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NEW YORK'S GRANT OF GREATER FIFTH AMENDMENT RIGHTS TO SEXUAL PREDATORS IN SOMTA PROCEEDINGS

SUPREME COURT OF NEW YORK
NEW YORK COUNTY

New York v. Suggs[1]
(decided April 18, 2011)

John Suggs was a repeat sexual offender who objected to being called as a witness in an Article 10 proceeding.[2] Suggs argued that being called to testify against his will violated his privilege against self-incrimination made available to him by the Fifth Amendment of the United States Constitution,[3] as well as article I, section 6 of the New York Constitution.[4] The State sought to call Suggs as a witness in order to prove that Suggs suffered from a Mental Abnormality under Article 10 of New York State's Mental Hygiene Law, titled the Sexual Management and Treatment Act [hereinafter "SOMTA"];[5] SOMTA provides for the "indefinite confinement or indefinite strict and intensive supervision and treatment" of persons found to suffer from a mental abnormality.[6] Despite the fact that

[1] 920 N.Y.S.2d 644 (Sup. Ct. 2011).

[2] *Id.* at 645.

[3] The Fifth Amendment to the United States Constitution reads, in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

[4] Article I, section 6 of the New York Constitution reads, in pertinent part: "No person shall be . . . compelled in any criminal case to be a witness against himself or herself . . . ." N.Y. CONST. art I, § 6.

[5] *Suggs*, 920 N.Y.S.2d at 645.

[6] *See* MENTAL HYG. § 10.03(i) (2011) (defining a "Mental abnormality" as: "[A] congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a 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").

neither the federal nor state's constitutions invoke the right against self-incrimination in SOMTA proceedings, the court concluded that "the language of Article 10 itself, . . . indicates that the Legislature did not intend to allow the State to call SOMTA respondents as witnesses for the state over a respondent's objection."[7] Thus, the court denied the motion to compel Suggs to testify absent his consent.[8]

On January 28, 2009, the State filed a petition against Respondent Suggs for sex offender civil management under Article 10 of the Mental Hygiene Law, resulting from Suggs' extensive history of sexually committed crimes.[9] Dating back to the age of seventeen, Suggs, who was fifty-nine years of age at the time of the proceeding, had committed six forcible rapes and two attempted rapes.[10] A SOMTA jury trial subsequently commenced to have Suggs indefinitely confined as prescribed by the statute.[11] During the SOMTA proceeding, the State produced testimony from two psychologists, Dr. Stuart Kirschner and Dr. Tricia Peterson.[12] Both psychologists were of the opinion that Suggs suffered from a Mental Abnormality under the act.[13] A third psychologist, Dr. Joseph Plaud, presented by Suggs, testified that Suggs "*did not* suffer from such a Mental Ab-

[7] *Suggs*, 920 N.Y.S.2d at 646.

[8] *Id.* at 654.

[9] *Id.* at 645.

[10] New York v. Suggs, No. 30051-09, 2011 WL 2586413, at *5, *21 (N.Y. June 30, 2011). In 1968, Suggs pled guilty to Rape in the First Degree for attacks allegedly committed against several women in the surrounding area of City College, located in Manhattan. *Suggs*, 920 N.Y.S.2d at 645. Suggs was sentenced to a term of five to fifteen years of incarceration as a result of his guilty plea. *Id.* Ten years later, the federal district court found that Suggs was not mentally competent enough to enter a guilty plea. *Id.* This decision was granted following Suggs' petition for a writ of *habeas corpus* after lengthy state and federal appeals. *Id.* The decision was affirmed by the Second Circuit in *Suggs v. LaVallee*, 570 F.2d 1092 (1978). *Id.* Suggs was consequently released from prison. *Suggs*, 920 N.Y.S.2d at 645. Shortly thereafter—twenty-eight days later—Suggs was once again charged with rape. *Id.* Following his conviction, Suggs was sentenced to seventy-four months to twenty years incarceration. *Id.* In 1996, four years after his release, Suggs was convicted of Rape in the First Degree by forcible compulsion and was sentenced to twelve and one-half years of incarceration. *Id.*

[11] *Id.*

[12] *Suggs*, 920 N.Y.S.2d at 645.

[13] *Id.* Dr. Kirshner summarized his views as follows: "Mr. Suggs is an extremely dangerous man. He is under no uncertain terms a serial rapist. . . . And other than the fact that he's aged . . . there is nothing different about him today than there was 40 years ago." *Suggs*, 2011 WL 2586413, at *7.

normality."[14] The State then moved to call Suggs as a witness to prove that he did in fact satisfy SOMTA's definition of such condition.[15]

Suggs objected to being called as a witness for the State, arguing that the State could not require him to testify against his will in an Article 10 proceeding.[16] Whether the State may compel a respondent to testify against his will during such a proceeding was an issue of first impression for the New York County Supreme Court.[17] The New York County Supreme Court denied the State's motion to compel the respondent to testify, holding that "absent the consent of a respondent, a respondent cannot be called as a witness by the State at an Article 10 trial and be compelled to testify against himself."[18] The court in *Suggs* began its determination by acknowledging that there were five relevant constitutional and statutory provisions linked to the issue before the court[19]: (1) the Fifth Amendment to the United States Constitution,[20] (2) article I, section 6 of the New York Constitution,[21] (3) Civil Practice Rules and Law section 4512,[22] (4) Civil Practice Rules and Law section 4501,[23] and (5) Article 10 of the

[14] *Suggs*, 920 N.Y.S.2d at 645 (emphasis added). "The age of Mr. Suggs . . . meant that he could not opine that Mr. Suggs was likely to re-offend if released, even if released with no supervision." *Suggs*, 2011 WL 2586413, at *10.

[15] *Suggs*, 920 N.Y.S.2d at 645. "The State had earlier alerted the Court and the Respondent that they might be moving to call the Respondent as a witness and the Court had previously heard legal arguments on the issue." *Id.*

[16] *Id.*

[17] *Id.* at 644.

[18] *Id.* at 654.

[19] *Suggs*, 920 N.Y.S.2d at 645.

[20] U.S. CONST. amend. V.

[21] N.Y. CONST. art. I, § 6.

[22] N.Y. C.P.L.R. § 4512, entitled "Competency of interest witness or spouse" states, "Except as otherwise expressly prescribed, a person shall not be excluded or excused from being a witness, by reason of his interest in the event or because he is a party or the spouse of a party." N.Y. C.P.L.R. § 4512 (McKinney 2012).

[23] N.Y. C.P.L.R. § 4501, entitled "Self-incrimination," states:

> A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish that he owes a debt or is otherwise subject to a civil suit. This section does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture, nor does it vary any other rule respecting the examination of a witness.

N.Y. C.P.L.R. § 4501 (McKinney 2012).

Mental Hygiene Law.[24]

The court in *Suggs* started its analysis of the Fifth Amendment by referring to *Allen v. Illinois*,[25] a United States Supreme Court decision which upheld the constitutionality of civil management and denied the defendant the right to assert his privilege against self-incrimination.[26] In *Allen*, the Supreme Court considered the issue of "whether proceedings under the Illinois 'Sexually Dangerous Persons Act' [hereinafter "the Act"] were criminal within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination."[27] The petitioner in *Allen*, Terry B. Allen, was charged with committing unlawful restraint and deviate sexual assault.[28] The state subsequently filed a petition to have Allen declared a sexually dangerous person.[29]

At trial, the State presented testimony of two psychiatrists despite Allen's objections that it violated his privilege against self-incrimination.[30] Both psychiatrists testified that the "petitioner was mentally ill and had criminal propensities to commit sexual assaults."[31] The trial court found the petitioner to be sexually danger-

[24] *Suggs*, 920 N.Y.S.2d at 645. *See also* Mental Hygiene Legal Service v. Spitzer, No. 07 Civ. 2935(GEL), 2007 WL 4115936, at *1 (S.D.N.Y. 2007) (stating the history behind SOMTA).

> On March 14, 2007, Governor Spitzer signed the Sex Offender Management and Treatment Act, which became effective on April 13, 2007, in part as Article 10 of the New York Mental Hygiene Law ("MHL"), creating a new legal regime for "Sex Offenders Requiring Civil Commitment or Supervision." As part of the Act, the New York Legislature found that "recidivistic sex offenders pose a danger to society that should be addressed through comprehensive programs of treatment and management," . . . and that some "sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses" . . . . The Legislature concluded that such offenders 'should receive . . . 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 recidivist conduct.

Id. (citations omitted).

[25] 478 U.S. 364 (1986).

[26] *Id.* at 375.

[27] *Suggs*, 920 N.Y.S.2d at 646.

[28] *Allen*, 478 U.S. at 365.

[29] *Id.*

[30] *Id.* at 366.

[31] *Id.*

ous under the Act.[32] The Appellate Court of Illinois reversed, and held that "the trial court had improperly relied upon testimony obtained in violation of petitioner's privilege against self-incrimination."[33] The Supreme Court of Illinois reinstated the trial court's decision and found the petitioner to be a sexually dangerous person under the Act.[34] The court held that "the privilege against self-incrimination was not available in sexually-dangerous-person proceedings because they are 'essentially civil in nature,' the aim of the statute being to provide 'treatment, not punishment.' "[35] The Supreme Court of the United States granted certiorari,[36] and in a 5-4 decision delivered by Justice Rehnquist, the Court concluded that "the Illinois proceedings . . . were not 'criminal' within the meaning of the Fifth Amendment to the United States Constitution, and that due process does not independently require application of the privilege [against self-incrimination]."[37] In making its determination, the Supreme Court looked to the language of the Illinois statute.[38] The Court found that a civil label is not always held to be dispositive.[39] The Court stated that "[w]here a defendant has provided 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' that the proceeding be civil, it must be considered criminal and the privilege against self-incrimination must be applied."[40] The Court ultimately concluded that the statutory scheme was civil in nature, not criminal, because it did not have such a punitive effect.[41]

Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, dissented, stating that a procedure must be labeled a "criminal case" under the Fifth Amendment in situations where the "criminal law casts so long a shadow on a putatively civil proceed-

[32] *Id.*

[33] *Allen*, 478 U.S at 367 (citation omitted).

[34] *Id.*

[35] *Id.* (citation omitted).

[36] *Id.* at 368.

[37] *Id.* at 375.

[38] *See Allen*, 478 U.S at 368 (noting that the question of "whether a particular proceeding is criminal for the purposes of the Self-Incrimination Clause is first of all a question of statutory construction" (citations omitted)).

[39] *Id.* at 369.

[40] *Id.* (quoting United States v. Ward, 448 U.S. 242, 248-49 (1980)).

[41] *Id.* at 375.

ing."[42] Justice Stevens reasoned that:

> The impact of an adverse judgment against an individual deemed to be a "sexually dangerous person" is at least as serious as a guilty verdict in a typical criminal trial . . . . [T]he sexually-dangerous-person proceeding authorizes far longer imprisonment than a mere finding of guilt on an analogous criminal charge.[43]

The dissent disagreed with the majority's justification that persons found to be sexually dangerous are a threat to society.[44] The dissent argued that this finding does not suffice as a justification for denying an individual the Fifth Amendment privilege against self-incrimination, for the right would be unavailable to anyone who is accused of committing a violent crime.[45] Moreover, the dissent also noted that even though the State may undergo greater difficulty in finding evidence that will lead to imprisonment—absent a defendant's testimony—this difficulty also does not justify the denial of one's privilege against self-incrimination.[46] Otherwise, the right against self-incrimination "would never be justified, for it could always be said to have that effect."[47] Justice Stevens strongly disagreed with the majority, as well as with the Supreme Court of Illinois; he consequently would have affirmed the decision of the Appellate Court of Illinois, which held that Allen's privilege against self-incrimination was, in fact, violated.[48]

Although the majority in *Allen* consisted of only five justices,[49] it has since been the leading authority for the United States Supreme Court.[50] Clear support does not exist for the proposition that a respondent can refuse to answer questions in an Article 10 proceeding under the Fifth Amendment's privilege against self-

[42] *Id.* at 376 (Stevens, J., dissenting).

[43] *Allen*, 478 U.S at 377. *See also* United States ex rel. Stachulak v. Coughlin, 520 F.2d 931 (7th Cir. 1975) (recognizing that a proceeding under the Sexually Dangerous Person's Act can lead to far longer imprisonment, an indeterminate commitment, than a guilty charge in a criminal trial).

[44] *Allen*, 478 U.S. at 382 (Stevens, J., dissenting).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] People v. Allen, 463 N.E.2d 135 (Ill. App. Ct. 1984), *rev'd*, *Allen*, 478 U.S. 364.

[49] *Allen*, 478 U.S. at 365.

[50] *Suggs*, 920 N.Y.S.2d at 647-48.

incrimination.[51] For instance, in *Kansas v. Hendricks*,[52] the United States Supreme Court held that persons found to have a "Mental Abnormality" are to be committed under civil management and are not entitled to the protection of the Fifth Amendment.[53] In *Hendricks*, Kansas enacted the Sexually Violent Predator Act which set-forth procedures for the civil commitment of all individuals who were found to have a "mental abnormality" or a personality disorder, and who were considered "likely to engage in 'predatory acts of sexual violence.' "[54] The defendant in this case, Leroy Hendricks, was an inmate with a long history of sexually molesting children.[55] Hendricks admitted that he abused children whenever he was not imprisoned.[56] He further stated that the only way to be sure that he would not sexually abuse another child was if he were to die.[57] Hendricks was subsequently found to be a sexually violent predator under the statute.[58] Hendricks appealed this finding, arguing that the Sexually Violent Predator Act established a criminal proceeding, and he was therefore entitled to his constitutional privilege against self-incrimination.[59]

In upholding civil management in *Hendricks*, the Supreme Court underwent the same analysis as it did in *Allen*, and similarly found:

> [C]ommitment under the Act does not implicate either

[51] *Id.* at 648.

[52] 521 U.S. 346 (1997).

[53] *Id.* at 369.

[54] *Id.* at 350 (citation omitted).

[55] *Id.* Hendricks' sexually violent history consisted of the following: In 1955, Hendricks exposed his genitals to two young girls and pleaded guilty to indecent exposure. *Id.* at 354. In 1957, he was convicted of lewdness involving a young girl and received a brief jail sentence. *Hendricks*, 521 U.S at 354. In 1960, he molested two young boys while he worked for a carnival and served two years in prison. *Id.* On parole, he molested a 7 year-old girl and was rearrested. *Id.* In 1965, he was released from a state psychiatric hospital where attempts had been made to treat his sexual deviance. *Id.* In 1967, Hendricks assaulted another young boy and girl. *Id.* He performed oral sex on the 8-year old girl and fondled the 11 year-old boy. *Hendricks*, 521 U.S at 354. He refused to participate in a sex offender treatment program, and therefore remained incarcerated until his parole in 1972. *Id.* "In 1984, Hendricks was convicted of taking 'indecent liberties' with two 13-year-old boys." *Id.* at 353.

[56] *Id.* at 355.

[57] *Id.*

[58] *Hendricks*, 521 U.S. at 355.

[59] *Id.* at 361.

> of the two primary objectives of criminal punishment: retribution or deterrence. The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a 'mental abnormality' exists or to support a finding of future dangerousness.[60]

The Court did not find commitment under Kansas' Sexually Violent Predator Act to be of a punitive nature.[61] On the contrary, the Court found that it was far from punitive, and that the confinement's duration was directly linked to the need to protect society.[62] Thus, a person's confinement would continue until the individual's "mental abnormality" is no longer considered to be a threat to the community.[63] The Supreme Court ultimately held that involuntary confinement under the Sexually Violent Predator Act did not establish a criminal proceeding.[64]

Adhering to federal precedent, New York courts have relied on *Allen* and its progeny in cases presenting similar issues. For example, in *State v. Nelson*,[65] the New York County Supreme Court "analyzed the question of whether the retroactive designation of certain non-sex crimes as 'sexually-motivated' felonies eligible for coverage under SOMTA violated the *ex post facto* clause of the United States Constitution."[66] The respondent, Nelson, was convicted for kidnapping, promoting prostitution, and bail jumping.[67] A sex offender civil management petition was filed against Nelson.[68] Nelson moved to dismiss the petition, arguing that it violated the United States and New York State Constitutions.[69] In accordance with the reasoning of the majority opinion in *Allen*, the New York County Supreme Court held that "SOMTA's retroactive designation of certain

[60] *Id.* at 361-62.
[61] *Id.* at 363.
[62] *Id.*
[63] *Hendricks*, 521 U.S. at 363 (citation omitted).
[64] *Id.* at 369.
[65] No. 20459, 2010 WL 4628018 (N.Y. Sup. Ct. Nov. 16, 2010).
[66] *Suggs*, 920 N.Y.S.2d at 647.
[67] *Nelson*, 2010 WL 4628018, at *1.
[68] *Id.*
[69] *Id.* at *1.

prior criminal convictions as sexually motivated was a civil procedure."[70]

Many other New York courts have also relied on *Allen*, and have held that statutes similar to SOMTA fall under civil proceedings, and therefore the privilege against self-incrimination is inapplicable.[71] In *State v. C.B.*,[72] the Bronx County Supreme Court dealt with the same issue as the court in *Suggs*, and held that the Fifth Amendment right against self-incrimination does not apply in proceedings pursuant to Article 10.[73] In *C.B.*, respondent C.B. made a videotaped confession.[74] On the tape, C.B. described eleven separate events in which he masturbated on sleeping females while unlawfully entering private residences, and further admitted to being an exhibitionist.[75] C.B. also stated that he needed help to deal with an alleged disease that was to blame for his repeatedly committing such crimes.[76]

C.B. challenged the admission of these tapes, arguing that it would violate his "constitutional right to challenge the voluntariness of the confession, since none of the procedural avenues to challenge that admission of the videotape which are available in a criminal proceeding apply under Article 10."[77] The court decided that the videotaped statements made by C.B. were relevant and necessary for the jury to make a determination as to C.B.'s present mental condition.[78]

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[70] *Suggs*, 920 N.Y.S.2d at 647.

[71] *Id.* at 647. *See, e.g.*, *Hendricks*, 521 U.S. 346 (noting that the legislature found it necessary to establish a civil commitment procedure for the long-term care and treatment of the sexually violent predator); *Nelson*, 2010 WL 4628018, at *9 (finding that retroactive sexually motivated felonies were not punitive. *Id.* "[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.") (citations omitted); In re Michael WW., 798 N.Y.S.2d 222, 223 (App. Div. 4th Dep't 2005) (finding that whether or not respondent voluntarily waived his *Miranda* rights was "irrelevant to a Family Court Article 10 proceeding because they are grounded in the rights to remain silent and to counsel under the Fifth and Sixth Amendments, which only apply in the context of criminal proceedings"); and Ughetto v. Acrish, 518 N.Y.S.2d 398, 403 (App. Div. 2d Dep't 1981) (adopting the reasoning in *Allen* and finding that "involuntary commitment proceedings under the Mental Hygiene Law are civil and not criminal in nature").

[72] No. 51010(U), 2009 WL 1460779 (N.Y. Sup. Ct. May 20, 2009).

[73] *Suggs*, 920 N.Y.S.2d at 647 (quoting *C.B.*, 2009 WL 1460779, at *3).

[74] *C.B.*, 2009 WL 1460779, at *1.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at *3.

The court conclusively held that "[n]o Fifth Amendment right applies in this civil, sex offender commitment proceeding."[79]

While courts have consistently held that the constitutional right against self-incrimination does not apply in civil management cases, the court in *Suggs* acknowledged that New York has afforded greater rights under the New York Constitution than those of the United States Constitution.[80] The New York Court of Appeals has provided greater protection despite the fact that article I, section 6 of the New York State Constitution contains the same substantive language as that of the Fifth Amendment.[81] In determining "whether the state constitution provides broader protections than a federal constitutional provision with identical language . . . New York courts engage in an analysis known as 'noninterpretive review.' "[82] Such an analysis can be seen in the case *In re Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003* [hereinafter *Duces Tecum*],[83] where the New York Court of Appeals was confronted with the issue of "whether the New York privilege against compelled self-incrimination . . . afford[s] greater protection regarding fundamental rights than the Federal Constitution and the United States Supreme Court."[84]

The court in *Duces Tecum* established a "two-pronged 'interpretive' and 'nointerpretive' analysis of various factors to determine if a provision of [a] State Constitution should be construed more broadly than its federal analog."[85] This analysis consists of "first review[ing] the text of the state and federal constitutional provisions[,] '[i]f the language of the State Constitution differs from that of its Federal counterpart, then the court may conclude that there is a basis for a different interpretation of it.' "[86] When there is not a "material

[79] *C.B.*, 2009 WL 1460779, at *3 (citations omitted).

[80] *Suggs*, 920 N.Y.S.2d at 648 (citations omitted).

[81] *Id. See, e.g.*, People v. Davis, 553 N.E.2d 1008, 1010-11 (N.Y. 1990) (holding that New York's right to counsel "extends well beyond the right to counsel afforded by the Sixth Amendment of the United States Constitution and other State Constitutions"); *see also* People v. Bethea, 493 N.E.2d 937, 938 (N.Y. 1986) (reading a constitutional rule practicable even if it were if it were deemed inconsistent with federal constitutional rule).

[82] *Suggs*, 920 N.Y.S.2d at 648.

[83] 830 N.E.2d 1118 (N.Y. 2005).

[84] *Id.* at 1123.

[85] *Id.*

[86] *Id.* (citation omitted).

textual difference between the relevant constitutional provisions," the court must only "conduct a 'noninterpretive' review of the constitutional provisions."[87] The court noted that a noninterpretive review seeks to discover:

> [A]ny preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of that individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right.[88]

Such a finding leads to the conclusion that a broader reading of the state constitutional provision is applicable.[89] However, after conducting this noninterpretive analysis, the New York Court of Appeals in *Duces Tecum* concluded that "none of the factors that would suggest a broader reading of article I, section 6 were present."[90]

A noninterpretive review analysis may help support a broad reading of *Suggs*' SOMTA. However, there is yet to be a case "where such an analysis has been conducted with respect to whether respondents in proceedings which bear some resemblance to Article 10 have a right against self-incrimination which is broader than that provided by the federal constitution."[91] Thus, no support exists for a broader reading of the New York Constitution.[92]

The court in *Suggs* did not have clear support for the proposition that a respondent in an Article 10 trial may refuse to answer questions by asserting his Fifth Amendment privilege against self-incrimination.[93] The United States Supreme Court has consistently followed the reasoning found in the seminal case *Allen* and its progeny, concluding that Article 10 proceedings are civil in nature. Similarly, there is also a lack of support for the proposition that article I, section 6 of the New York State Constitution provides a more expan-

[87] *Id.*
[88] *Duces Tecum*, 830 N.E.2d at 1123-24 (citation omitted).
[89] *Id.* at 1124.
[90] *Id.*
[91] *Suggs*, 920 N.Y.S.2d at 648.
[92] *Id.*
[93] *Id.*

sive right than the Fifth Amendment, for the New York courts have yet to undergo a noninterpretive review analysis which would support a broader interpretation of the statute found in *Suggs*.[94] The New York County Supreme Court then questioned whether either New York's Civil Practice Rules and Law section 4501 entitled, "Self Incrimination," or section 4512, entitled, "Competency of Witness or Spouse," was applicable to Article 10.[95]

The court in *Suggs* again was unable to find clear authority for a respondent's right to refuse to answer questions in an Article 10 proceeding under Civil Practice Rules and Law section 4501.[96] Civil Practice Rules and Law section 4501 provides that an individual is not to be excused from answering relevant questions in civil cases, or in cases which tend to prove that the individual owes a debt.[97] However, it goes on to state that one would not be required "to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture . . . ."[98] The court noted that "[t]he scope of this protection is unclear, . . ." for caselaw provides little guidance.[99] While New York courts have provided this privilege to respondents in Article 81 guardianship proceedings, the Fourth Department "recently held that the Fifth Amendment's right against compulsory self-incrimination did not apply to Article 81 guardianship proceedings and that a respondent subject to an Article 81 petition can be compelled to testify at a hearing against his will."[100] The disparity between federal precedent and state caselaw does not provide support for allowing a respondent's refusal to answer questions under Civil Practice Rules and Law section 4501.[101] Additionally, the court found that Article 10 explicitly includes Civil Practice Rules and Law section 4512, which "supports the notion that respondents *may* be called as witnesses by the State at a SOMTA trial."[102] Instead the court found that section 10.07(c) of New York's Mental Hygiene Law "explicitly provides that the statute shall be governed by the

[94] *Id.*
[95] *Id.* at 648-50.
[96] *Suggs*, 920 N.Y.S.2d at 650.
[97] N.Y. C.P.L.R. § 4501 (McKinney 2012).
[98] *Id.*
[99] *Suggs*, 920 N.Y.S.2d at 649.
[100] *Id.* at 649-50 (citation omitted).
[101] *Id.* at 650.
[102] *Id.* (emphasis added).

provisions of Article 45 of the CPLR."[103] Thus, Article 10 specifically includes the CPLR provision, which "allows one party to call an opposing party as a witness," which helps support the proposition that the State *is* allowed to call respondents to testify in SOMTA proceedings.[104]

The New York County Supreme Court then underwent an analysis of whether the language of Article 10 of the Mental Hygiene Law itself allowed the State to call a respondent as a witness over the respondent's objection.[105] The court noted that this issue was complex.[106] The court stated that "the treatment of the issue in contexts analogous to SOMTA has been a close question."[107] The court found that numerous provisions of Article 10 indicate that the Legislature did not intend to allow for the State to call a respondent as a witness over the respondent's objection.[108] The court noted that, "[f]irst, Article 10 directly addresses the question of who may call the respondent as a witness at an Article 10 trial."[109] However, "[t]he statute does not contain any provision . . . which authorizes the State to call a respondent as a witness at his own trial [which] . . . creates a strong inference that the Legislature did not intend the State to have that right."[110]

Second, the court interpreted section 10.06(d) of the Mental Hygiene Law to be a strong inference of the fact that the "Legislature intended the decision on whether to testify at an Article 10 trial to rest with respondents alone."[111] This section provides the Attorney General with the power to "request that a respondent be subject to a psychiatric examination . . . upon such a request the Court must order such an examination."[112] However, the statute does not provide any sanction or punishment for a respondent who "refuses to submit to

[103] *Id.*

[104] *Suggs*, 920 N.Y.S.2d at 650 (emphasis added).

[105] *Id.* at 651-52.

[106] *Id.* at 651.

[107] *Id.*

[108] *Id.*

[109] *Suggs*, 920 N.Y.S.2d at 651. The statute provides, "The respondent may, as a matter of right, testify in his or her own behalf, call and examine other witnesses, and produce other evidence in his or her behalf." *Id.* (citation omitted).

[110] *Id.*

[111] *Id.*

[112] *Id.* (citation omitted).

such an examination."[113] The statute's only remedy available against a respondent who refuses examination is that the State is entitled to an instruction to the jury that such respondent refused examination.[114]

The court in *Suggs* ultimately concluded that "the most reasonable inference which can be drawn from the provisions of Article 10 is that the Legislature implicitly assumes that the well-established right of a criminal defendant to refuse to be called by the prosecution would apply in Article 10 trials."[115] Thus, a respondent cannot be compelled to testify against himself.[116]

Rather than deferring to the discretion of the United States Supreme Court or New York State decisional law, the court in *Suggs* blatantly defies both federal precedent and State law. The court relied on the language of Article 10, and inferred that the Legislature intended for Article 10 to provide protections not afforded by either the Federal Constitution, or the New York State Constitution. This holding is likely to create a significant amount of controversy.

Although *Suggs*' holding at first glance appears to have a compelling social policy justification—not allowing a respondent to incriminate him or herself in a case where he or she can be greatly impacted by an adverse judgment[117]—this holding will most likely lead to serious complications. For instance, by allowing individuals the right to assert their Fifth Amendment right against self-incrimination in cases where the defendant is a repeat offender, the State may be presented with fact-finding issues. The court will consequently be presented with great difficulty in proving that the respondent in fact suffers from a mental abnormality under SOMTA or similar statutes. Proponents of the holding may offer the argument that the jury may still find a respondent to suffer from a mental abnormality, despite the individual not being compelled to testify.[118] However, testimony such as that of Respondent Hendricks in *Hendricks* would be foreclosed from trial, and evidence may be insuffi-

[113] *Suggs*, 920 N.Y.S.2d at 651.

[114] *Id.* at 651-52.

[115] *Id.* at 653.

[116] *Id.* at 654.

[117] *See Allen*, 478 U.S. at 377 (Stevens, J., dissenting) (arguing that the finding of an individual to be a sexually dangerous person "authorizes far longer imprisonment than a mere finding of guilt on an analogous criminal charge").

[118] *See Suggs*, No. 30051-09, 2011 WL 2586413, at *25 (finding Respondent Suggs to be a "Dangerous Sex Offender in Need of Confinement").

cient to ensure a correct holding.

Furthermore, *Suggs* holding creates tension with the court's holding in *C.B.* For instance, if New York courts were to follow the court's decision in *Suggs*, courts would hold a respondent's videotaped confession to be privileged, and would therefore hold it to be inadmissible evidence to prove the individual suffers from a mental abnormality. The court's decision in *Suggs* may consequently lead to the release of potentially dangerous persons into society who will continue to commit crimes against others.[119]

Proponents of the *Suggs* decision may further argue that *Suggs*' holding provides a safeguard for individuals whose liberty is threatened by civil management. By refusing to be a witness against oneself, an individual is protected from the severe results of an adverse judgment. A finding that one suffers from a Mental Abnormality leads to indefinite confinement or long term treatment. However, as the majority in *Allen* reasoned, civil management proceedings are designed to provide care and treatment for persons who are found to pose a threat to the community. These individuals will be released from such facilities as soon as he or she is no longer seen to be dangerous to others.[120] Statues such as those in *Allen* or *Suggs*, allow for the overall protection of one's community. *Suggs*' holding conversely leads to the protection of a person who puts the lives of the others in direct danger, rather than providing treatment for such an individual before releasing him or her into society. This court should defer to the judgment of the Supreme Court, rather than creating such controversy and potential danger.

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[119] *See Hendricks*, 521 U.S. 353. Respondent Hendricks admitted that he had repeatedly abused children whenever he was not confined, and also stated that "the only way he could keep from sexually abusing children in the future was 'to die.' " *Id.* at 355.

[120] *See Allen*, 478 U.S. at 370 (reasoning that the State has an obligation to provide care and treatment for the recovery of persons found to be sexually dangerous under the statute).

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