITE TITLE AS: State of N.Y. ex rel. Harkavy v Consilvio

ABSTRACT

Incapacitated and Mentally Disabled Persons
Involuntary Commitment

Commitment of Sex Offenders upon Expiration of Criminal Sentence

State of New York ex rel. Harkavy v Consilvio, 2006 NY Slip Op 50191(U). Incapacitated and Mentally Disabled Persons—Involuntary Commitment—Commitment of Sex Offenders upon Expiration of Criminal Sentence. (Sup Ct, NY County, Feb. 8, 2006, Silbermann, J.)

OPINION OF THE COURT

Jacqueline W. Silbermann, J.

In this proceeding pursuant to Article 70 of the CPLR, Stephen J. Harkavy, Deputy Director of the Mental Hygiene Legal Service (hereinafter "MHLS"), once again seeks the immediate release of former inmates (hereinafter "Petitioners") who were transferred from various prisons to the Kirby Forensic Psychiatric Center (hereinafter "Kirby") after completing prison terms for sexually violent offenses.[1] Although the Petitioners ostensibly were transferred to Kirby to receive treatment for mental illnesses which may have contributed to their predatory behavior, Petitioners assert the allegedly improper transfers were effected in accordance with Governor Pataki's well-publicized plan to use existing state statutes to civilly commit sexually violent offenders to state psychiatric hospitals upon the expiration of their sentences in order to delay their release into society.[2] Respondent, Eileen Consilvio, Executive Director of Kirby, opposes the application and asserts the Petitioners properly were transferred pursuant to Article 9 of the Mental Hygiene Law.

The Court notes that in the absence of legislation enacted to address the situation ***2** presented in the instant application (and despite this Court's desire to assist Governor Pataki in his attempt to protect our citizenry, especially our children, from future attacks by individuals believed to be repeat offenders of sexually violent crimes), this Court again is put in the untenable position of attempting to "do justice" by applying existing statutes to fact patterns clearly not anticipated by the legislature at the time they were enacted -- a situation essentially akin to a judicial determination of which statutory "square peg" fits best into the factual "round hole" presented in this (and its predecessor) application.

Background/Facts

A review of the facts and circumstances surrounding the civil confinement of the Petitioners is appropriate. Generally, Petitioners were admitted to Kirby, a secure psychiatric facility, between November 4, 2005 and December 20, 2005, pursuant to Mental Hygiene Law §9.27, upon the application of the Superintendents of the correctional facilities in which they resided at the end of their terms of incarceration. Respondent concedes that Petitioners were not transferred pursuant to the pre-commitment procedures set forth in Correction Law §402, which provide an inmate alleged to be mentally ill with notice of the prison superintendent's desire to transfer him to a psychiatric hospital, and an opportunity for a hearing on the need for such hospitalization prior to his transfer.

Upon the instant application, Respondent asserts that the procedure set forth in Correction Law §402 is inapplicable here, because Petitioners were not committed to Kirby until after their prison terms expired. As such, Respondent contends the Petitioners were entitled to no greater protection than that afforded to any other free citizen under Article 9 of the Mental Hygiene Law. Conversely, Petitioners assert they were entitled to the enhanced due process protections set forth in Correction Law §402, because in reality, they were in the custody of the Department of Corrections from the time their

sentences expired until the time they were admitted to Kirby.

A review of the supporting affidavits submitted with the Petition reveals that each of the Petitioners was evaluated by two or more psychiatrists prior to the date of his anticipated release, and then formally "committed" to Kirby upon the examination of a third physician immediately upon the expiration of his sentence. Accordingly, by carefully orchestrating each Petitioner's arrival at Kirby to coincide with the expiration of his sentence, each of the Petitioners technically was a civilian at the time of his admission, despite the fact that not one of the Petitioners was free to leave prison at any point prior thereto. Indeed, each of the Petitioners was transported from prison to Kirby by Department of Corrections personnel.

The experience of John Doe No.21, as alleged in his affidavit accompanying the Petition, is typical of the experiences recounted by the other Petitioners. John Doe #21 states he was admitted to Kirby on November 28, 2005, his conditional release date from Sullivan Correctional Facility. He indicates that approximately one week prior to his anticipated release date, he met with two psychiatrists and two "other people", one of whom told him he would be discharged either to a shelter or a hospital. He states he was told it would be better for him to go to a hospital so that he could obtain Social Security Insurance benefits and find better housing in the community. For that reason, he says, he was told he would be discharged to Manhattan Psychiatric Center, a non-secure facility. On November 28, 2005, John Doe #21 was transported in shackles by two Corrections officers to Kirby without further explanation. He indicates that before he was transferred, ***3** he was not informed of his due process right to notice and an opportunity to be heard, nor of his entitlement to representation by an MHLS attorney.

John Doe #14 relates a similar experience. He states that upon his conditional discharge from Auburn Correctional Facility on November 8, 2005, he was immediately put in a van and transported to Kirby. He indicates that on November 2, 2005, he was examined both in person and telephonically by prison psychiatrists. He states he was not told of the purpose of the examination until November 4, 2005, when he was placed in a "strip" cell with no clothes and no access to a phone. He indicates he was told he would be transferred to Manhattan Psychiatric Center upon his discharge from prison, and never was told he would be admitted to Kirby until his arrival at that facility on November 8th. Like John Doe #21, this Petitioner also states he was not advised of his due process rights or of his right to representation by the Mental Hygiene Legal Service.

The affidavits of the remaining Petitioners present facts similar to those related above.

To date, none of the Petitioners either has sought judicial review of his involuntary commitment pursuant to MHL §9.31, or transfer to a non-secure facility pursuant to 14 NYCRR Part 57.

Legal Analysis

New York statutes provide two mechanisms for the involuntary civil commitment of persons alleged to be in need of psychiatric care and treatment, to wit: Mental Hygiene Law §9.27, and Correction Law §402.

Article 9 of the Mental Hygiene Law is the State's general civil commitment statute, and applies to all free persons in New York State. Pursuant to Section 9.27(a), certain designated applicants may seek the involuntary hospitalization of an individual alleged to be mentally ill upon the certification of two examining physicians attesting to the need for psychiatric care and treatment. Thereafter, a member of the psychiatric staff of the hospital to which admission is sought is required to examine the patient and determine whether he or she is in need of involuntary hospitalization. If so, the patient is committed for an initial period of sixty days.

Pursuant to MHL §9.31, involuntarily hospitalized patients have the right to a (post-commitment) hearing on the question of the need for involuntary care and treatment upon a written request therefor. Section 9.31(c) instructs a court in receipt of such a request to fix the date of the hearing at a time not later than 5 days from the date such notice is received by the court.

Conversely, Correction Law Section 402 provides for the commitment of mentally ill inmates who cannot safely be treated in a prison setting. To summarize, that section sets forth a detailed procedure whereby the superintendent of a correctional facility may apply to the Court for an order committing an inmate to a hospital for the mentally ill, upon notice to the inmate, his family (or friend if no family can be located), and the Mental Hygiene Legal Service. Thereafter, the inmate is advised of his right to a pre-commitment hearing at which he is entitled to representation by counsel and to seek an independent medical opinion on the need for hospitalization.

In the event a civilly committed inmate's term of imprisonment expires (or he is otherwise due to be conditionally released) during the term of his involuntary hospitalization, Correction Law §404(1) provides that the director of the hospital may apply ***4** to the court for the continued retention of the former inmate pursuant to Article 9 of the Mental Hygiene Law. In the event hospital authorities believe the former inmate is "reasonably safe to be at large" when his term of imprisonment expires, §404(2) provides that such former

inmate shall be discharged from the hospital.

In its decision in *State ex rel. Harkavy on behalf of John Does 1 through 12 v. Consilvio*, 2005 NY Slip Op 25499 (Nov. 15, 2005), (hereinafter "*Harkavy I*"), this Court held that John Does 1-12 were entitled to the due process protections set forth in Correction Law §402 prior to their involuntary commitment to a psychiatric hospital, because although their terms of imprisonment technically had expired by the time they were committed to Manhattan Psychiatric Center ("MPC"), the so-called "former inmates" never were free from incarceration. Indeed, they were transported directly from prison to MPC by Department of Corrections personnel upon completion of their prison sentences without prior notice or an opportunity to be heard.

Upon the instant application, the Respondent asserts that the Petitioners at issue here are entitled to no greater protection than that afforded by the civil commitment scheme outlined in Mental Hygiene Law Article 9, because, at the time of their admission to Kirby, a secure psychiatric facility, the Petitioners were ordinary citizens no longer subject to Department of Corrections control.

Upon careful consideration of this argument for a second time, the Court remains convinced that the Petitioners were not "free" in any true sense of the word at the time of their commitment to Kirby. Not only were they subjected to psychiatric evaluations several days prior to their anticipated release from prison (usually without any explanation regarding the purpose of the evaluations), but they then were transported to Kirby, often in shackles, by Department of Corrections personnel without any notice or opportunity to object to this substitute form of confinement prior to its becoming a *fait accompli.*

The reasoning of the Supreme Court's decision in *Vitek v. Jones*, 445 U.S. 480 (1980) is instructive here, and suggests that the involuntary confinement of the Petitioners pursuant to MHL §9.27, which did not provide them with notice and an opportunity to be heard prior to their commitment, was violative of the Petitioners' Constitutionally-protected due process rights. In *Vitek*, the Supreme Court considered an inmate-patient's procedural due process challenge to Nebraska's analogue to Correction Law §402(1). The *Vitek* Court concluded that the transfer of an inmate from a correctional facility to a civil psychiatric hospital implicates a liberty interest, and cannot be undertaken without affording the inmate due process protections, which included, at a minimum, written notice that psychiatric hospitalization was being considered; a hearing at which the inmate could present evidence opposing the transfer; an independent decision-maker; and the assistance of competent help at the hearing, though not necessarily by an attorney, among others. *Id.,* at 494-497.

In light of the Supreme Court's holding in *Vitek*, it seems clear that in choosing whether to apply law treating the Petitioners in the case at bar as "free persons" entitled only to the post-commitment judicial remedies set forth in Article 9 of the Mental Hygiene Law, or as "inmates" entitled to pre-commitment judicial proceedings pursuant to the Correction Law, the Court must err on the side of protecting the Petitioners' due process rights. As such, this Court finds that at a minimum, Petitioners were entitled to the ***5** enhanced due process protections of Correction Law §402 prior to their transfers to Kirby.

In light of the Respondent's admission that the pre-commitment procedures of Correction Law §402 were not employed in effecting the involuntary hospitalization of the Petitioners, the Court adheres to its ruling in *Harkavy I,* and finds that the Petitioners' due process rights were violated when they were committed to Kirby without prior notice or an opportunity to be heard.

Even assuming, *arguendo*, that the Court is found to be incorrect in its belief that the procedures set forth in the Correction Law must control where a Superintendent of a correctional facility seeks to transfer a soon-to-be-released inmate to a psychiatric facility, the Court believes the transfers at issue here were improper even under the standard set forth in Mental Hygiene Law §9.27.

Although in its decision in *Harkavy I* this Court indicated that a prison super-intendent is a proper applicant under MHL §9.27(b) as an officer of a public institution, the Court is now aware it mis-read the provision so as to eliminate the requirement that such person be an officer of a "... public or well recognized *charitable* institution or agency ..." Clearly, a prison superintendent is not an officer of a charitable institution or agency, and, as such, is not an appropriate applicant for the involuntary admission of a person pursuant to §9.27 of the Mental Hygiene Law.[3] Accordingly, the continued retention of Petitioners pursuant to §9.27 of the Mental Hygiene Law is inappropriate.

Although the Court already has concluded that the Petitioners improperly were transferred to Kirby for the reasons aforementioned, the Court believes it appropriate to address Petitioners' concerns that their rights were further violated by virtue of their transfer directly to Kirby, a secure facility, without a prior determination that a less restrictive environment would be inappropriate. Petitioners contend there is no authority in the Mental Hygiene Law (or elsewhere), permitting the commitment of individuals directly to secure facilities.

In considering this issue, the Court notes that MHL §9.27 provides that patients may be committed to a "hospital". *See* MHL §9.27 (a),(c),(f),(i). The Mental Hygiene Law definition of "hospital" does not limit itself to particular

types of hospitals, [MHL 1.03(1)], and Kirby is listed in the Mental Hygiene Law as a New York State Office of Mental Health ("OMH") "hospital" which provides for the "care, treatment and rehabilitation of [the] mentally disabled." MHL §7.17(b).

Although it is clear that Petitioners have the right to be held, if at all, in the least restrictive environment possible, it is also clear that the OMH has a duty to provide a safe environment for those it serves [MHL §33.02(a)(1)], and that the Petitioners were committed to the Director's custody for the purpose of receiving care and treatment for mental illnesses which may have contributed to their commission of sexually violent offenses. Moreover, Petitioners may seek transfers from Kirby to non-secure facilities by means of the process established in the Commissioner's regulations, and may seek judicial ***6** review of those determinations with which they disagree. *See* 14 NYCRR Part 57.

In light of the foregoing, and in the absence of a statute directly addressing the issue, this Court cannot conclude upon the papers submitted that the Petitioners' rights were violated by virtue of their commitment directly to a secure facility, absent a case by case examination of the facts and circumstances surrounding each Petitioners' hospitalization. The Court notes that the Petitioners are entitled to such a review pursuant to the Commissioner's regulations as set forth in 14 NYCRR Part 57.

Having found that the Petitioners' due process rights were violated as a result of their involuntary commitment to Kirby, the Court now turns to an analysis of the appropriate remedy for the violations. As in *Harkavy I*, Respondent again argues against the immediate release of the Petitioners on the ground that this habeas corpus proceeding more appropriately should be governed by the provisions of MHL § 33.15, and not CPLR Art. 70. In *Harkavy I,* this Court agreed with Respondent that it is inappropriate to order the release of civilly committed individuals as a result of procedural errors without first "... examin[ing] the facts concerning the person's alleged mental disability and detention." MHL § 33.15(b).

While case law dealing with habeas applications on behalf of insanity acquittees who allege that their retention in secure psychiatric facilities is illegal are not directly analogous to the facts presented here, the reasoning underlying the decisions in those cases is instructive. For example, in ruling on a habeas petition of a defendant found not guilty by reason of insanity and confined pursuant to CPL 330.20, the Court of Appeals stated the "... proper disposition of a writ application ... is a conditional order releasing the defendant unless, within a fixed and short period of time after the order a hearing on the retention application is begun and expeditiously concluded." *People ex rel. Thorpe v. Von Holden,* 63 NY2d 546, 555 (1984). Similarly, in determining the remedy for procedural errors in connection with the continued retention of an insanity acquittee, the Appellate Division, First Department indicated that "... the interests of public safety should not be ignored by allowing insanity acquittees to be released, unsupervised into the community, without first determining whether they are in need of further observation to protect themselves and the public." *See also Supreme Court ex rel. Cardona v. Singerman,* 63 Misc 2d 509, 511 (Sup. Ct. Bronx Co. 1970); *State of New York ex rel. Henry L. v. Hawes,* 174 Misc 2d 929, 935 (County Ct. Franklin Co. 1977).

Here, as in *Harkavy I,* Petitioners comprise a class of individuals who allegedly are suffering from mental illnesses which may have contributed to their commission of sexually violent offenses. As such, Petitioners may present a threat to society if released without treatment. Accordingly, although the Court has determined that the Petitioners' writ should be sustained because the procedure by which they were committed violated their due process rights, the Court believes the proper disposition of this habeas application to be a conditional order releasing the Petitioners unless within 20 days of the date of this order, they are produced in Court for individual hearings on the need for continued inpatient psychiatric hospitalization. *See* MHL §33.15; *People ex rel. Thorpe v. Von Holden,* 63 NY2d 546, 555 (1984). *See also Supreme Court ex rel. Cardona v. Singerman,* 63 Misc 2d 509, 511 (Sup. Ct. Bronx Co. 1970); *State of New York ex rel. Henry L. v. Hawes,* 174 Misc 2d 929, 935 (County Ct. Franklin Co. 1977).

***7** Accordingly, for the foregoing reasons it is hereby ORDERED and ADJUDGED:

1. That the writ of habeas corpus is hereby sustained.

2. That Respondent is directed to produce the Petitioners remaining in her custody as of the date of this order for individual hearings to be conducted by this Court on the issue of the Petitioners' alleged need for continued psychiatric hospitalization. Such hearings shall commence within 20 days of the date of this Order and shall expeditiously be completed.

3. That in the event the Petitioners are not produced for the aforementioned hearings, they shall be discharged from the custody of Respondent and from further detention under and by virtue of the applications made pursuant to MHL § 9.27 while each of the prisoners was in custody of the DOCS, as directed herein.

Dated: February 8, 2006

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J.S.C.

FOOTNOTES

[1] This is the Director's second application to this Court for release of former inmates allegedly improperly tansferred from prison to a psychiatric facility. The Court's decision in the related case, *State ex rel. Harkavy on behalf of John Does 1 through 12 v. Consilvio,* 2005 NY Slip Op 25499 (Nov. 15, 2005) (hereinafter *Harkavy I*), currently is on appeal and awaiting decision by the Appellate Division, First Department. In that case, the Court held that the transfers of the former inmates were improper, and ordered that the former inmates be conditionally released unless two independent physicians to be appointed by the Court certified that they were in need of care and treatment in a psychiatric facility. An automatic stay is in effect pending the Appellate Division's decision.

[2] The Court deems the Petitioners to have withdrawn their application on behalf of John Does 16 and 17, as those former inmates have been discharged from Kirby and, upon information and belief, no longer are confined to a hospital under the auspices of the New York State Office of Mental Health ("OMH").

[3] To the extent Respondent now argues that the word "charitable" applies only to "institution" and not to "agency", the Court is not convinced. Moreover, even assuming, *arguendo*, Respondent is correct, this Court is not of the opinion that a prison, which clearly is an institution, is also an "agency" for purposes of this statute.