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COMMENTS IN OPPOSITION TO H 5874 –
RELATING TO CIVIL COMMITMENT OF SEXUALLY VIOLENT PREDATORS

The following is a non-exhaustive list of constitutional and fiscal concerns with 2011 House Bill H 5874, "Civil Commitment of Sexually Violent Predators." This bill will not only deplete crucial State resources, but it also suggests that civilly committing these (mostly) men[1] will constitute Double Jeopardy/*ex post facto* violations and clog the already backlogged Criminal Justice System.

The RI ACLU urges this Committee to strongly consider the fiscal and administrative impact of this bill before deciding how to vote on H 5874.

Inordinate Financial Cost

Last year, the twenty states who civilly commit sex offenders spent approximately $500 million to house 5,200 sex offenders. Clarke, Matt, "Civilly Committing Sex Offenders Strains Some States' Budgets," *Prison Legal News* 34-35 (January 2011). That averages out to a cost of approximately $100,000 per year per sex offender, which is four times the average cost of keeping the sex offender in prison. See Goodnough, Amy and Monica Davey, "For Sex Offenders, a Dispute over Therapy's Benefits," *New York Times* (March 6, 2007) (hereafter "3/6/07 NYT Article"), available at http://www.nytimes.com/2007/03/06/us/06civil.html.

In Kansas, the cost is $185,000 per year for *each* civilly committed sex offender (hereafter "CCSO"), which is more than eight times the cost of incarcerating a defendant in the state. See 3/4/07 NYT Article. In California, one city required $388 million to expand its current CCSO facility to hold enough offenders. Id.

Under this proposed legislation, the State would have to not only fund the housing, supervision, security and treatment of these CCSOs, but would also have to fund *yearly* jury trials (including prosecution costs, court time and court personnel), pay for expert witnesses (for both sides if the CCSO is indigent), court-appoint a trial (and possibly appellate) attorney if the CCSO is indigent, and administer appeals. See H 5874 §§ 11-37.3-7 through 11-37.3-9. Furthermore, if criminal defendants know that they may be civilly committed if they plead to certain sex offenses, those defendants may take their chances at trial (which will increase the criminal

[1] As of 2007, only three women were being civilly committed as sexually dangerous/violent persons in the United States. See Davey, Monica and Abby Goodnough, "Doubts Rise as States Hold Sex Offenders after Prison," *New York Times* (March 4, 2007) (hereafter "3/4/07 NYT Article"), available at http://www.nytimes.com/2007/03/04/us/04civil.html?scp=1&sq=doubts%20rise%20as%20states%20hold%20sex%20offenders%20after%20prison&st=cse.

court's already backlogged caseload, and will force more victims to go through the mental anguish of testifying at trial).

Between the 2006-2008 fiscal years, it cost the Commonwealth of Massachusetts over $1.3 million *just on expert witnesses alone* in these hearings. See enclosed chart.

The Office of the Public Defender previously testified in 2006 that the office could not fund such appointments, let alone have the availability in their caseloads to attend these yearly trials and appeals. Presumably, the Public Defender's Office is in a similar position at this time. This cost would come at a time when the Rhode Island Supreme Court is seriously considering reform in the budget of indigent defense in Rhode Island. Any further strain on those representing indigent defendants may lead to the entire system collapsing.

As various mental health/disability groups testified in 2006, funds for the R.I. MHRH are already "faltering." Implementing this bill would cripple the agency.

"Qualified" Experts?

This bill has the potential of creating an industry of professional expert witnesses whose sole practice will consist of testifying at these civil commitment trials. Unfortunately, this may result in unqualified "experts" giving their opinion on whether a CCSO should be released or held. At one civil commitment trial in Florida, an "expert" witness testified at trial that even though he had little experience treating sex offenders, he had evaluated over 350 CCSO candidates and had testified in *dozens* of CCSO trials in under ten years. See 3/6/07 NYT Article, *supra.*

Double Jeopardy Violation/*Ex post facto law*

While the United States Supreme Court has upheld indefinite civil commitment of sex offenders, it has done so when the challenged legislation focused on confinement to treat, not incarcerate the offenders. See Kansas v. Hendricks, 521 U.S. 346, 358 (1997); Kansas v. Crane, 534 U.S. 407, 413 (2002).

This bill provides several reasons why a court may find the CCSO law punitive as opposed to a civil remedy. First and foremost, the bill is introduced as falling under Title 11 of the Rhode Island General Laws, entitled "Criminal Offenses," suggesting that this legislation is criminal in nature, not civil. Second of all, the bill fails to set standards of care for the *treatment* of CCSOs, and triggers a CCSO proceeding just prior to a sex offender's release from incarceration. See H 5874 § 11-37.3-4(a). If the statute were really focused on treating sex offenders, it would focus on providing treatment as soon as an offender is incarcerated. Third of all, it allows the R.I. Department of Mental Health Retardation & Hospitals (hereafter "MHRH") to make arrangements with the Department of Corrections to house these CCSOs, which indicates that these men are being incarcerated as a criminal sanction (as opposed to being held in an appropriate treatment facility for civil commitment reasons). Lastly, under the proposed law, if a CCSO trial results in a mistrial, the court is allowed to detain the CCSO in prison until a new trial is conducted. See H 5874 § 11-37.3-8(a).

Violates Right against Self-Incrimination

By civilly committing these men and (presumably) subjecting them to sex offender treatment, the State will require the CCSOs to potentially disclose unreported prior sex offenses, in violation of the CCSO's constitutional right against self-incrimination. Many attorneys for sex offenders are likely to advise their clients not to disclose such information, which will obstruct the CCSO's progress in treatment and inevitably delay/prevent the CCSO's release from commitment.

Equal Protection Violation

The statutory scheme treats "mentally abnormal" sex offenders from those subjected to civil commitment for mental illness. For example, under the mental health civil commitment statute, a trial must take place within three weeks of a probable cause hearing. See R.I.G.L. § 40.1-5-8(d)(2). Yet under the proposed CCSO law, the CCSO trial may occur two months after the completion of the probable cause hearing, although *either party* may be granted a continuance upon a showing of good cause. See H 5874 § 11-37.3-7. Additionally, an incompetent criminal defendant is allowed to have his competency reviewed every six months, while incompetent CCSOs are forced to have their criminal charges determined at a trial, and are only able to have their SVP determination reviewed once a year. See R.I.G.L. § 40.1-5.3-3(k), (l), and (m); H 5874 §§ 11-37.3-8 and 11-37.3-9.

Furthermore, sex offenders are singled out among all criminals for restricting their ability to re-offend (despite the fact that sex offenders pose less of a risk of re-offending than other criminals, especially other violent offenders – see *infra*). Such selective treatment may constitute an Equal Protection violation.

Commitment Ineffective?

As the RI ACLU has noted in prior testimony concerning Sex Offender Registration, according to the most recent recidivism rates collected by the U.S. Dept. of Justice, sex offenders have a lower recidivism rate for any new crime than non-sex offenders.

As for the recidivism rate for sex offenders to commit new sex offenses, one researcher notes the rate is 5%. See Clarke (2011), *supra*. Unfortunately, research has shown that sex offender treatment only reduces that risk to 4%. Id.

Furthermore, it is incredibly difficult to accurate "predict" which sex offenders are likely to re-offend. See Fennel, John A., Punishment by Another Name: The Inherent Overreaching in Sexually Dangerous Person Commitments, 35 N.E. J. on Crim. & Civ. Con. 37, 39 (2009).

> The reasons the [Massachusetts SDP] law fails its intended task is twofold: (1) there is no reliable basis to distinguish between those who offend because of a "mental abnormality or personality disorder" and those who offend because they choose to; and (2) the science of sex offender research cannot accurately sort those offenders likely to recidivate from those who are not.

Id. If the individual CCSO has an actual mental illness/disorder, the non-sex offense civil commitment statute remains available for the State to address the issue.

Many sex offenders are subjected to significant periods of parole and/or probation following their release. The fact that they can be violated for failing to "keep the peace or be of good behavior" is already a significant curb on their future recidivism. Furthermore, the Sex Offender Registration and Community Notification requirements already in place keep substantial oversight on a sex offender's behavior and whereabouts.

Indefinite Commitment

Research on current CCSO laws indicates that few are actually released. By 2007, in 18 of the 19 states that had CCSO laws at the time, only 50 were deemed "safe" enough to be released. See 3/4/07 NYT Article, *supra*. Specifically, no CCSOs have been released from Minnesota; as of mid-2009, one CCSO has been released in Missouri and Pennsylvania; two have been released in Washington State, and only ten have been released from Virginia within the last seven years. See Clarke (2011), *supra*. Sadly, 62 CCSOs have passed away while being housed in CCSO facilities nationwide. Id.

For those that are released, they will face a crippling stigma that is very likely of preventing these men from reintegrating back into society upon release. As it is, registered sex offenders difficulty finding employment, housing and stable social connections, and face a risk of being harassed and/or assaulted. See State v. Krieger, 163 Wis.2d 241, 257-58 (1991) (A survey of the Wisconsin prison system revealed that sex offenders were at a greater risk for various forms of physical, sexual and psychological abuse than inmates not convicted of sex offenses); see also 42 U.S.C. §§ 15601-02 (the Prison Rape Elimination Law); 103 DOC 519.01-11 (the Dept. of Corrections' Sexually Abusive Behavior Prevention and Intervention Policy); Farmer v. Brennan, 511 U.S. 825, 833 (1994) ("Being violently assaulted in prison is simply not part of the penalty that criminal offenders [should] pay for offenses against society"); No Escape: Male Rape in U.S. Prisons, Human Rights Watch, p. 59 (April 2001) (prisoners convicted of sexual offenses against minors are more likely to be targeted for sexual assault in prison than other offenders); see also Doe v. Attorney General, 426 Mass. 136, 144 (1997) (noting the possible harm of public dissemination to the offender's earning capacity); Tweksbury (2006), *supra* (discussing the social stigma and collateral consequences endured by registered sex offenders).

California made *two hundred and sixty nine* (269) attempts to secure housing for *one* of its released CCSOs. See 3/4/07 NYT Article, *supra*. Milwaukee officials tried for four years to find housing for one of its CCSOs to no avail. Id. Without a place to house released CCSOs, that burden will ultimately fall upon the taxpayers.

Trying Incompetent Defendants

Criminal defendants are entitled to actively participate in their own defense, which includes the requirement that a defendant have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." Drope v. Missouri, 420 U.S. 162, 171 (1975).

Yet under this bill, those found incompetent to stand trial on the criminal charge(s) will still be tried by a jury, in front of a judge, and found guilty beyond a reasonable doubt. See H 5874 § 11-37.3-8(b). Forcing an incompetent person to go to trial on the criminal charge(s) he faces is a violation of his constitutional right to due process. Pate v. Robinson, 383 U.S. 375, 378 (1966); see R.I.G.L. § 40.1-5.3-3 (providing statutory protections for incompetent, mentally ill criminal defendants). The Rhode Island Supreme Court noted in 1968:

> From early times in England, it has been clear that persons who are found to be insane were never put on trial until their infirmity had dissipated. This humane view is so deeply embedded in our criminal jurisprudence that if a man is tried today while suffering from a decomposed mentality, it is regarded as violative of his constitutional rights of due process

State v. Cook, 244 A.2d 833, 834-35 (1968). This provision of the bill is a blatant violation of the CCSO's Federal and State constitutional rights and the statutory protections afforded to him.

Confidentiality Violation

The bill allows a State agency and/or the Attorney General's Office to have access to confidential and/or privileged materials concerning the CCSO, which may not only violate State and Federal health records privacy laws, but has the potential of possibly including attorney-client privileged materials. See H 5874 § 11-37.3-13. Not only is this a severe infringement on the CCSO's privacy rights, but it may very likely cause CCSOs to fear full participation in treatment/counseling (for fear of being prosecuted for previously undisclosed criminal acts).

CCSO proceedings will be politically skewed

Public outcry against sex offenders is not a new phenomenon. Sadly, this bill will likely result in CCSO proceedings based upon public outcry that a certain sex offender is about to be released from the ACI. This legislation is dangerous if misused, and would waste critical State resources.

If the Rhode Island General Assembly later regrets the implementation of this bill, it will be almost impossible to repeal. Indeed, one expert from the University of Maryland School of Law notes that many state officials have quietly regretted implementing the law. See Clarke (2011), *supra* ("I've heard people in a lot of the states quietly say, 'Oh my God, I wish we'd never gotten this law.'").

Please do not institute this costly and damaging bill just because of the subject matter.

Submitted by : Katherine Godin, Esq.