

Sexually Dangerous Person (SDP) Civil Commitment

The Massachusetts SDP statute, G.L. c. 123A, allows for an individual to be civilly committed (incarcerated) for a day to life if that person has been found to meet the criteria for sexual dangerousness beyond a reasonable doubt. Persons found to be SDP are confined to the Nemsasket Correctional Center in Bridgewater, Massachusetts (also known as the Massachusetts Treatment Center) where sex offender treatment and rehabilitation is to be provided. G.L. c. 123A, §2.

The district attorney may petition to have an individual indefinitely confined as sexually dangerous upon completion of the individual's term of incarceration. The deprivation of liberty after an individual has served his sentence and punishment for his sexual crime(s) has been found to be constitutional as a remedial measure where the state can prove that the individual suffers from a mental illness or mental abnormality that renders the individual incapable of controlling his sexually dangerous impulses. *Kansas v. Crane*, 534 U.S. 407, 413 (1997) (“the nature of the psychiatric diagnosis, and severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sex offender whose serious mental illness, abnormality or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.”)

The SDP process begins with the discretion of the district attorney to petition the Superior Court for an order of commitment. The statute applies to adults, juveniles and youthful offenders who have one or more enumerated sex offense convictions or adjudications. G.L. c. 123A § 1. According to the statute, any agency with jurisdiction of the adjudicated or convicted individual must notify the district attorney in the county where the sex offense occurred and the attorney general six months prior to the individual's release. G.L. c. 123A § 12(a). However, the district attorney may not make a decision about whether or not to petition against an individual until days before the individual's sentence terminates. The district attorney can file a petition alleging that an individual is SDP by stating sufficient facts to support the allegation in the superior court where the individual is committed or in the superior court of the county where the sexual offense occurred. G.L. c. 123A § 12(b). Indigent persons are entitled to appointment of counsel when a petition is filed. Once a petition is filed, the court must determine whether probable cause exists

to believe that the individual is sexually dangerous. G.L. c. 123A § 12(c). If probable cause is found, he will be held for an additional 60 day period for a more in-depth evaluation by qualified examiners to determine whether or not he is sexually dangerous. G.L. c. 123A § 13(a). If a qualified examiner finds that he is sexually dangerous and the district attorney petitions for a trial, he is held until a trial takes place to determine whether or not he meets the criteria for sexual dangerousness beyond a reasonable doubt. G.L. c. 123A § 14(a). The trials are generally jury trials. If either the district attorney or the individual named in the petition request a jury trial, the case is tried to a jury. G.L. c. 123A, § 14(a). Although these cases are considered civil, the standard of proof at trial is “beyond a reasonable doubt.” Strict timelines govern the temporary commitment period and the Commonwealth’s obligations. See more detailed discussion below.

A SDP civil commitment requires the government to prove the following beyond a reasonable doubt:

1. The person has been convicted as an adult, juvenile or youthful offender for a sex offense listed under G.L. c. 123A § 1; 1
2. The person is presently a prisoner;

1 **"Sex offense"**: includes any of the following crimes: indecent assault and battery on a child under fourteen (G.L. c.265, §13B); aggravated indecent assault and battery on a child under fourteen (G.L. c. 265, §13B ½); a repeat offense under section 13B ¾ of chapter 265; indecent assault and battery on a mentally retarded person (G.L. c.265, §13F); indecent assault and battery on a person who has obtained the age of fourteen ((G.L. c.265, §13H); rape (G.L. c.265, §22); rape of a child under sixteen with force (G.L. c.265, §22A); aggravated rape of a child under 16 with force (G.L. c. 265, §22B); a repeat offense under section 23B of chapter 265; rape and abuse of a child under sixteen (G.L. c.265, §23); aggravated rape and abuse of a child under sixteen (G.L. c. 265, §23A); a repeat offense under section 23B of chapter 265; assault with intent to commit rape (G.L. c.265, §24); assault on a child with intent to commit rape (G.L. c.265, §24B); kidnapping with intent to commit above offenses (G.L. c.265, §26); enticing away a person for prostitution or sexual intercourse (G.L. c.272, §2); drugging persons for sexual intercourse (G.L. c.272, §3); inducing a person under 18 into prostitution (G.L. c.272, §4A); living off or sharing earnings of a minor prostitute (G.L. c.272, §4B); open and gross lewdness and lascivious behavior (G.L. c.272, §16); incestuous intercourse involving a person under the age of 21 (G.L. c.272, §17); dissemination or possession with the intent to disseminate to a minor matter harmful to a minor (G.L. c.272, §28); posing or exhibiting a child in a state of nudity (G.L. c.272, §29A); dissemination of visual material of a child in a state of nudity or sexual conduct (G.L. c.272, §29B); purchase or possession of visual material of a child depicted in sexual conduct (G.L. c.272, §29C); dissemination of visual material of a child in the state of nudity or in sexual conduct (G.L. c.272, §30D); unnatural and lascivious acts with a child under the age of sixteen (G.L. c.272, §35A); accosting or annoying persons of the opposite sex and lewd, wanton and lascivious speech or behavior (G.L. c.272, §53); any attempt to commit any of the above listed crimes (G.L. c.274, §6); a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority; or any other offense, the facts of which, under the totality of the circumstances, manifest a sexual motivation or pattern of conduct or series of acts of sexually-motivated offenses. G.L. c. 128A, section 1.

3. The person suffers from a mental abnormality² or personality disorder³; and
4. That the abnormality or disorder makes the person likely to engage in sexual offenses if not confined to a secure facility.

A person's incompetence to stand trial for the sex offense charge does not exempt him from the civil commitment process. The government may seek civil commitment of an incompetent person charged with a sexual offense under G.L. c. 123A § 15. Under this provision there is a bench trial in the Superior Court where the judge must first find, beyond a reasonable doubt, that the incompetent person committed the sex offense (s) charged. Criminal rules of evidence apply to this initial trial and all rights available to criminal defendants at trial, other than the right not to be tried while incompetent, apply. If a court finds, beyond a reasonable doubt, that the person did commit the act(s) charged, the court enters a final order, subject to appeal, and proceeds to the SDP trial pursuant to the procedures set forth in G.L. c. 123A, §§ 13 and 14.

District Attorney Can Only Petition Against an Individual who is Currently a Prisoner

The district attorney can file a petition against any person who is currently a prisoner, regardless of the reason for the current incarceration, confinement or commitment. For example, an individual who is serving a sentence for a failure to register conviction, a drug conviction or a probation violation may be petitioned against as sexually dangerous as long as he has a qualifying sex offense conviction in his background.

However, the Supreme Judicial Court has found that an individual does not qualify as a "prisoner" for purposes of this statute in certain circumstances. An individual civilly committed at Bridgewater State Hospital pursuant to G.L. c. 123 is not a prisoner for purposes of a c. 123A sexually dangerous persons petition. *Commonwealth v. Gillis*, 448 Mass. 354 (2007) ("The fact that the current SDP statute applies only to those serving a term of penal confinement may very well reflect a legislative judgment that those who are merely civilly committed due to mental

² A "mental abnormality" is defined as "a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons." G.L. c. 128A, section 1.

³ Personality disorder is defined as "a congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses." G.L. c. 128A, section 1.

illness should not be subject to SDP commitment.”)

An individual held in prison beyond his release date because of a miscalculation of earned credits is not a prisoner for purposes of a c. 123A sexually dangerous persons petition. *Commonwealth v. Allen*, 73 Mass. App. Ct. 862 (2009) (Sentence expired on 5/25/07 and petition was filed on 6/13/07; client was not awarded his automatic jail credits until after the Commonwealth filed the 123A petition); See *Commonwealth v. DeWeldon*, 80 Mass. App. Ct. 626 (2011) (DOC is not required to grant good time credits earned in another state; DOC discretionary decision must be made prior to filing of SDP petition).

An individual incarcerated for violating the terms of an unconstitutional sentence is not a “prisoner” subject to a sexually dangerous persons petition. *Commonwealth v. Coffin*, 458 Mass. 186 (2010) (Defendant incarcerated for violating terms of lifetime community parole imposed pursuant to G.L. c. 275, §18, which the SJC had declared facially unconstitutional in *Commonwealth v. Pagan*, 445 Mass. 161 (2005)).

Temporary Commitment Pending a Determination of Probable Cause, G.L. c. 123A, § 12(e)

If a person is scheduled to be released prior to a probable cause determination, the court, upon a “sufficient showing based on the evidence before the court at that time,” may “temporarily commit” the offender to the Massachusetts Treatment Center “pending disposition of the petition.” G.L. c. 123A, § 12 (e). The client may request the Court to release him from such a temporary commitment at any time prior to the probable cause determination. *Id.*

Sixty Day Observation Period

After the Court finds probable cause, the defendant “shall be committed to the treatment center for a period not exceeding 60 days for the purpose of examination and diagnosis by two qualified examiners who shall, no later than 15 days prior to the expiration of said period, file with the court a written report of the examination and diagnosis and their recommendation of the disposition of the person named in the petition.” G.L. c. 123A § 13(a).

Qualified examiners (QEs) are required by statute to be licensed psychiatrists or psychologists with at least 2 years of experience with the diagnosis or treatment of sexually aggressive offenders and who have been designated as “qualified examiners” by the

commissioner of correction. G.L. c. 123A, § 1. See *LeSage, Petitioner*, 76 Mass. App. Ct. 566 (2010) (the court found that the Qualified Examiner in question did not meet the statutory requirement of 2 or more years of experience with diagnosis or treatment of sexually aggressive offenders and that it was an abuse of discretion for the judge to allow her to testify).

If the qualified examiners file reports finding that the client is not sexually dangerous, he is released. If a qualified examiner finds that he is sexually dangerous, the district attorney may petition for a trial. If the district attorney petitions the court for a trial, the case is then set for a trial where one or more qualified examiners are the principal witnesses for the Commonwealth. For the duration of the trial, the defendant "shall be confined to a secure facility." G.L. c. 123A § 14 (a). The defendant may hire his own independent experts (IEs) to testify on his behalf. An indigent defendant is entitled to funds for the retention of such expert witnesses. G.L. c. 123A § 14 (b). Independent expert reports are admissible in section 12 initial commitment proceedings and in section 9 discharge proceedings. *Santos, Petitioner*, 78 Mass. App. Ct. 280 (2010).

Statutory Timelines Applicable to Initial Commitment Proceedings

The Supreme Judicial Court has strictly construed deadlines in the SDP statute in order to protect liberty interests that are implicated whenever an individual is detained beyond his discharge date.

A. Prior to PC Hearing

Absent unusual circumstances, a PC hearing should commence no later than 10 business days after a temporary commitment order is made under G.L. c. 123A, section 12(a). *Commonwealth v. Bruno*, 432 Mass. 489, 513 (2000).

B. After PC Hearing

Commitment to the treatment center for purposes of examination by the QEs shall not exceed 60 days. The QEs must file their reports no later than 15 days prior to the expiration of the 60 day period. G.L. c. 123A, section 13(a). The commitment petition is dismissed when an individual has been held beyond the 60 day confinement period without action by the Commonwealth to adhere to the timelines in the statute. *Commonwealth v. Kennedy*, 435 Mass. 527 (2001) (where "the defendant is detained beyond his discharge date, the liberty interests at

stake compel strict adherence to the time frames set forth in the statute.)”

In *Commonwealth v. Parra*, 445 Mass. 262, 265 (2005), the court clarified that the statutory deadlines are mandatory and *any* delay by the Commonwealth that results in confinement exceeding 60 days is a violation of the statute and dismissal is appropriate absent extraordinary circumstances that would justify a very brief delay. Although the statute requires QE reports to be filed 15 days prior to the expiration of the 60 day period, if the reports are late but filed prior to the expiration of the 60 day period, the case will not be dismissed.

Commonwealth v. Gagnon, 439 Mass. 826 (2003) (noting that the delay was within the 60 day period and had not hampered defendant’s counsel’s ability to prepare for potential trial or prevent the Commonwealth from properly evaluating the QE reports).

In *Gangi v. Commonwealth*, 462 Mass. 158, 163 (2012), The SJC affirmed that any violation of the sixty-day statutory deadline, however brief, requires dismissal, absent extraordinary circumstances. Gangi had been confined for 16 days more than the statutory sixty day maximum. The error by the Court clerk in failing to contemporaneously docket the probable cause finding did not constitute “extraordinary circumstances” justifying the delay. *Id.* at 162. The Commonwealth conceded that the Superior Court Judge’s attempt to reset the clock by issuing a second order for temporary commitment was “judicial error amounting (in retrospect) to a nullity.” *Id.* at 161, n. 3. The SJC also found that defense counsel’s pre-probable cause request for continuances have no bearing on the application of the sixty-day statutory deadline. *Id.* at 163.

C. After QE Reports Filed

The petition for commitment must be filed within 14 days of filing of the QE reports. G.L. c. 123A, section 14 (a). Trial must commence within 60 days. G.L. c. 123A, section 14.

A separate petition for trial must be filed by the Commonwealth after the filing of the QE reports as required in section 14 (a); the case will be dismissed if the petition is not timely filed within 14 days. *Commonwealth v. Gross*, 447 Mass. 691(2006) (filing of separate trial petition is mandatory; request for trial in original section 12(b) petition is not adequate). The court reasoned that the petition gave the court the authority to detain the defendant for the duration of trial; without such petition, the defendant could not continue to be detained beyond his discharge date. *Id.* at 695.

Section 14 (a) does not require dismissal if a trial does not take place within 60 days after filing of the Commonwealth's petition where the delay was not caused by the Commonwealth and did not substantially prejudice the defendant. *Commonwealth v. DeBella*, 442 Mass. 683 (2004).

Day to Life Civil Commitment

After a trial, if a judge or a jury unanimously concludes beyond a reasonable doubt that the offender is a sexually dangerous person, the Court will commit the offender to the Treatment Center "for an indeterminate period of a minimum of one day and a maximum of such person's life until discharged pursuant to the provisions of G.L. c. 123A § 9." G.L. c. 123A, § 14 (d). If the individual is still serving a criminal sentence the Department of Correction may attempt to transfer him to the treatment center pursuant to procedures under G.L. c. 123A § 2A. If such person is a youth adjudicated as delinquent, he is committed to the department of youth services until he reaches his twenty-first birthday, and then to the treatment center. G.L. c. 123A, § 14 (d).

Discharge Proceedings Pursuant to G.L. c. 123A, § 9

Once civilly committed, an individual may file a petition for release every twelve months. However, he may have to wait 3 or more years for the opportunity to have a trial to determine whether or not he currently remains sexually dangerous. The statute provides that the Commonwealth or the individual may exercise the right to a jury trial in these proceedings. These trials are usually held in the Unified Session in Suffolk Superior Court and proceed "according to the practice of trial in civil cases in the Superior Court." G.L. c. 123A, § 9. However, according to rule 81 of the Rules of Civil Procedure, the civil rules do not apply to sexually dangerous persons proceedings. "[T]he practice in civil proceedings to which these rules do not apply shall follow the course of the common law, as near to these rules as may be, except that depositions shall not be taken, nor interrogatories served, save by order of the court, on motion, with notice, for good cause shown." Mass. R. Civ. P. 81. Although these trials are considered civil, the standard of proof remains "beyond a reasonable doubt."

An individual who has petitioned for release will be assessed first by the Community Access Board (CAB). The CAB is an administrative body composed of five members appointed

by the Commissioner of Correction and must include three department of correction employees and two persons who are not department of correction employees but may be independent contractors or consultants. G.L. c. 123A, §6A. The non-employee members must be psychiatrists or psychologists. Id. The CAB is required to conduct annual reviews and prepare reports of its findings on the current sexual dangerousness of all inmates. Id. These reports are admissible in a section 9 trial and any of the CAB members can be called as witnesses in the trial.

Even if the CAB finds an individual remains sexually dangerous, he is entitled to an evaluation by two Qualified Examiners and his own independent experts. If both qualified examiners opine that the client is no longer sexually dangerous, the client must be released regardless of the CAB decision. See *In Re Johnstone*, 453 Mass. 544, 552 (2009) (The SJC found that the Commonwealth cannot rely solely on the CAB's opinion finding the petitioner sexually dangerous; In order to proceed to trial in an SDP proceeding, at least one of the QEs must opine that the petitioner is, or remains, sexually dangerous).

If at least one qualified examiner finds that the client remains sexually dangerous, the case proceeds to trial. If an individual refuses, without good cause, to be personally interviewed by a qualified examiner appointed pursuant to G.L. c. 123A, section 9, he is deemed to have waived his right to a trial under this section.

The client is entitled to retain independent expert witnesses to testify on his behalf. All expert testimony and reports will be put before the fact-finder at trial to decide, beyond a reasonable doubt, whether the petitioner remains a sexually dangerous person.

At the section 9 discharge trial, the Commonwealth must prove beyond a reasonable doubt each of the following elements:

1. The individual was previously found to be a sexually dangerous person by a court of the Commonwealth (initial civil commitment as a sexually dangerous person); and
2. His misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either:
 - a. Violence against any victim; or
 - b. Aggression against and victim under the age of 16 years; and

3. As a result, he is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires. G.L. c. 123A, §1.

After trial, if the fact-finder finds that the petitioner is not today sexually dangerous, the client is released. If the fact-finder finds that the petitioner remains sexually dangerous, the petitioner is returned to confinement at the Nemasket Correctional Center.