



OFFICE OF THE ATTORNEY GENERAL  
STATE OF ILLINOIS

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December 31, 2012

FILE NO. 12-004

JUDICIAL SYSTEM:

Public Defender's Representation  
of Indigent Persons Who are the  
Subject of Sexually Violent Persons  
Commitment Act Proceedings

The Honorable Timothy C. Evans  
Chief Judge, Circuit Court of Cook County  
2600 Richard J. Daley Center  
Chicago, Illinois 60602

Dear Chief Judge Evans:

I have your letter inquiring whether the duties of public defenders include the representation of indigent persons who are the subject of commitment proceedings under the Sexually Violent Persons Commitment Act (the Act) (725 ILCS 207/1 *et seq.* (West 2010)). For the reasons stated below, it is my opinion that the public defender's duties include the representation of indigent persons who are held in custody and subject to proceedings initiated under the Act. Therefore, it is within the discretion of the trial court to determine whether to appoint the public defender or to appoint other counsel to represent a respondent under the Act.

## BACKGROUND

A sexually violent person is a person who has been: (1) convicted of committing a sexually violent offense;<sup>1</sup> (2) adjudicated delinquent for a sexually violent offense; or (3) found not guilty of a sexually violent offense by reason of insanity, and who is dangerous because he or she suffers from a mental disorder<sup>2</sup> that makes it substantially probable that he or she will engage in future acts of sexual violence. 725 ILCS 207/5(f) (West 2010). Beginning three months prior to the anticipated date upon which a person who "may meet the criteria for commitment as a sexually violent person" is: (1) to be released from imprisonment; (2) to enter into mandatory supervised release; (3) to be released from a correctional facility as a result of being adjudicated delinquent; or (4) to be discharged or conditionally released, as the case may be, the agency with jurisdiction and custody and control over that person must notify the Attorney General and the State's Attorney of the county in which the underlying offense was committed of the anticipated release or discharge. 725 ILCS 207/10 (West 2010). The Attorney General or the State's

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<sup>1</sup>A "sexually violent offense" includes any of the following: (1) criminal sexual assault (720 ILCS 5/11-1.20 (West 2010)); (2) aggravated criminal sexual assault (720 ILCS 5/11-1.30 (West 2011 Supp.)); (3) predatory criminal sexual assault of a child (720 ILCS 5/11-1.40 (West 2010)); (4) aggravated criminal sexual abuse (720 ILCS 5/11-1.60 (West 2011 Supp.)); (5) indecent solicitation of a child (720 ILCS 5/11-6 (West 2010)); (6) child pornography (720 ILCS 5/11-20.1 (West 2011 Supp.)); (7) aggravated child pornography (720 ILCS 5/11-20.1B (West 2011 Supp.)); (8) first degree murder (720 ILCS 5/9-1 (West 2010)), if it is determined by the agency with jurisdiction to have been sexually motivated; or (9) any solicitation, conspiracy, or attempt to commit a crime involving the foregoing. 725 ILCS 207/5(e) (West 2010).

The term also includes the following sections of the Criminal Code of 1961 that were repealed by Public Act 83-1067, effective July 1, 1984: (1) section 11-1 (Ill. Rev. Stat. 1983, ch. 38, par. 11-1) (rape); (2) 11-3 (Ill. Rev. Stat. 1983, ch. 38, par. 11-3) (deviate sexual assault); (3) 11-4 (Ill. Rev. Stat. 1983, ch. 38, par. 11-4) (indecent liberties with a child); and (4) 11-4.1 (Ill. Rev. Stat. 1983, ch. 38, par. 11-4.1) (aggravated indecent liberties with a child).

<sup>2</sup>"Mental disorder" means "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." 725 ILCS 207/5(b) (West 2010).

Attorney, either individually or acting jointly, may file a petition alleging that the person is sexually violent. 725 ILCS 207/15 (West 2010). A person who is determined to be sexually violent is committed to the custody of the Department of Human Services (DHS) until he or she is found to no longer be sexually violent. 725 ILCS 207/40 (West 2010).

Proceedings on the petition are characterized as civil in nature. 725 ILCS 207/20 (West 2010). The person who is the subject of the petition, however, has certain enumerated rights, including the right to be represented by counsel:

(c) Except as provided in paragraph (b)(1) of Section 65 and Section 70 of this Act,<sup>3</sup> at any hearing conducted under this Act, the person who is the subject of the petition has the right:

(1) To be present and to be represented by counsel. *If the person is indigent, the court shall appoint counsel.*

(2) To remain silent.

(3) To present and cross-examine witnesses.

(4) To have the hearing recorded by a court reporter.

(d) The person who is the subject of the petition \* \* \* may request that a trial under Section 35 of this Act be to a jury. (Emphasis added.) 725 ILCS 207/25 (West 2010).

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<sup>3</sup>Subsection 65(b)(1) of the Act (725 ILCS 207/65(b)(1) (West 2010), as amended by Public Act 97-1075, effective August 24, 2012), addresses petitions for discharge after a person has been civilly committed, and provides that while the committed person has a right to have an attorney represent him or her at the probable cause hearing on a petition for discharge, he or she is not entitled to be present at the hearing. Section 70 of the Act authorized a court to deny a petition for discharge without a hearing if the committed person previously filed a petition for discharge without the approval of the Secretary of Human Services and the court determined that the person's petition was frivolous or that the person was still a sexually violent person. 725 ILCS 207/70 (West 2010). Public Act 97-1075, effective August 24, 2012, repealed section 70 and moved its language into subsection 65(b)(1) of the Act.

Section 30 of the Act (725 ILCS 207/30 (West 2010)) provides, in pertinent part:

Detention; probable cause hearing; transfer for examination.

(a) Upon the filing of a petition under Section 15 of this Act, the court shall review the petition to determine whether to issue an order for detention of the person who is the subject of the petition. The person shall be detained only if there is cause to believe that the person is eligible for commitment under subsection (f) of Section 35 of this Act. A person detained under this Section shall be held in a facility approved by the Department. If the person is serving a sentence of imprisonment, is in a Department of Corrections correctional facility or juvenile correctional facility or is committed to institutional care, and the court orders detention under this Section, the court shall order that the person be transferred to a detention facility approved by the Department. A detention order under this Section remains in effect until the person is discharged after a trial under Section 35 of this Act or until the effective date of a commitment order under Section 40 of this Act, whichever is applicable.

(b) Whenever a petition is filed under Section 15 of this Act, the court shall hold a hearing to determine whether there is probable cause to believe that the person named in the petition is a sexually violent person. If the person named in the petition is in custody, the court shall hold the probable cause hearing within 72 hours after the petition is filed, excluding Saturdays, Sundays and legal holidays. The court may grant a continuance of the probable cause hearing for no more than 7 additional days upon the motion of the respondent, for good cause. If the person named in the petition has been released, is on parole, is on mandatory supervised release, or otherwise is not in custody, the court shall hold the probable cause hearing within a reasonable time after the filing of the petition. At the probable cause hearing, the court shall admit and consider all relevant hearsay evidence.

(c) If the court determines after a hearing that there is probable cause to believe that the person named in the petition is a sexually violent person, the court shall order that the person be

taken into custody if he or she is not in custody and shall order the person to be transferred within a reasonable time to an appropriate facility for an evaluation as to whether the person is a sexually violent person.

The respondent is entitled to a trial to determine whether he or she is a sexually violent person within 120 days after the date of the probable cause hearing. 725 ILCS 207/35(a) (West 2010). At the trial, the petitioner has the burden of proving the allegations in the petition beyond a reasonable doubt. 725 ILCS 207/35(d) (West 2010). If the court or the jury finds that the person who is the subject of the petition is a sexually violent person, the court shall order the person to be committed to the custody of DHS for control, care, and treatment until such time as it is determined that the person is no longer sexually violent. 725 ILCS 207/40 (West 2010).

#### ANALYSIS

The Act requires a court to appoint counsel for an indigent person who is the subject of a sexually violent persons commitment petition. It does not, however, specifically provide that the court is to appoint the public defender.<sup>4</sup> Therefore, although the respondent is entitled to the appointment of counsel if he or she is indigent, the right to appointed counsel does

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<sup>4</sup>In contrast, other statutory provisions expressly provide for the appointment of the public defender in qualifying circumstances. *See, e.g.*, 405 ILCS 5/3-805(2) (West 2010) (in involuntary civil commitment proceedings, a respondent is entitled to counsel; "[i]f an attorney from the Guardianship and Mental Health Advocacy Commission is not available, the court shall appoint as counsel the public defender or, only if no public defender is available, an attorney licensed to practice law in this State"); 705 ILCS 405/1-5 (West 2010) (in proceedings under the Juvenile Court Act, "[a]t the request of any party financially unable to employ counsel, \* \* \* the court shall appoint the Public Defender or such other counsel as the case may require"); 750 ILCS 50/13(B)(c) (West 2010) (if a petition for adoption alleges a person to be unfit, the person is entitled to counsel; "[i]f such person is indigent or an appearance has not been entered on his behalf at the time the matter is set for hearing, the court shall appoint as counsel for him either the Guardianship and Advocacy Commission, the public defender, or, only if no attorney from the Guardianship and Advocacy Commission or the public defender is available, an attorney licensed to practice law in this State").

not necessarily require the appointment of the public defender. *See Maloney v. Bower*, 113 Ill. 2d 473, 479 (1986). The issue, then, is whether the duties of the public defender include the representation of indigent persons in proceedings under the Act. *Maloney*, 113 Ill. 2d at 477-78 (in determining whether a chief judge exceeded his authority in entering an administrative order directing circuit court judges to appoint the public defender to represent indigent defendants in civil contempt proceedings in which the defendants might be subject to incarceration, the pivotal inquiry is whether the public defender is authorized to be appointed under such circumstances).

It has long been recognized that a statutory officer, such as the public defender, possesses only those powers that the General Assembly has expressly granted by statute, together with those powers which are necessarily implied therefrom to effectuate the expressly granted powers. *Euziere v. Highway Commissioner of the Town of Rockville*, 346 Ill. 131, 134 (1931); *Phoenix Bond & Indemnity Co. v. Pappas*, 309 Ill. App. 3d 779, 784 (1999), *aff'd*, 194 Ill. 2d 99 (2000); Ill. Att'y Gen. Op. No. 95-008, issued July 14, 1995. Further, when making appointments pursuant to a statute, courts are limited to making only the appointments allowed by the statute. *Maloney*, 113 Ill. 2d at 478. Here, section 3-4006 of the Counties Code (55 ILCS 5/3-4006 (West 2010)) sets out the duties of the public defender, providing, in pertinent part:

*The Public Defender, as directed by the court, shall act as attorney, without fee, before any court within any county for all persons who are held in custody or who are charged with the commission of any criminal offense, and who the court finds are unable to employ counsel.* (Emphasis added.)<sup>5</sup>

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<sup>5</sup>In addition, the Code of Criminal Procedure of 1963 (725 ILCS 5/100-1 *et seq.* (West 2010)) provides that the public defender shall represent indigent persons before arraignment (725 ILCS 5/113-3(b) (West 2010)), on appeal (725 ILCS 5/121-13(a) (West 2010)), and at post-conviction hearings, for the limited purpose of attacking substantial constitutional errors in the proceeding in which the defendant was convicted or in certain instances where there is newly discovered evidence in a case where the death penalty was imposed (725 ILCS 5/122-1, 122-4 (West 2010); *see also* Ill. Att'y Gen. Op. No. 95-008; 1980 Ill. Att'y Gen. Op. 114.

Where statutory language is clear and unambiguous, it must be given effect as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). Pursuant to section 3-4006 of the Counties Code, the public defender's duties include representing indigent persons: (1) who are "held in custody," or (2) who are "charged with the commission of any criminal offense[.]" This section uses the word "or" in describing the two circumstances in which the public defender shall represent indigent persons. "As used in its ordinary sense, the word 'or' marks an alternative indicating that the various members of the sentence which it connects are to be taken separately." *People v. Vraniak*, 5 Ill. 2d 384, 389 (1955), *cert. denied*, 349 U.S. 963, 75 S. Ct. 895 (1955). The phrase "held in custody," therefore, is not limited to persons who are in custody in connection with the commission of a crime.

In *Tedder v. Fairman*, 92 Ill. 2d 216, 226-27 (1982), two inmates filed petitions for writs of *mandamus* and *habeas corpus* related to the deprivation of needed medical assistance and the circuit court appointed the public defender to represent them. On appeal, the Illinois Supreme Court stated, with respect to the representation of convicted prisoners challenging the conditions of their imprisonment:

Public defenders are expressly authorized by the statute to represent indigent persons "held in custody." The public defender acts as a legal representative "as directed by the court." \* \* \* There is no legislative mandate that a public defender be appointed to represent an indigent prisoner in a case alleging deprivation of a prisoner's civil rights in Illinois. However, the statutory language does not preclude such an appointment.

The *Tedder* majority rejected the interpretation of "held in custody" as limited to persons who are held in custody and awaiting criminal charges.

Thus, the issue here is whether the respondent in a proceeding under the Act is "in custody" as that term is used in section 3-4006 of the Counties Code. Section 15 of the Act provides that a petition alleging that a person is sexually violent is generally<sup>6</sup> to be filed before the release or discharge of the subject or within 30 days of his or her placement into parole or mandatory supervised release. In the case of a respondent who is serving a sentence of imprisonment in a Department of Corrections correctional facility or juvenile correctional facility, or is committed to institutional care, if the court determines from the allegations of the petition that there is cause to believe that the respondent is eligible for commitment, it shall order the respondent to be transferred to a facility approved by DHS and detained until the effective date of the commitment order or until the respondent is discharged under the Act. 725 ILCS 207/30(a) (West 2010). In the case of a respondent who is not in a correctional facility or committed to institutional care, if the court determines at the initial hearing that probable cause exists to believe that he is sexually violent, the court "shall order that the person be taken into custody" and transferred to an appropriate facility for evaluation. 725 ILCS 207/30(c) (West 2010).

Under the Act, the respondent is ordinarily in the custody of the Department of Corrections when the petition is filed or is taken into DHS custody immediately following the court's determination that there is cause to believe that the respondent is eligible for commitment

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<sup>6</sup>See 730 ILCS 5/3-14-2 (West 2011 Supp.) ("The Department [of Corrections] shall retain custody of all persons placed on parole or mandatory supervised release \* \* \* and shall supervise such persons during their parole or release period in accord with the conditions set by the Prisoner Review Board"); *see also People ex rel. Gibson v. Cannon*, 65 Ill. 2d 366, 370 (1976) ("[w]hen a person is released on parole, the Department retains custody. \* \* \* [T]he term ["custody"] serves to describe the parolee's legal status and his relationship with the Department").



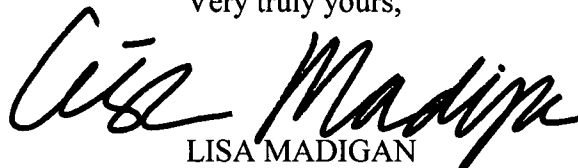
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as a sexually violent person. Because the public defender's duties include representing indigent persons who are "held in custody," the trial court has the discretion to appoint the public defender to represent a respondent who is in custody and subject to proceedings under the Act.

### CONCLUSION

Courts are required to appoint counsel to represent indigent persons who are the subject of proceedings under the Sexually Violent Persons Commitment Act. The public defender's duty to represent indigent persons is not limited to persons who are charged with the commission of a crime, but may extend to persons who are held in custody. As a result, it is my opinion that, when determining whether to appoint counsel to represent an indigent respondent who is in custody and subject to proceedings under the Act, the trial court has the discretion to appoint the public defender.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan". The signature is fluid and cursive, with the first name "Lisa" written in a smaller, more compact script than the last name "Madigan".

LISA MADIGAN  
ATTORNEY GENERAL