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SEARCHING INQUIRY REQUIREMENT IN CIVIL COMMITMENT PROCEEDINGS OF SEX OFFENDERS

SUPREME COURT OF NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT

In re New York v. Raul L.¹
(decided June 4, 2014)

I. INTRODUCTION

Respondent² Raul L. represented himself in a civil commitment proceeding under the Sex Offenders Management and Treatment Act (“SOMTA”).³ The court found him to be a dangerous sex offender requiring confinement⁴ and directed the respondent to a se-

¹ 988 N.Y.S.2d 190 (App. Div. 2d Dep’t 2014).

² Because the civil commitment proceedings are civil in nature, the parties subject to civil commitment are designated as respondents. *See* N.Y. MENTAL HYG. LAW § 10.03(n) (McKinney 2011). Defining respondent as:

[A] person referred to a case review team for evaluation, a person as to whom a sex offender civil management petition has been recommended by a case review team and not yet filed, or filed by the attorney general and not dismissed, or sustained by procedures under this article.

Id. § 10.03(n)

³ *Raul L.*, 988 N.Y.S.2d at 193; *see generally* Sara E. Chase, Note, *The Sex Offender Management and Treatment Act: New York’s Attempt at Keeping Sex Offenders Off the Streets . . . Will it Work?*, 2 ALB. GOV’T L. REV. 277 (2009) (providing the reasons behind the enactment of the Sex Offenders Management and Treatment Act and how the Act can be improved).

⁴ *See* N.Y. MENTAL HYG. LAW § 10.01(b) (McKinney 2007). The statute explains who requires confinement as a sex offender:

That some sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses. These offenders may require long-term specialized treatment modalities to address their risk to reoffend. They should receive such treatment while they are incarcerated as a result of the criminal process, and should continue to receive treatment when that incarceration comes to an end. In extreme cases, confinement of the most dangerous offenders will need to be extended by civil process in order to provide them such treatment and to protect the public from their recidivistic conduct.

cure treatment facility.⁵ Respondent then appealed the trial court's decision.⁶ He argued that he was deprived of his statutory right to counsel when the trial court failed to conduct a searching inquiry to make certain "that he was aware of the dangers and disadvantages of proceeding pro se."⁷ The New York Supreme Court, Appellate Division, Second Department reversed the trial court's decision in which the court found the respondent to be a dangerous sex offender requiring confinement.⁸ The Appellate Division held that the lower court erred in granting the respondent's request to proceed pro se⁹ without conducting a searching inquiry.¹⁰ Therefore, the court stated that the respondent's waiver of his statutory right to counsel was ineffective.¹¹

This Case Note will discuss whether the court in *Raul* correctly applied the searching inquiry standard, which is conducted by the courts in a criminal context, to a SOMTA proceeding pursuant to Mental Hygiene Law Article 10.¹² In doing so, this Note will analyze the Appellate Division's justifications for applying the searching inquiry standard to the SOMTA proceeding in *Raul*.¹³ Moreover, this Note will suggest how the court could have reached a better decision by appointing a standby counsel to be present during the SOMTA proceeding.

Part II of this Note will describe the facts and procedural background of *Raul*, and the Appellate Division's stance on the issue of the standard of waiver of the right to counsel in civil commitment proceedings. Then Part III will discuss how the court analyzed the issue in *Raul*. Part IV will address the federal approach to the issue presented in *Raul*. In Part V, the approach taken by the State of New

Id. §10.01(b).

⁵ *Raul L.*, 988 N.Y.S.2d at 195; see N.Y. MENTAL HYG. LAW § 10.03(o) (McKinney 2011) (defining secure treatment facility as "a facility located on the grounds of a correctional facility, that is staffed with personnel from the office of mental health or the office for people with developmental disabilities for the purposes of providing care and treatment to persons confined").

⁶ *Raul L.*, 988 N.Y.S.2d at 195.

⁷ *Id.*

⁸ *Id.* at 200.

⁹ A person proceeding pro se "represents oneself in a court proceeding without the assistance of a lawyer." BLACK'S LAW DICTIONARY 1258 (8th ed. 2004).

¹⁰ *Raul L.*, 988 N.Y.S.2d at 200.

¹¹ *Id.*

¹² *Id.* at 192.

¹³ *Id.* at 197-99.

Jersey on the issue will be presented. In Part VI, the holding in *Raul* will be discussed. Finally, Part VII will provide recommendations on how the court could have reached a better decision.

II. *IN RE NEW YORK V. RAUL L.*

A. Factual Background and Procedural History

In 2003, Raul L., at the age of 15, “entered a woman’s home, struck her in the head with a baseball bat,” and sexually assaulted her while she was unconscious.¹⁴ In 2005, a jury convicted him of sodomy in the first degree and assault in the first and second degree. He was sentenced to prison.¹⁵

In March 2011, the State of New York commenced SOMTA proceedings, (“trial”) pursuant to Mental Hygiene Law Article 10, to determine whether probable cause existed to believe that the appellant was a sex offender requiring civil management.¹⁶ The respondent was detained at a secure treatment facility pending trial.¹⁷ Before the trial, the respondent’s counsel recommended to the respondent that the proceedings be adjourned.¹⁸ The respondent disagreed with the recommendation.¹⁹ Prompted by this disagreement, the respondent’s counsel moved for leave to withdraw from the case.²⁰ The trial court denied counsel’s application and granted the adjournment of the proceedings.²¹

During the trial, the court explained to the respondent that if new counsel were appointed, the new counsel would require a few

¹⁴ *Id.*

¹⁵ *Raul L.*, 988 N.Y.S.2d at 193.

¹⁶ *Id.*; see N.Y. MENTAL HYG. LAW § 10.03(q) (McKinney 2011) (defining a sex offender requiring civil management as “a detained sex offender who suffers from a mental abnormality. A sex offender requiring civil management can, as determined by procedures set forth in this article, be either (1) a dangerous sex offender requiring confinement or (2) a sex offender requiring strict and intensive supervision.”).

¹⁷ *Raul L.*, 988 N.Y.S.2d at 193 (noting that after the trial court concluded that probable cause existed to believe that the respondent was a sex offender requiring civil management, the trial court directed that the respondent be detained at a secure treatment facility).

¹⁸ *Id.* From the facts of the case it is not clear why the respondent’s counsel wanted the proceedings to be adjourned.

¹⁹ *Id.* (noting that the respondent opposed his counsel’s recommendation on “an adjournment because he did not want to spend any additional time in the custody”).

²⁰ *Id.*

²¹ *Id.*

more months to prepare.²² The respondent then stated that he would like to “fight” his own case and was willing to proceed pro se.²³ He also informed the court about his familiarity with the *Diagnosics and Statistical Manual of Mental Disorder* (“DSM—IV”).²⁴ The court then relieved his counsel.²⁵

The Assistant Attorney General, representing the State, showed his concern about the trial court’s failure to conduct a broader inquiry concerning the respondent’s ability to represent himself and handle the case.²⁶ In response to his concern, the court stated that it was only obligated to “put on the record” that the respondent was aware “that he would represent himself” and did not need an attorney.²⁷ Further, the court, referring to the letter written by the respondent regarding his disagreement, found that the letter demonstrated that the respondent knew how to read and write.²⁸

B. The Appellate Division’s Decision

On appeal, the Appellate Division had to decide whether the respondent was deprived of his statutory right to counsel when the trial court granted his request to proceed pro se without conducting a searching inquiry.²⁹ The court held that a trial court must conduct a searching inquiry in SOMTA proceedings to determine whether a respondent intelligently and voluntarily waived his statutory right to counsel.³⁰ Therefore, the trial court’s error of granting the respondent

²² *Raul L.*, 988 N.Y.S.2d at 193.

²³ *Id.*

²⁴ *Id.*; see *DSM*, AMN. PSYCHIATRIC ASS’N, <http://www.psychiatry.org/practice/dsm> (last visited Mar. 27, 2015) (explaining that the “*Diagnosics and Statistical Manual of Mental Disorders* (DSM) is the standard classification of mental disorders used by mental health professionals in the United States”).

²⁵ *Raul L.*, 988 N.Y.S.2d at 193.

²⁶ *Id.*

²⁷ *Id.* at 193-94. When the Assistant Attorney General insisted again that “a further inquiry was necessary, the court replied that it was satisfied that the appellant was aware of what he was doing.”

²⁸ *Id.*

²⁹ *Id.* at 195. One of the issues on appeal was “that the State failed to establish, by clear and convincing evidence that [the respondent] was a sex offender suffering from a mental abnormality.” This Note, however, will not focus on that issue.

³⁰ *Raul L.*, 988 N.Y.S.2d at 200 (noting that “a court must conduct a searching inquiry in order to determine whether a respondent in a SOMTA intelligently and voluntarily waived the statutory right to counsel is manifest, considering that such proceedings invariably require expert testimony and two separate hearings”).

ent's request to proceed pro se without conducting a searching inquiry deprived the respondent of his statutory right to counsel.³¹

III. ANALYSIS

In order to decide the issue, the court in *Raul* had to determine “whether the due process considerations that underpin a sex offender’s statutory right to counsel in a SOMTA proceeding obligate the court to conduct the same type of searching inquiry that is required in a criminal proceeding.”³² In reaching its decision, the court applied a very systematic approach. The court first examined the kind of searching inquiry conducted in criminal cases and then analyzed whether SOMTA proceedings were criminal or civil in nature. After concluding that SOMTA proceedings were civil in nature, the court had to determine whether the due process concerns that are implicated in a criminal case require the same searching inquiry be conducted in a SOMTA proceeding. To better understand how the court in *Raul* reached its decision, this Case Note will discuss each question that the court answered in reaching its decision.

A. The Searching Inquiry in Criminal Cases

After the court in *Raul* ascertained that “the federal and state constitutional right to counsel also includes” the right of self-representation and the right to refuse appointed counsel,³³ it looked at various criminal cases to analyze what type of searching inquiry is conducted in criminal cases and the scope of such inquiry.³⁴

1. *People v. Smith*

In 1998, the New York Court of Appeals in *People v. Smith*³⁵ reviewed whether the defendant’s waiver of his right to counsel was effective.³⁶ The defendant in *Smith* was convicted of selling illegal drugs.³⁷ Numerous times, before and during the trial, the defendant

³¹ *Id.*

³² *Id.* at 197.

³³ *Id.*

³⁴ *Id.* at 197-98.

³⁵ 705 N.E.2d 1205 (N.Y. 1998).

³⁶ *Id.* at 1206.

³⁷ *Id.*

expressed his unhappiness with his assigned attorney and frequently requested that the court assign new counsel.³⁸ The defendant also maintained that he could not proceed pro se.³⁹ The court repeatedly denied his request for new counsel.⁴⁰ During the trial, the defendant's counsel requested to be relieved because the defendant had threatened him.⁴¹ The trial judge discussed this allegation with the defendant.⁴² During the "waiver-textured colloquy," the defendant never asserted that he wanted to proceed pro se, but the judge relieved his counsel.⁴³ For the rest of the trial, the defendant proceeded pro se and was found guilty.⁴⁴

The Court of Appeals affirmed the Appellate Division's decision.⁴⁵ In its decision, the Appellate Division concluded that the de-

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Smith*, 705 N.E.2d at 1206.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1206-07. Following is the discussion between the defendant and the judge:

THE COURT: I told you, Mr. Smith, that that's the only legal counsel you're going to get. Now, you have no right—and I have no reason to disbelieve Mr. Kury, as an officer of the Court, if he told me you said something. So it looks like you don't want Mr. Kury. So I'm going to let you proceed without Mr. Kury as your attorney. He will sit back there and if you want to ask him a question, he will give you legal advice. If you think you know how to conduct a cross-examination, you can do it, but you're not going to abuse attorneys.

THE DEFENDANT: I'm not going to abuse attorneys, but it's all right for an attorney to abuse me?

THE COURT: In what manner are you claiming that he abused you?

THE DEFENDANT: In what manner are you saying I abused him?

THE COURT: If he tells me that you threatened him, as an officer of the Court, I believe him. Are you telling me that he threatened you?

THE DEFENDANT: No, but I didn't threaten him either. I just told the man it's like there's two D.A.'s in here.

THE COURT: I'm sure Mr. Kury will accept your apology if you want him to continue as your attorney.

THE DEFENDANT: No, there's two D.A.'s in here.

THE COURT: That's your opinion. I don't see two D.A.'s in here.

THE DEFENDANT: Not on paper, but other than that.

THE COURT: And you don't want him? You're discharging him?

THE DEFENDANT: Now you're discharging him, I'm not discharging him.

MR. KURY: Your Honor, I am—

THE COURT: I'm relieving him. He doesn't have to take this abuse, I'm relieving him.

Id. at 1207.

⁴⁴ *Smith*, 705 N.E.2d at 1207.

⁴⁵ *Id.* at 1209.

defendant was inadequately warned by the trial court about the risks of proceeding pro se; therefore, his implied waiver of right to counsel was ineffective.⁴⁶ The Court of Appeals noted that “a trial court must be satisfied that a defendant’s waiver is unequivocal, voluntary and intelligent” even if the defendant insists on proceeding pro se and renounces the benefits that are associated with his right to counsel.⁴⁷ Further, the court held that if the searching inquiry is not conducted, then the waiver of the right to counsel will not be recognized as effective.

Moreover, the court stated that to recognize whether or not such a requirement is appropriately satisfied, trial courts should conduct a searching inquiry into whether the defendant understands the dangers and risks associated with waiving his right to counsel and proceeding pro se.⁴⁸ Furthermore, the trial courts are also required to investigate other factors (*e.g.*, age, education, and occupation) that might bear on a defendant’s competency, intelligence, and voluntary waiver.⁴⁹ The court even noted that “a defendant’s refusal to cooperate with” his assigned counsel, or to acknowledge the assigned counsel, cannot be considered a waiver of his right to counsel.⁵⁰

2. *People v. Arroyo*

The New York Court of Appeals in *People v. Arroyo*⁵¹ addressed the issue of the inherent clash between a defendant’s right to self-representation and his right to counsel.⁵² The defendant in *Arroyo* was convicted of robbery and grand larceny after a jury trial.⁵³ During the trial, the defendant informed the trial court that he wanted

⁴⁶ *Id.* at 1208-09 (noting that the record shows that the trial judge at several points during his colloquy “made cautionary or encouraging statements to defendant about the fact that defendant had a right to an attorney,” and the trial judge also ensured that the defendant knew that he had an “excellent” assigned counsel. However, the trial judge failed to address the “key admonition that is designed to pointedly alert a defendant of potential pro se representation pit falls and responsibilities.”).

⁴⁷ *Id.* at 1207 (noting that “[g]overning principles demand that appropriate record exploration between the trial court and defendant be conducted, both to test an accused’s understanding of the waiver and to provide a reliable basis for appellate review”).

⁴⁸ *Id.*

⁴⁹ *Smith*, 705 N.E.2d at 1208.

⁵⁰ *Id.*

⁵¹ 772 N.E.2d 1154 (N.Y. 2002).

⁵² *Id.* at 1155.

⁵³ *Id.*

to proceed pro se and expressed his dissatisfaction with his assigned counsel.⁵⁴ The trial court made some “cursory warnings,” but the court was mainly concerned with whether the defendant was of “sound mind.”⁵⁵ The trial court then granted the defendant’s request to proceed pro se. However, the trial court requested the defense counsel to be present as stand-by counsel.⁵⁶

The New York Court of Appeals reversed the Appellate Division’s decision affirming the trial court’s decision, and held that the defendant was not allowed to represent himself because “the trial court failed to secure an effective waiver of counsel.”⁵⁷ The court noted that a defendant proceeding pro se must make a voluntary, knowing, and intelligent waiver of the right to counsel, and to evaluate whether the waiver meets the requirements, the court should conduct a searching inquiry of the defendant.⁵⁸ Moreover, the court stated that even though the defendant does not need to possess the experience and skills of an attorney, he should be told about the risks and disadvantages associated with self-representation so that he is aware of “what he is doing and his choice is made with eyes open.”⁵⁹

B. Are SOMTA Proceedings Criminal in Nature?

1. *In Re New York v. Floyd Y.*

The New York Court of Appeals in *In Re New York v. Floyd Y.*⁶⁰ had to decide whether the defendant’s due process rights were violated when the trial court allowed “experts to introduce unreliable,

⁵⁴ *Id.*

⁵⁵ *Id.* Following is the discussion that was noted by the trial court:

[Y]ou have a right to do it because I don’t think there’s anything wrong with you. A person has a right to represent himself, but it is usually not a good idea. . . . I don’t have to ask you any questions to know that you are sensible to some extent and have a right to represent yourself. I have to make sure that you’re of sound mind and the rest of it and I’m convinced of that. But I would like to talk you out of it because [defense counsel is] going to make a better summation.

Arroyo, 772 N.E.2d at 1155.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1156.

⁵⁸ *Id.* at 1155.

⁵⁹ *Id.* at 1156 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1974)).

⁶⁰ 2 N.E.3d 204 (N.Y. 2013).

testimonial hearsay.”⁶¹ The Appellate Division held that the trial court did err in allowing the expert’s opinions because they were based on unreliable accusations against the defendant, but the Appellate Division did find this error to be harmless, which prompted the appeal to the Court of Appeals.⁶² The New York Court of Appeals, in reversing the decision of the Appellate Division, held that “[t]he admission of the unreliable hearsay was not harmless error” because two of the allegations in the opinion testimony violated the defendant’s due process right.⁶³ In order to determine whether the right to due process exists in a SOMTA proceeding, the court analyzed whether SOMTA proceedings were civil in nature rather than criminal.

The court noted that “[w]hen a sex offender commitment statute is punitive in nature, the respondent enjoys the same due process rights as a criminal defendant.”⁶⁴ However, the civil commitment proceeding is not criminal in nature “when the State acts through its *parens patriae* power to confine a sex offender for therapy and treatment”⁶⁵ Further, by interpreting the language in the statute the court found that SOMTA “falls squarely within the substantive due process requirements for civil process.”⁶⁶ Moreover, the court looked at other New York cases and recognized that SOMTA has a remedial purpose rather than a penal one.⁶⁷ Therefore, the court found that the constitutional protection of the Fifth and Sixth Amendments do not apply in SOMTA proceedings, but due process rights still exist through the Due Process Clauses of the Fifth and Fourteenth Amendments.⁶⁸

2. *In Re New York v. Company*

In *In Re New York v. Company*,⁶⁹ the issue was whether, in a criminal action, the standard for ineffective assistance of counsel

⁶¹ *Id.* at 209.

⁶² *Id.* at 208.

⁶³ *Id.* at 214-15.

⁶⁴ *Floyd Y.*, 2 N.E.3d at 209.

⁶⁵ *Id.*

⁶⁶ *Id.* at 210.

⁶⁷ *Id.*

⁶⁸ *Id.* at 209 (noting that the scope of procedural due process is governed by the balancing test as expressed in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

⁶⁹ 905 N.Y.S.2d 419 (App. Div. 4th Dep’t 2010).

should be applied to SOMTA proceedings.⁷⁰ The Appellate Division, Fourth department analyzed whether SOMTA proceedings are criminal or civil in nature, and the court held that the proceedings are of a civil nature.⁷¹ The court in *Campany* reasoned that even though the jury trial pursuant to Mental Hygiene Law Article 10 has some characteristics of a criminal trial (*e.g.*, the jury consists of 12 jurors and a unanimous verdict must be rendered), the legislative intent, plain language of the statute, and purpose of the statute make it civil, rather than criminal, in nature.⁷²

C. Statutory Right to Counsel in SOMTA Proceedings

Under SOMTA, a respondent has a statutory right to counsel when the court shall appoint the counsel for a respondent if the respondent is financially unable to obtain counsel himself.⁷³ The court in *Raul* examined a variety of family court proceedings in which, even though no Sixth Amendment right of counsel was involved, the court applied the same principles that are applied in criminal cases to safeguard the right to counsel.⁷⁴

In *Matter of Kathleen K. (Steven K.)*,⁷⁵ where the family court refused to allow the respondent's father to proceed pro se in a proceeding to terminate his parental rights, the New York Court of Appeals affirmed the ruling of the New York Supreme Court, Appellate

⁷⁰ *Id.* at 422.

⁷¹ *Id.* at 423-25.

⁷² *Id.* at 425.

⁷³ See N.Y. MENTAL HYG. LAW § 10.06(c)-(d) (McKinney 2012). Stating when the court shall appoint an attorney for the respondent:

(c) Promptly upon the filing of a sex offender civil management petition, or upon a request to the court by the attorney general for an order pursuant to subdivision (d) of this section that a respondent submit to an evaluation by a psychiatric examiner, whichever occurs earlier, the court shall appoint counsel in any case where the respondent is financially unable to obtain counsel.

(d) [T]he attorney general may request the court in which the sex offender civil management petition could be filed, or is pending, to order the respondent to submit to an evaluation by a psychiatric examiner. Upon such a request, the court shall order that the respondent submit to an evaluation by a psychiatric examiner chosen by the attorney general and, if the respondent is not represented by counsel, the court shall appoint counsel for the respondent.

Id.

⁷⁴ *Raul L.*, 988 N.Y.S.2d at 198.

⁷⁵ 953 N.E.2d 773 (N.Y. 2011).

Division, Second Department, because the record did not demonstrate that the respondent's application for self-representation was unequivocal and timely.⁷⁶ The court noted that such proceeding has a "*Faretta*-type right of self-representation."⁷⁷ Further, the court mentioned that if the request to proceed pro se had been timely, then a searching inquiry would have been triggered to ensure that the respondent's waiver of the right to counsel was knowing, intelligent, and voluntary.⁷⁸

Although family court proceedings are civil in nature, they implicate constitutional due process concerns because these proceedings "involve issues of fundamental import relating to the welfare and custody of children."⁷⁹ Furthermore, these proceedings can also "result in adjudication that can bear an everlasting and significant stigma."⁸⁰

D. SOMTA Proceedings and Due Process Implications

Although SOMTA proceedings are civil in nature and no constitutional protections of the Fifth and Sixth Amendments apply, the respondent has a constitutional right to due process.⁸¹ Even though in a family court proceeding the rights at stake are significant, the court in *Raul* stated that the rights at risk in SOMTA proceedings are no less important than those in a family court proceeding.⁸² The court, in differentiating criminal trials from SOMTA proceedings, stated that the implications for one's due process rights in SOMTA proceedings are greater than those for the due process rights involved in a criminal trial because in a criminal trial, an individual has a definite sentence, while in SOMTA proceedings an individual can be indefinitely and involuntarily detained for his lifetime.⁸³ The threat to the

⁷⁶ *Id.* at 776-78.

⁷⁷ *Id.* at 777. For a discussion of *Faretta v. California*, see *infra* Part IV.

⁷⁸ *Id.*

⁷⁹ *Raul L.*, 988 N.Y.S.2d at 198.

⁸⁰ *Id.*

⁸¹ *Id.* at 200 (noting that "at the heart of the due process guarantees in the federal and state constitutions is the principle that when the State seeks to take life, liberty, or property from an individual, the State must provide effective procedures that guard against an erroneous deprivation").

⁸² *Id.* at 199.

⁸³ *Id.* at 199; see also N.Y. MENTAL HYG. LAW §10.09(h) (McKinney 2012) (noting that "[a]t the conclusion of an evidentiary hearing, if the court finds by clear and convincing evidence that the respondent is currently a dangerous sex offender requiring confinement, the

liberty of a respondent is more severe.⁸⁴ Therefore, the court in *Raul* reasoned that the standard for the waiver of the right to counsel in criminal proceedings is in every respect proper in SOMTA proceedings because of the due process implications.⁸⁵

IV. FEDERAL APPROACH

To better evaluate whether the court in *Raul* applied the correct standard, it is necessary to have an understanding of the federal approach to this issue. In criminal cases, the defendant has a right to counsel.⁸⁶ That right to counsel has been applied to the states through the Fourteenth Amendment of the United States Constitution.⁸⁷ In *Faretta v. California*,⁸⁸ the court held that in criminal cases the defendant has a constitutional right, under the Sixth Amendment of the United States Constitution, to waive his or her constitutional right to counsel.⁸⁹ Therefore, the court must inform the defendant of the disadvantages of self-representation and that he will be held to the same standard as others for knowing the rules and procedures of the court.⁹⁰ If an accused proceeds pro se, he relinquishes many of the established benefits related with the right to counsel; therefore, in order to proceed pro se, the respondent must knowingly and intelligently relinquish those benefits.⁹¹ The accused should be told about the dangers and disadvantages associated with self-representation to es-

court shall continue the respondent's confinement.”).

⁸⁴ *Raul L.*, 988 N.Y.S.2d at 198 (providing that the “a respondent in a SOMTA proceeding arguably faces an even more severe threat to his or her liberty than that faced by a criminal defendant”).

⁸⁵ *Id.* at 199-200.

⁸⁶ See U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the *Assistance of Counsel* for his defence.

Id. (emphasis added).

⁸⁷ See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that the Sixth Amendment providing that the accused shall enjoy the right to counsel in criminal cases applies to the states by the Fourteenth Amendment of the constitution).

⁸⁸ 422 U.S. 806 (1975).

⁸⁹ *Id.* at 836.

⁹⁰ *Id.* at 835.

⁹¹ *Id.*

establish that he makes his choice to self-represent knowingly and intelligently.⁹² The defendant in a criminal case is not required to have the experience and skills of a lawyer in order to self-represent.⁹³ This searching inquiry is to be conducted by the court before the defendant can waive his right to counsel in a criminal proceeding because in such a proceeding the defendant's right to life, liberty, or property is at stake.

In July 2006, Congress enacted the Civil Commitment of a Sexually Dangerous Person under the Adam Walsh Child Protection and Safety Act.⁹⁴ Although Congress has provided the right to counsel in such civil commitment proceedings,⁹⁵ the courts have also held that because the outcome of such proceedings can be negative, which can result in a "massive curtailment of liberty," procedural due process guarantees certain protections in civil commitment proceedings to respondents.⁹⁶ Therefore, the analysis of the court in *Raul* was correct. If the court can provide right to counsel because the due process concerns in civil commitment proceedings are the same as those in criminal proceedings, then the court should also apply the same standard for the waiver of the right to counsel in civil commitment proceedings that is applied in criminal trials because of the due process implications.

Furthermore, because the individuals' rights at risk can implicate due process concerns, the courts in civil cases have also conducted inquiries into whether or not individuals are knowingly and voluntarily relieving their right to counsel. Similarly, the court in

⁹² *Id.*

⁹³ *Farretta*, 422 U.S. at 835.

⁹⁴ 18 U.S.C. § 4248 (2006).

⁹⁵ Certain protections, by statute, have been provided by Congress. See 18 U.S.C. §4247(d) (2006) (providing the defendant with representation by counsel, and "an opportunity to testify, to present evidence, to subpoena witnesses . . . , and to confront and cross-examine witnesses who appear at the hearing").

⁹⁶ *Vitek v. Jones*, 445 U.S. 480, 491-93 (1980) (quoting *Humphrey v. Cady*, 405 U.S. 504, 509 (1972)); see also *United States v. Baker*, 45 F.3d 837, 842-43 (4th Cir. 1995), which states:

[T]he constitutional rights to which a defendant in a criminal trial is entitled do not adhere to a respondent in a commitment hearing. Nonetheless, because an adverse result in a commitment hearing results in a substantial curtailment of the respondent's liberty (whether the respondent is already a prisoner or not), . . . the Supreme Court has held that procedural due process does guarantee certain protections to civil commitment respondents.

Id.

Raul correctly held that the searching inquiry standard is the standard for the waiver of the right to counsel because the respondents in civil commitment trials have a lot at stake.

V. SIMILARITY BETWEEN CRIMINAL PROCEEDINGS AND CIVIL COMMITMENT PROCEEDINGS

When determining whether a respondent suffers from mental abnormality, New York's civil commitment statute requires clear and convincing evidence,⁹⁷ which is in accordance with the standard of proof established by the Supreme Court in *Addington v. Texas*.⁹⁸ However, many scholars have argued that the standard of proof should be beyond a reasonable doubt because of the difficulties that arise in civil commitment proceedings and procedural fairness.⁹⁹ But many states have kept the clear and convincing standard as the standard of proof for civil commitment proceedings.¹⁰⁰

The goals of criminal proceedings are the same as the goals of civil commitment for sex offenders because in both the state wants to protect its citizens from harm that can be caused by dangerous criminals. As the goals of criminal proceedings and civil commitments for sex offenders are the same, so are the liberty interests that are at

⁹⁷ See N.Y. MENTAL HYG. LAW §10.07(d) (McKinney 2007) (noting that the court “shall determine by clear and convincing evidence whether the respondent is a detained sex offender who suffers from a mental abnormality.”).

⁹⁸ See *Addington v. Texas*, 441 U.S. 418, 432-33 (1979) (establishing the clear and convincing standard as the minimum standard of proof required in order to perform a civil commitment).

⁹⁹ See Alexander Tsesis, *Due Process in Civil Commitments*, 68 WASH. & LEE L. REV. 253, 257 (2011). Stating that:

The beyond a reasonable doubt standard is better suited to civil commitment hearings because it is more exacting and less likely to lead to the erroneous deprivation of liberty. Two difficulties arise in civil commitment. The first of these involves repeated empirical findings that show psychiatrists are no better at predicting dangerous behaviors than untrained people. The second problem judges face in applying the Supreme Court standard in *Comstock* is the ambiguity of the very concept of mental illness.

Id.

¹⁰⁰ *Id.* at 275-77 (describing the statutory scheme of many states on the burden of proof requirement in civil commitment cases after *Addington v. Texas* and stating that “[t]he overwhelming majority of states do not use the highest standard of proof for involuntary institutionalization hearings. They instead rely on the Supreme Court’s holding in *Addington*, which only requires clear and convincing proof.”).

stake.¹⁰¹ An alleged criminal who is not properly defended may end up spending more time in jail than he should. Similarly, an alleged sex offender might be wrongfully civilly committed. Because an individual may be deprived of a liberty interest, due process concerns arise in civil commitment proceedings.¹⁰² To prevent the wrongful deprivation of liberty, due process requires a “rigorous standard of proof.”¹⁰³ Similarly, if a court allows a respondent to proceed pro se without conducting a searching inquiry, the liberty interests of such a respondent are at stake and could result in severe deprivation of liberty if that respondent is found guilty. Thus, to protect the liberty interest of respondents, the courts should apply the searching inquiry.

VI. *IN RE CIVIL COMMITMENT OF D.Y.*

Because of the recent enactment of the civil commitment statutes for sex offenders,¹⁰⁴ the courts are still developing the governing body of law. Other than New York, only a few states have provided guidance on whether the searching inquiry should be conducted in a civil commitment proceeding for sex offenders. Some states have chosen not to rule on the issue of whether the respondent has a right to counsel in a civil commitment proceeding.¹⁰⁵ But others have adopted the searching inquiry with certain limitations or requirements attached to the right of self-representation.

Only a month after *Raul*, the Supreme Court of New Jersey in *In re Civil Commitment of D.Y.*¹⁰⁶ reversed the decision of the Appellate Division, which held that a respondent in a Sexually Violent

¹⁰¹ See generally N.Y. MENTAL HYG. LAW § 10.01(a) (McKinney 2007) (explaining that “[c]ivil and criminal processes have distinct but overlapping goals, and both should be part of an integrated approach . . .”).

¹⁰² See *Addington v. Texas*, 441 U.S. 418, 425 (1979) (stating that “civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection”).

¹⁰³ Tthesis, *supra* note 99, at 260. See also *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (stating how due process obligates courts to determine the risks that state action will result in an erroneous deprivation of one’s rights).

¹⁰⁴ See N.J. STAT. ANN. §304-27.1 (West 2009); N.Y. MENTAL HYG. LAW § 10.01(a) (McKinney 2007); WASH. REV. CODE ANN. §71.09.030 (West 2008); WIS. STAT. ANN. §980.015 (West 2008).

¹⁰⁵ See *Favors v. Jesson*, No. A13-1579, 2014 WL 997055, at*4 (Minn. Ct. App. Mar. 17, 2014) (refusing to give any proper ruling on whether the respondent had a right to self-represent himself in a criminal trial because the respondent failed to cite any authority).

¹⁰⁶ 95 A.3d 157 (N.J. 2014).

Predator Act (“SVPA”)¹⁰⁷ civil commitment proceeding does not have the right to self-representation.¹⁰⁸ The New Jersey Supreme Court found that a sex offender who is competent to stand trial has a constitutional right to self-representation with standby counsel.¹⁰⁹ The issue was whether the respondent had a right to proceed pro se in an involuntary civil commitment proceeding pursuant to the SVPA.¹¹⁰

The respondent in *D.Y.* was convicted of various sex offenses, both in state and federal court; in October 1994, he pled guilty to two counts of the federal indictment, and in April 1995, he was sentenced to 137 months incarceration.¹¹¹ When the respondent was near completion of his term of incarceration, which was on or about June 7, 2008, the State petitioned for the respondent’s involuntary civil commitment pursuant to N.J.S.A. 30:4-27.28.¹¹² At the final civil commitment hearing, which *D.Y.* did not attend, the assigned counsel advised the court that the respondent had refused to talk to him and that the respondent wished to proceed pro se.¹¹³ The trial court only allowed the respondent to “participate in his representation in conjunction with” his counsel.¹¹⁴

First, the court found the genesis of the right to self-representation in the English common law and English legal tradition.¹¹⁵ Second, because a respondent’s decision to proceed pro se may weaken his position in the case, and can also hinder the proceedings, the need for standby counsel exists in cases where the litigants want to proceed pro se.¹¹⁶ Then the court referred to criminal proceedings in which the defendants exercised their right to proceed pro se and the presence of standby counsel was a successful solution to

¹⁰⁷ See N.J. STAT. ANN. § 30:4-27.24 (West 1999).

¹⁰⁸ *D.Y.*, 95 A.3d at 160.

¹⁰⁹ *Id.* at 171.

¹¹⁰ *Id.* at 160.

¹¹¹ *Id.* at 161-62.

¹¹² *Id.* at 162; see N.J. STAT. ANN. § 30:4-27.28(c) (West 1999) (stating that “[t]he Attorney General may initiate a court proceeding for involuntary commitment . . . of an inmate who is scheduled for release upon expiration of a maximum term of incarceration . . .”).

¹¹³ *D.Y.*, 95 A.3d at 163.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 165; see also *Iannaccone v. Law*, 142 F.3d 553, 557 (2d Cir. 1998) (noting that “[t]he origins of the right to appear for oneself in civil proceedings derive from a number of sources, all deeply rooted in our history and culture”).

¹¹⁶ *D.Y.*, 95 A.3d at 167.

the challenges that might be caused during the trial.¹¹⁷ The standby counsel helps not only the respondent, but also the court by protecting the integrity of the civil commitment proceeding when a respondent is uncooperative with the court.¹¹⁸

Finally, the court in *D.Y.*, analyzed the plain language of SVPA and held that it “requires that there be one of two alternative forms of representation at SVPA commitment hearings: (1) full representation of the [respondent] by counsel or (2) self-representation” with standby counsel present throughout the proceedings and available to assist the respondent if needed.¹¹⁹ Further, the court held that the decision to waive the right to full representation by counsel should be unequivocally and clearly stated to the trial court.¹²⁰ Moreover, the trial court should ensure the waiver is made by the respondent knowingly, intelligently, and voluntarily.¹²¹ The court resolved the issue in *D.Y.* by statutory construction and did not reach the Sixth Amendment and due process issues.¹²²

VII. DISCUSSION OF *RAUL* IN CONTEXT OF CASES DISCUSSED

The court in *Raul* applied a very systematic approach in reaching its decision. First, it inquired about what kind of searching inquiry is conducted in criminal cases. For that reason, it analyzed different criminal cases. It determined that for a waiver of the right to counsel to be effective, the courts in criminal cases must make sure that the defendant had been adequately warned about the risks and disadvantages of proceeding pro se and about the benefits of the right to counsel. The courts in criminal cases must consider whether the defendant knowingly, voluntarily, and intelligently waived his right to counsel.

After the court in *Raul* analyzed and discussed the scope of the searching inquiry in order to waive the right to counsel in crimi-

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 168 (stating that having a standby counsel “also serves to protect the integrity of the proceeding when a litigant is uncooperative with the court and to the opposing counsel, or refuses to proceed at all”); see also *Faretta*, 422 U.S. at 834 n.46 (finding that “the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct”).

¹¹⁹ *D.Y.*, 95 A.3d at 171.

¹²⁰ *Id.* at 172.

¹²¹ *Id.*

¹²² *Id.* at 161.

nal cases, it inquired as to whether SOMTA proceedings are criminal in nature. If SOMTA proceedings were criminal in nature, then applying the same inquiry as in criminal cases would be justified. However, in *Raul*, the court was not able to find any relevant authority. The courts in New York have held that SOMTA proceedings are civil in nature rather than criminal because New York's civil commitment statute is not punitive. As a result, a respondent in a SOMTA proceeding does not enjoy the same due process rights that a defendant in a criminal proceeding does. Therefore, the court in *Raul* noted that the Sixth Amendment protections do not apply to SOMTA proceedings.¹²³

The defendant in SOMTA proceedings does not enjoy the same due process rights as does a defendant in a criminal case because SOMTA proceedings are civil in nature.¹²⁴ However, the court in *Raul* found that in family court proceedings, which are civil in nature, the searching inquiry has been applied.¹²⁵ Because of the due process implications in family court proceedings, the courts have applied the searching inquiry for the waiver of the right to counsel.¹²⁶

Finally, in *Raul*, the court considered that the due process implications in SOMTA proceedings are similar to those in family court proceedings because of the rights that are at stake.¹²⁷ Therefore, the court correctly applied the searching inquiry standard that is applied in criminal cases.

VIII. RECOMMENDATIONS

After evaluating the stances taken on the federal level and by the Supreme Court of New Jersey on whether the searching inquiry should be applied in a civil commitment proceeding, it can be concluded that the court in *Raul* correctly applied the searching inquiry standard. The due process implications for the respondents involved in SOMTA proceedings are the same, if not more significant, as for those involved in criminal proceedings. However, if the court in *Raul* had required a standby counsel to be present at all times, that could have solved other challenges that might have arisen during the

¹²³ *Raul L.*, 988 N.Y.S.2d at 198.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 199.

course of trial.¹²⁸ Sometimes trial proceedings are disruptive because the respondent does not want to cooperate or wants to delay the proceedings, or it might be that the respondent is not competent to handle his own case. Having a standby counsel is an effective solution for all these challenges faced by the court during the course of trial.

In many criminal cases where the court does provide the right to self-representation, the court appoints a standby counsel,¹²⁹ even though they are not required to do so.¹³⁰ In *D.Y.*, the reason the court appointed standby counsel to be present during the entire proceeding was because the New Jersey statute required it.¹³¹ In contrast, New York's civil commitment statute requires that counsel be appointed if the respondent is financially unable to obtain one.¹³² The courts in New York should follow New Jersey's example and also require that standby counsel be present during the course of the civil commitment

¹²⁸ Because the topic of discussion of this Note is not whether the standby counsel should be present in civil commitment proceeding, this Note only provides a cursory view of the author's opinion on why the court should have required standby counsel to be present during the civil commitment proceedings.

¹²⁹ See *Smith*, 705 N.E.2d at 1207 (noting that “[d]efendant completed the trial pro se, with the former counsel serving as legal advisor”).

¹³⁰ *Faretta*, 422 U.S. at 834 n.46 (finding that “a State *may*—even over objection by the accused—appoint a ‘standby counsel’ to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary”) (emphasis added).

¹³¹ Compare N.Y. MENTAL HYG. LAW § 10.01(b) (McKinney 2007) (stating the legislative finds as: “[t]hat some sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses. These offenders may require long-term specialized treatment modalities to address their risk to reoffend. . . . [C]onfinement of the most dangerous offenders will need to be extended by civil process.”), with N.J. STAT. ANN. § 30:4-27.25(b) (West 2008). The New Jersey statute states:

Under the existing involuntary commitment procedure, persons are subject to commitment if they are mentally ill and dangerous to self, others or property. “Mental illness” is a current, substantial disturbance of thought, mood, perception or orientation which significantly impairs judgment, capacity to control behavior or capacity to recognize reality, which causes the person to be dangerous to self, others or property. The nature of the mental condition from which a sexually violent predator may suffer may not always lend itself to characterization under the existing statutory standard, although civil commitment may nonetheless be warranted due to the danger the person may pose to others as a result of the mental condition.

Id.

¹³² See N.Y. MENTAL HYG. LAW § 10.06(c) (McKinney 2012) (stating that the court shall appoint an attorney for the respondent “where the respondent is financially unable to obtain counsel”).

proceeding because of the dangers involved.¹³³

IX. CONCLUSION

The court in *Raul* correctly articulated the searching inquiry standard that the trial court should conduct before granting a respondent's request to proceed pro se. In civil cases the defendant does not have a right to counsel through the Sixth Amendment, but some states have provided right to counsel because of the due process implications involved in certain type of civil cases. Similarly, the searching inquiry should be conducted in civil commitment cases because of the due process implications involved. One of the reasons for the courts to apply the same search inquiry standard as in criminal cases is that the stakes of deprivation of liberty are high, and the respondents, by waiving their right, might end up being deprived of their life, liberty, or property.

Further, even though New York's civil commitment statute does not require the counsel to be present as New Jersey's civil commitment statute does, the courts should require standby counsel to be present during the course of civil commitment proceedings when the respondent wants to proceed pro se. A standby counsel can be an effective solution to challenges that might erupt during the course of trial that cannot be handled by the respondent.

*Arsalan Ali Memon**

¹³³ The New York legislature, at the time of enacting the civil commitment statute, did not take into consideration the importance of having standby counsel present during the proceedings. *See generally* Sex Offender Management and Treatment Act, N.Y. Bill Jacket, L. 2007, ch. 7 (providing no discussion in regards to providing standby counsel during SOMTA proceedings). *See also* N.Y. MENTAL HYG. LAW § 10.06 (providing no provision for standby counsel to be present during SOMTA proceedings).

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