



TO: Members of the Senate Judiciary Committee
FROM: Allen Gilbert, executive director, ACLU of Vermont
DATE: Oct. 15, 2008
SUBJECT: Sex offender issues

I provided you with a memo Aug. 28 regarding concerns that the ACLU of Vermont had with proposals then under consideration around sex offender issues.

Following that memo, the administration put forth an additional list of proposals, many of which were not included in proposals already on the table from the state's attorneys and attorney general.

We understand that the committee has nearly concluded its deliberations on all of the proposals put forth. Accordingly, we wish to relay to the committee our position on those proposals relevant to our work. Comments made in my Aug. 28 memo are incorporated into this memo, and in some cases expanded on. We have tried to provide information that we hope will be helpful as you decide what legislative actions, if any, to recommend.

Changes to the Vermont Rules of Evidence

The state's attorneys and attorney general have proposed that Vermont "[a]dopt the federal rule of evidence that allows the introduction of evidence of a defendant's commission of other sex offenses in a prosecution for sexual assault or child molestation." To the extent that the committee will propose the adoption verbatim of Federal Rules of Evidence 413 and 414, it should know that constitutional infirmities exist with those rules, that the federal judiciary opposed the rules' adoption with unheard-of unanimity, and that any changes to the admissibility of prior crimes requires careful thought by the Legislature as to a rule change's effect upon other rules of evidence.

As reference, Federal Rule of Evidence 413 provides that:

- (a) Evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
- (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of

trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, “offense of sexual assault” means a crime under Federal law or the law of a State . . . that involved --

- (1) any conduct proscribed by chapter 109A of title 18, United States Code;
- (2) contact, without consent, between any part of the defendant’s body or an object and the genitals or anus of another person;
- (3) contact, without consent, between the genitals or anus of the defendant and any part of another person’s body;
- (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
- (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).¹

Rules 413 and 414 were proposed by Congress and submitted to the Judicial Conference of the United States for recommendations prior to ratification -- an unusual procedure. The Judicial Conference is comprised of the chief justice of the United States, the chief judges of the Courts of Appeals, and a district judge from each of the geographical Courts of Appeals. At the time at which the Judicial Conference considered Rules 413 and 414, the Conference included Chief Justice William Rehnquist, Chief Judges Stephen Breyer of the First Circuit, Jon Newman of the Second Circuit, and Richard Posner of the Seventh Circuit – all noted jurists and none who could be characterized as soft on criminal defendants. The Judicial Conference recommended that Rules 413 and 414 not be adopted:

The advisory committee believed that the concerns expressed by Congress and embodied in new Evidence Rules 413, 414, and 415 are already adequately addressed in the existing Federal Rules of Evidence . . . Furthermore, the new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person. *It is important to note the highly unusual unanimity of the members of the Standing and Advisory Committees, composed of over 40 judges, practicing lawyers, and academicians, in taking the view that Rules 413-415 are undesirable. Indeed, the only supporters of the Rules were representatives of the Department of Justice.*²

Should you recommend adoption of Rules 413 and 414, the same infirmities noted by the

1 Fed. R. Evid. 414 is identical to R. 413, aside from the substitution of “child molestation” for “sexual assault” and the definition of “child” and crimes of child molestation.

2 Judicial Conference of the United States, Report to Congress Pursuant to 103 Pub. L. 322, § 320935(b) (emphasis added).

Judicial Conference will exist. We feel strongly that the committee should not recommend adoption of these rules without a compelling showing by the state's attorneys and attorney general that they have a difficult time prosecuting sex crimes without Rules 413 and 414, a showing that has thus far been entirely absent. The desire to adopt Rules 413 and 414 is even more suspect given that Vermont Rule of Evidence 404(b) currently permits the admission of "[e]vidence of other crimes, wrongs, or acts . . . for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." We feel that this makes the adoption of Federal Rules 413 and 414 unnecessary and unwise.

Secondly, the committee should not recommend adoption of Rules 413 and 414 without considering the interplay of the proposed rules with the existing Vermont Rules of Evidence. In particular, Vt. R. Evid. 403 mandates that relevant evidence "*may* be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Federal Rules 413 and 414, on the other hand, command that "[e]vidence of the defendant's commission of another offense or offenses . . . *is* admissible." Adoption of federal Rules 413 and 414, therefore, would appear to repeal Vermont Rule 403, which serves the vital function of "provid[ing] the necessary counterweight to a broadly inclusive rule of relevance" and ensuring that the mismatch of the state versus the individual not further devolve into a show trial. Vt. R. Evid. 403 reporter's note. Considerations of basic fairness (and the guarantee of equal justice set forth in Articles 4 and 10 of the Vermont Constitution) also counsel addressing the asymmetry of Federal Rules 413 and 414, which fail to expressly permit criminal defendants to rebut evidence of a relevant criminal conviction with similar evidence. *Cf.* Vt. R. Evid. 609(b) (specific conduct of witnesses permitted on cross-examination "if probative of truthfulness or untruthfulness"); Vt. R. Evid. 806 (permitting the credibility of a hearsay declarant to be attacked if the hearsay is admitted). These considerations cannot go unaddressed by the committee.

DNA collection from felony arrestees

The ACLU of Vermont is opposed to the collection of DNA samples from persons arrested on suspicion of having committed a felony. We believe that the practice contravenes Vermonters' right to be free from unreasonable search and seizure. DNA evidence should not be obtained without probable cause that someone has committed a crime. Additionally, the DNA should not be kept on file in databanks once it has served the purpose for which it was collected; to store DNA for identification purposes on the mere speculation that an arrestee may commit a crime in the future turns on its head the basic principle that someone is innocent until proven guilty.

We also have concerns about information beyond ID purposes that may be obtained from DNA evidence. Currently the DNA strand analyzed for ID purposes is called "junk DNA" because it supposedly has no value other than to identify with some probability a specific individual. However, this information reveals information about familial relations – exposing family members of arrestees to unwarranted police attention – and could soon be able to reveal deeply private information such as medical conditions and genetic diseases.

Finally, the ACLU of Vermont believes that the recent history of DNA databanking practices shows that “function creep” – the government’s urge to use DNA samples for purposes other than originally intended – is inevitable. Just this year in Massachusetts, for example, the ACLU of Massachusetts was forced to sue for the return of a DNA sample that an individual (Keith Amato) voluntarily gave police as part of a murder investigation on Cape Cod. Although Amato and others had been promised that their samples would be purged from the state databank and returned if the donor was not implicated in the crime, the district attorney in the case later refused to do so when Amato requested the return of his sample. The district attorney relented only after suit was filed.³

As with modifications to the rules of evidence, there is no suggestion that the individual charged in the Bennett case, Michael Jacques, would have been caught any more quickly had the state possessed a DNA sample from him. Jacques was caught by good police work; investigators’ computer forensic work “eliminated the whole world out there and narrowed our focus,” according to Vermont State Police Col. James Baker, leading to Jacques’s arrest within three days of Bennett’s disappearance.⁴ The committee should not force all Vermonters accused of a crime to yield their DNA for perpetuity without a plausible rationale for doing so.

Pre-sentence investigations

The states attorneys and attorney general have proposed that courts be permitted to include information from the Department for Children and Families’ child protection registry and to consider facts from prior convictions when formulating sentences for sex offenders. This proposal suffers from two constitutional problems: as to formulating sentences based upon the child protection registry, the United States Supreme Court held in *Blakely v. Washington* that where a person is tried by a jury, her or his Sixth Amendment jury trial right is violated when a sentencing judge makes use of facts not proven at trial. 542 U.S. 296, 306 (2004). Any measure that purports to give Vermont judges the authority to draw on facts gleaned from the child protection registry would flatly fall afoul of this prohibition.

Similarly, because “the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury’s finding of any disputed fact essential to increase the ceiling of a potential sentence,” sentencing judges may not draw facts from prior convictions beyond the satisfaction of the elements of the crime for which the defendant had been convicted. *Shepard v. United States*, 544 U.S. 13, 25 (2005). The committee should therefore avoid recommending any legislation that contravenes these fair trial guarantees.

Civil confinement of sex offenders

A civil confinement system for sex offenders has been proposed. The ACLU of Vermont’s

³ *Man Gets DNA Sample Back*, Boston Globe, Aug. 28, 2008.

⁴ *Police: Uncle “Person of Interest” In Disappearance*, Barre-Montpelier Times Argus, Jun. 30, 2008. *See also State Sets Attention on Sex Crime Units*, Barre-Montpelier Times Argus, Oct. 12, 2008 (Noting that “[s]ex crimes are tough to prosecute because the cases often lack physical evidence.”).

position is that any system that confines individuals after the completion of a prison sentence is a punitive and deeply unfair measure that Vermonters recognize as inconsistent with our conception of freedom. If the state wishes to incarcerate sex offenders for life, it should amend the relevant criminal statutes to provide for such punishment so that all Vermonters will be clearly apprised of the punishments that they will face if they commit a sex crime.

Nonetheless, if the committee decides to recommend any changes to Vermont's current system of civil confinement, any resulting legislation will have to comport with the due process requirements set forth by the United States Supreme Court's decisions governing this area of the law. These include that where the state seeks to confine a person on the basis of a belief that the person poses a threat to re-offend, the state must prove beyond a reasonable doubt at trial that the person has engaged in past sexually violent behavior, and that she or he currently suffers from, and has serious difficulty controlling, a mental condition that creates a likelihood of such conduct in the future. A mere determination of dangerousness alone is constitutionally insufficient for committing a person thought to be a risk to re-offend. *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997); *Kansas v. Crane*, 534 U.S. 407, 413 (2002). Any civil confinement measure would also have to provide meaningful opportunities for court review of a person's continued confinement. The Kansas statute upheld by the court in *Hendricks* and *Crane*, for example, provided that a court would automatically annually review a confined person's fitness for release, and that either the confined person or the state attorney general could petition for release whenever s/he felt it appropriate. Moreover, under the statute, confined persons were provided with counsel – at no charge, for the indigent – for the purposes of challenging their continued confinement. Vermonters would expect no less than these basic guarantees.

Supervision of sex offenders no longer on parole or probation

The state's attorneys and attorney general have proposed additional monitoring of sex offenders in the form of electronic monitoring and internet usage monitoring. It is not clear whether such additional monitoring would also be applied to those no longer on parole or probation. We merely wish to note that any legislation purporting to authorize monitoring of individuals no longer on parole or probation would be bootless. Individuals who are not subject to conditions of parole or probation enjoy the full protection of the federal and state constitutions, and may not have their rights of speech, association, or movement restricted simply because they have completed a sentence for a sex offense.⁵

Permitting recorded testimony of a child at DCF substantiation hearings

Because inclusion on the state registry of sex abusers⁶ effectively prevents one from being employed in certain positions, inclusion implicates liberty and property interests protected by the U.S. Constitution. *Valmonte v. Bane*, 18 F.3d 992, 1002 (2d Cir. 1994). As such, persons whom

5 *E.g.*, *Doe v. Shurtleff*, No. 08-cv-64, 2008 WL 4427594 (D. Utah Sep. 25, 2008) (striking state statute requiring all sex offenders, regardless of parole or probation status, to register internet usernames and aliases with state for monitoring).

6 *See* Vt. Stat. Ann. § 4916.

the Department for Children and Families seeks to list on the registry are owed procedural protections, including the “fundamental requirement of due process”-- the right “to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), (internal quotation omitted).

Currently, those appealing their inclusion on the registry are entitled to a fair hearing in accordance with Vermont administrative procedure, which includes the right to call witnesses and to have all witnesses “examined under oath.” Vt. Stat. Ann. tit. 3, § 3091(b). Any curtailing of this right to question an adverse witness would be impossible to justify, given the current existence of the examination right. *See Mathews*, 424 U.S. at 335; *In re A.L.*, 163 Vt. 635, 636-637 (1995). We feel that existing law should not be modified to permit the admission of recorded evidence that cannot be cross-examined.

Again, our aim in making these comments is to provide information that we hope will be helpful to you as you decide your next steps. We await specific recommendations from the committee and hope to provide you with further feedback once you have announced your plans. In the meantime, please do not hesitate to contact me and/or our staff attorney, Dan Barrett, if you or your counsel have any questions about the points we have raised.