

**Report to Chief Justice Robert J. Lynn, NH Superior Court**

**Concerning RSA Chapter 135-E:**

**The Commitment of Sexually Violent Predators**

**June 30, 2009**

In conducting this review, with the assistance of Kim France of the Administrative Office of the Courts, I have reviewed in detail the case files in the five RSA chapter 135-E petitions filed in Hillsborough County Superior Court, Northern District, discussed the cases with all levels of court staff, interviewed both the Hillsborough County Attorney and the lead public defender on RSA chapter 135-E cases statewide, who was involved in all the Hillsborough County cases, and reviewed the enabling legislation and the relevant case law. I have evaluated the procedures you put in place on April 7, 2009 and reviewed the legislation, which has been proposed in the current legislative session, which would make a number of changes to RSA chapter 135-E. I have also discussed the issues raised with senior staff in the New Hampshire Attorney General's Office and with the Attorney General. This review is our best assessment of what happened in these cases and why.

RSA 135-E establishes a procedure for the civil commitment of sexual offenders who upon completion of their sentences are determined to be too dangerous to release to society at large. The law was passed by the legislature in the 2006 legislative session with an effective date of January 1, 2007. RSA chapter 135-E (Laws 2006, c 327). This New Hampshire law became part of a developing trend among states and the federal government.<sup>1</sup>

This report will examine the New Hampshire law and, in particular, its application to three cases brought in 2008 in the Hillsborough County Superior Court, Northern District, which were dismissed in the spring of 2009 following the New Hampshire Supreme Court's decision in *State of New Hampshire v. Raymond Fournier*, 158 N.H. \_\_\_\_ (decided March 19, 2009).

RSA 135-E sets up a mechanism to permit the State, in certain cases, to initiate civil commitment proceedings for the purpose of detaining convicted sex offenders who are found to be sexually violent predators, upon the completion of their sentences. A "sexually violent predator" is defined as

Any person who:

- (a) Has been convicted of a sexually violent offense;
- (b) Suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care, and treatment; and

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<sup>1</sup> See 18 U.S.C.A. § 4248 (April 24, 2009); MO. ANN. STAT. §§ 632.480 – 632.513 (March 26, 2009); FLA. STAT. ANN. §§ 394.910 – 394.932 (March 17, 2009); ARIZ. REV. STAT. ANN. §§ 36-3701 – 36-3717 (April 9, 2009); 725 ILL. COMP. STAT. ANN. §§ 207/1 – 207/99 (2008); KAN. STAT. ANN. §§ 59-29a01 – 59-29a22 (2008); N.D. CENT. CODE §§ 25-03.3-01 – 25-03.3-24 (2008); N.J. STAT. ANN. §§ 30:4-27.24 – 30:4-27.38 (2008); MINN. STAT. ANN. § 253B.185 (2007); S.C. CODE ANN. §§ 44-48-20 – 44-48-170 (2007); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001 – 841.150 (2003); IOWA CODE ANN. §§ 229A.1 – 229A.16 (2000); WIS. STAT. ANN. §§ 980.01 – 980.14 (1998).

(c) Is not eligible for involuntary admission under RSA 135-C or 171-B.

RSA 135-E:2, XII(a)—(c) (Supp. 2008).

The statute provides for two separate tracks for the commencement of proceedings, one, where there is substantial lead time before the defendant's release from confinement, and a second, where the defendant's release is imminent and the defendant is likely to be released before the matter can be heard on the merits, creating a need for emergency relief from the Superior Court. As the three cases specifically subject of this review followed the first track, with significant lead time before each defendant's release, this report will focus on the procedures involved in that process, referring to the emergency procedures only where they may be helpful in understanding the overall way these cases were handled.

Under RSA chapter 135-E, when a defendant who has committed a sexually violent offense is to be released from prison, the prison authorities must give notice to the prosecuting authority at least nine months prior to the defendant's anticipated release date. Upon receipt of that notice, the prosecuting agency may request an evaluation of the defendant to determine if he is a sexually violent predator. The defendant is evaluated by a multi-disciplinary team (MDT) of the Department of Health and Human Services, which must report its findings within six months of notice of the defendant's release. If the MDT finds that the defendant is a sexually violent predator, the prosecutor then has fourteen days to file a petition with the Superior Court seeking commitment of the defendant as a sexually violent predator.

Once the petition is filed, the court is required to act within ten days to determine, based only upon the contents of the petition, whether probable cause exists to believe

the defendant is a sexually violent predator. Upon making such a finding, the court is required to order that the defendant be held in custody while the case proceeds. The court must schedule a trial on the merits within 60 days of the probable cause hearing, or in the case of a demand for jury trial by either party, within 60 days of the demand for jury trial.<sup>2</sup>

The State must prove at the trial on the merits by clear and convincing evidence that the defendant is a sexually violent predator, and upon such a determination by the court or by a jury, if a jury trial is requested, the defendant is committed to the Department of Corrections for up to five years upon the completion of the underlying criminal sentence.<sup>3</sup>

In one of the three cases subject to this review, *State v. Fournier*, Hillsborough County Superior Court, Northern District, No. 08-E-085<sup>4</sup> the defendant, following proceedings in the Superior Court and a finding of probable cause, sought an interlocutory appeal to the New Hampshire Supreme Court. The appeal raised a number of issues, including the fact that the court did not make a finding of probable

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<sup>2</sup> While it is understandable that the legislature wished to ensure a speedy trial, particularly when a defendant may be held beyond the completion of his sentence, given the complexity of these proceedings, the need for discovery by the defense and the retention of experts by both sides, it is unlikely that any case brought under the statute could be adequately prepared for trial within 60 days.

<sup>3</sup> On September 15, 2006 Superior Court judges attended a training session entitled "Managing Sex Offense Cases from a Judicial Perspective," sponsored by the U. S. Department of Justice. While the focus of this training was more generic concepts in handling sex offender cases, the training included a panel discussion concerning new state legislation that included the adoption of RSA 135-E. Consequently, Superior Court judges were generally familiar with the changes in the law. On December 6, 2006, similar training was conducted by the N. H. Bar Association for practicing criminal defense lawyers and prosecutors.

<sup>4</sup> The two other cases subject to this review, *State v. Sawyer*, Hillsborough County Superior Court, Northern District, No. 08-E-145, and *State v. Hilton*, Hillsborough County Superior Court, Northern District, No. 08-E-153, were also appealed but all proceedings were stayed pending the outcome in the appeal of *State v. Fournier*.

cause within 10 days of the filing of the petition and did not conduct the trial on the merits within 60 days of the probable cause finding or demand for jury trial. For purposes of the appeal, the defendant waived his speedy trial rights prospectively so no trial on the petition under chapter 135-E was held in the Superior Court.

On March 19, 2009, the New Hampshire Supreme Court issued an opinion in *State v. Fournier, supra*, concluding that the legislature intended that the time limitations set forth in the statute for making a probable cause finding and for a trial on the merits were jurisdictional. Because the time limits set forth in RSA 135-E were not met in *Fournier*, the Supreme Court determined that the Superior Court would no longer have jurisdiction over the case. All three cases were remanded for further proceedings, in part, to determine whether conduct by the defendant contributed to the delay. Later, upon remand, the Superior Court found in each of the three cases that the jurisdictional time limit for an initial finding of probable cause had not been met and dismissed the cases, as required by the Supreme Court's order.<sup>5</sup>

We turn now to the procedural history of each of the three cases dismissed pursuant to the Supreme Court's opinion in *State v. Fournier, supra*.

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<sup>5</sup> It has been suggested that in light of the Supreme Court's reliance on *McCarthy v. Wheeler*, 152 N.H. 643 (2005), where, although the failure to meet the time limits in a domestic violence case caused the trial court to lose jurisdiction and required the dismissal of the case, the Court held that the case could be brought again on the same facts, the State here could simply bring new petitions after the dismissal of these cases. Such a result would be unlikely under RSA 135-E, as the State, in initiating any petition under the statute must do so within 14 days of the finding by the MDT that the defendant is a sexually violent predator under the statute. RSA 135-E:6 (Supp. 2008). Thus, in this situation, there is no way the State could comply with the mandatory requirement to file a petition within 14 days of the finding by the MDT that the defendant is a sexually violent predator. The County Attorney considered such a move but, after consultation with the Attorney General's Office, determined that such refiling could not, in good faith, be supported.

STATE v. RAYMOND FOURNIER

The State, through the Hillsborough County Attorney's Office, filed a petition under RSA chapter 135-E against Raymond Fournier on April 29, 2008. After pleading guilty on March 17, 1994, Fournier was sentenced to five to fifteen years at the New Hampshire State Prison on six aggravated felonious sexual assault indictments and one attempted aggravated felonious sexual assault indictment.<sup>6</sup> Fournier's scheduled release date was June 17, 2008. Upon a request for an assessment by the prosecutor, the MDT found the defendant to be a sexually violent predator under the statute and notified the County Attorney of the finding on March 11, 2008.

In its petition, after reciting the defendant's history at the State Prison and the MDT's detailed findings, the County Attorney requested the following relief, all in accordance with RSA 135-E:

- A. Issue Orders of Notice requiring the Respondent to answer this Petition whereby this Petition may be served on Respondent; and
- B. Within 10 days, find probable cause based on the contents of the foregoing Petition that Respondent is a Sexually Violent Predator pursuant to RSA 135-E:7, I; and
- C. Order that Respondent remain in custody and held in an appropriate secure facility for further proceedings in accordance with RSA 135-E: 7, I; and
- D. Schedule a trial within 60 days of the Court's determination of probable cause, to determine whether Respondent is a Sexually Violent Predator pursuant to RSA 135-E: 9; and
- E. Order that Respondent be committed to the Secure Psychiatric Unit of the New Hampshire State Prison for up to 5 Years for control, care, and treatment pursuant to RSA 135-E: 11,II; and
- F. Grant their Petitioner such other and further relief as the Court deems just and proper.

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<sup>6</sup> Fournier had been released on parole in 1999, but was returned to the State Prison under his original sentence for a parole violation.

State v. Fournier, Hillsborough County Superior Court, Northern District, *supra*, Petition to Certify Respondent as a Sexually Violent Predator Pursuant to RSA 135-E, filed March 17, 2008.

The petition filed by the County Attorney was docketed by Civil and Equity Department staff on March 17, 2008. Although the petition requested a finding of probable cause within ten days, no separate motion was filed by the County Attorney's office requesting *ex parte* relief. In those circumstances in the ordinary course the file would not be sent to a judge but would remain in the Clerk's Office awaiting further action in the case.

More importantly here, because no specific procedure was established by the Clerk's Office for this type of petition, the case was processed like every other equity petition filed with the court. When an equity petition is filed, the case is assigned to a judge randomly by Clerk's Office staff. The Civil and Equity Department staff then prepare orders of notice to be served on the defendant, identifying a return date (the first Monday of each month) far enough in advance so that service could be made on the defendant at least 14 days prior to the return date.

In the Fournier case, the return date was May 6, 2008, the first Monday of May. Under court rules, the defendant must file an appearance by that date, and then file an answer within 30 days of the return date, in this case by June 5, 2008. The case then would ordinarily be scheduled for a structuring conference with the assigned judge some time following the respondent's answer to the petition. In equity practice in the Superior Court, when a party seeks an order from the court earlier than when the case would be heard in the ordinary course, a motion seeking such an order is filed and the case would be brought to the assigned judge for ruling.

The normal processing of an equity petition does not accommodate the time demands of the statute in these cases, in particular a finding of probable cause within 10 days and a trial (by jury if demanded) within 60 days.<sup>7</sup> As this report will conclude later, it is the absence of any mechanism for treating the filing of these cases differently from other equity cases that resulted in all three cases not meeting the initial deadlines for a finding of probable cause, and ultimately the dismissal of each case.

In the Fournier case it was action by the defendant two days after the petition was filed that brought the case to the attention of court staff and the judge assigned, Judge James Barry, well before it would ordinarily have been brought to the judge's attention.

On Fournier's behalf, the Public Defender's Office, who had previously represented Fournier on his charges and on his parole violation, filed, on March 19, 2008, two days after the petition was filed, a motion for discovery and probable cause hearing, or in the alternative, for dismissal of petition. The defendant claimed among other things that the statute providing for an *ex parte* probable cause finding based upon the content of the petition was unconstitutional. Fournier demanded full discovery of the evidence supporting the MDT's findings and a full adversarial hearing *before* the court could make a finding of probable cause, in effect waiving Fournier's right to the determination of probable cause within 10 days. Alternatively, Fournier sought dismissal of the petition as a violation of his due process protections under both the state and federal constitutions.

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<sup>7</sup> The deadline for a trial in the statute is 60 days from the probable cause finding (required to be within 10 days from the filing of the petition) or 60 days from the demand for jury. Here, jury was demanded by the State in the petition at the time it was filed.

Ordinarily, motions not seeking an *ex parte* immediate order will be docketed and held for a response from the other party, required to be filed within 10 days. However, in this case, two days after the motion was filed, on March 21, 2008 the State filed an initial objection, questioning whether the motion should be entertained and also requesting 10 days to file a “substantive objection.” On March 24, 2008 the defendant filed another motion entitled “Motion to Keep State’s Petition Under Seal and for Protective Orders—State Objects,” which became the subject of one of the appeals to the New Hampshire Supreme Court.<sup>8</sup>

On March 21, 2008, a court assistant sent Judge Barry the file with a transmittal note asking the judge to review the defendant’s March 19, 2009 motion and the State’s response. This is standard practice when a motion has become ripe, that is, the motion has been responded to (in this case well before the 10 day deadline) and is ready for consideration by the judge. Judge Barry indicated that the clerk’s office should schedule a hearing, which was set for March 27, 2008, and the defendant was ordered to be transported for the hearing.<sup>9</sup>

At the hearing on March 27, 2008, the defense asserted that the court could *not* make any probable cause finding without discovery and a full adversarial hearing. The State objected to the defendant’s motion and the court heard detailed argument from defense counsel and the prosecutor as to the substantive issue raised by the defendant’s motion, that the court was constitutionally required to hold a hearing before issuing *any* finding of probable cause.

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<sup>8</sup> See *State v. DeCato*, 156 N.H. 570 (2007), which resolved the issue of public access to RSA chapter 135-E proceedings including the Fournier case.

<sup>9</sup> A full transcript of that hearing has been prepared and reviewed in detail in the preparation of this report.

Following the hearing the court took the matter under advisement. On April 4, 2008, the State filed a supplement to its earlier objection to the defendant's motion and on April 9, 2008, Judge Barry issued a six-page order denying the defendant's motion that alternatively sought discovery and a due process hearing or dismissal of the petition. That order was sent to the parties by clerk's notice dated April 10, 2008.

On April 25, 2008, the court made a finding of probable cause based on a review of the petition.<sup>10</sup> There followed a flurry of activity related to the motion to seal, and on June 9, 2008, the State requested a probable cause hearing as it was evident that the proceedings would not be concluded by the time the defendant was scheduled to be released from the prison, and a probable cause hearing was required under the statute. RSA 135-E:7, II.

The State's motion for a probable cause hearing was scheduled for June 16, 2008, and was heard over two days, on June 16 and June 17, 2008. Following this hearing, Judge Barry found probable cause under the statute in a lengthy order dated July 3, 2008.

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<sup>10</sup> While in hindsight it is easy to say that as Judge Barry had the file at the motion hearing on day 10, he could have made a probable cause finding based on the contents of the petition. Such a finding only involved the judge looking at the petition and determining that the State has alleged what the statute required. There is no record, or facts to be determined, and no reports are included with the petition. The decision is all but ministerial. But here, the defense motion specifically requested the judge *not* make a finding of probable cause on constitutional grounds, and once the court rejected that position, it was well beyond the ten-day time limit in the statute. There was no reason at that point, a year before the Supreme Court's later decision in *Fournier*, to believe that the court's finding of probable cause two weeks later, on April 25, 2008, would deprive the court of jurisdiction and require dismissal of the petition. In a recent analogous case, later distinguished by the Supreme Court in *Fournier*, addressing certain time limits in civil commitments of dangerously mentally ill persons under RSA chapter 135-C, the Court found that the probate court's failure to act within the time limits in that statute did *not* deprive the probate court of jurisdiction. *In re Christopher K*, 155 N.H. 219 (2007). While this analysis is not intended to question the Court's decision in *Fournier*, it is meant to underscore that neither the trial court nor the parties involved in these RSA chapter 135-E proceedings prior to *Fournier*, could reasonably have believed that the failure to make an essentially ministerial determination of probable cause based on the contents of a petition, would result in the permanent loss of jurisdiction over the commitment of a sexually dangerous predator. Indeed, in none of the three 2008 cases did counsel for the defendants file a motion to dismiss on jurisdictional grounds promptly after the 10-day period had passed, and in Hilton, no such motion was ever filed.

Meanwhile, on June 16, 2008, the day of the probable cause hearing and three months after the petition was filed, the defendant filed a motion to dismiss alleging that because the court had not issued a probable cause finding within 10 days (the finding the defense had earlier claimed the court could not make without violating the defendant's rights) and a trial by jury within 60 days (by May 16, 2008), the petition must be dismissed for lack of jurisdiction. At that time the parties were still litigating the issues of closure of the proceedings and the amount and type of discovery to which the defendant was entitled.<sup>11</sup>

On July 10, 2008, a jury trial was scheduled for September 2, 2008. Later, additional legal issues were raised by the defendant claiming that the testimony of the defendant's treatment professionals at the New Hampshire State Prison was privileged and inadmissible at any trial or hearing. As to both the jurisdictional issue and the witness privilege issue,<sup>12</sup> Judge Barry issued an interlocutory transfer to the New Hampshire Supreme Court on August 29, 2008, and the defendant moved to continue the jury trial and waived his speedy trial rights as to the trial as scheduled pending the outcome of the appeal to the New Hampshire Supreme Court.

This report next discusses the two other cases filed in Hillsborough County, Northern District, in 2008 following the filing of the Fournier case.

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<sup>11</sup> As noted earlier, that this case could actually have been ready for trial within 60 days given all the issues being litigated seems unlikely. Nevertheless, the case should have been scheduled for trial within the 60-day period, with the probable outcome that a motion to continue would have been filed and granted.

<sup>12</sup> The witness privilege issue was decided by the Supreme Court in January 2009. *State v. Fournier*, 158 N.H. \_\_\_\_ (decided January 8, 2009).

STATE v. WAYNE SAWYER

On April 21, 2008, the State, through the Hillsborough County Attorney's Office, filed a petition under RSA chapter 135-E to commit Wayne Sawyer as a sexually dangerous predator, seeking the identical relief sought in the Fournier petition.

Sawyer was convicted of attempted aggravated felonious sexual assault after his plea of guilty on April 19, 1990. He was sentenced to New Hampshire State Prison for 3½ to 15 years, stand committed, but that sentence was subsequently deferred. He later violated probation and was re-sentenced to a longer deferred state prison sentence, and later, after violating probation a third time, on March 3, 1997, he was sentenced to serve the previously imposed but deferred sentence of four to fifteen years. He was scheduled to be released from prison on August 13, 2008.

At the request of the Hillsborough County Attorney's Office, Sawyer was evaluated and in a report received by the prosecutor's office on April 15, 2008, Sawyer was found by the MDT to be a sexually dangerous predator under RSA 135-E:2, XII.

As in Fournier, the petition was docketed by the Civil and Equity Department staff in the ordinary course of filing an equity proceeding on April 21, 2008, and assigned to Judge Gillian Abramson. On April 25, 2008, orders of notice were issued with a June 3, 2008 return date, requiring the defendant to answer the petition by July 3, 2008. Although the prosecutors requested the court to make a probable cause finding within 10 days, in the absence of any separate motion for *ex parte* relief, the file was not forwarded to a judge. (At the time of the filing of the petition Judge Abramson was on

medical leave, from April 24, 2008 until May 19, 2008.) The defendant, through the public defender's office, filed a motion to seal, raising issues similar to the privilege and privacy issues raised in the Fournier case.

On May 12, 2008, twenty-one days after the petition was filed, the Sawyer file was sent to Judge Abramson with the motion to seal and the objection filed by the County Attorney's Office. In Judge Abramson's absence, Judge O'Neill directed that a hearing be scheduled on the motion, which was heard on June 27, 2008. On June 3, 2008 the prosecutor, Michael Valentine (also the prosecutor in the Fournier case discussed earlier), wrote the Clerk, noting that in Sawyer's case and in the case of Richard Hilton, discussed *infra*, the petition asked for a probable cause finding within 10 days and the county attorney's office had not received such an order. He requested that the files be brought to the court for the issuance of a probable cause finding. The file in *Sawyer* was brought to Judge Abramson that day, and upon review of the petition Judge Abramson found probable cause and ordered that the trial be held within 60 days. The contents of Judge Abramson's order follows:

Before the Court is the State's Petition to Certify Respondent as a Sexually Violent Predator Pursuant to RSA 135-E. Based on the content of the Petition, the Court finds probable cause to believe that the respondent is a sexually violent predator, pursuant to RSA 135-E: 7 and is subject to further proceedings in accordance with RSA 135-E: 7, I. Trial shall be scheduled within 60 days

State v. Sawyer, Hillsborough County Superior Court, Northern District, *supra*, Order, June 3, 2008 (Abramson, J.)

There is some confusion in the file as to what was intended by trial within 60 days. Trial was scheduled by notice June 5, 2008, for July 21, 2008, at 9:00 a.m. Probably realizing that the scheduling of the trial for July 21, 2008, would take the case

well beyond the 60 day time limit in the statute (here, the 60 day time limit for trial presumably began on April 21, 2008, the day the petition was filed and jury trial demanded by the State), the County Attorney's office requested an immediate structuring conference between June 16 and June 19. The defendant filed a motion to continue on June 27, 2008, waiving speedy trial rights, and it appears that a conference was held that day at which the defense indicated that neither party would be ready for trial in July.<sup>13</sup>

Subsequently, the parties agreed to waive the defendant's right to a formal probable cause hearing<sup>14</sup> under the statute, agreeing that he would remain incarcerated pending further proceedings. On July 30, 2008, the defendant moved to dismiss the petition for failure to comply with the time limits and that motion was denied by Judge Abramson on September 4, 2008. The parties in Sawyer had an understanding that as the Fournier appeal to the New Hampshire Supreme Court raised the same jurisdictional and privilege issues raised in this case, and as the DeCato appeal raised the public access issue, the parties would continue the trial on the merits in Wayne Sawyer's case until those issues were resolved by the Supreme Court.

Following the March 19, 2009 New Hampshire Supreme Court opinion in *State v. Fournier, supra*, Judge Abramson dismissed the petition, finding that the court lacked jurisdiction because no finding of probable cause was made within 10 days and the delay was not due to any fault on the part of the defendant.

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<sup>13</sup> While it is undoubtedly clear that the ten-day limit for making a probable cause finding was not met in the Sawyer case, as explained earlier, it is hard to conclude that when, on June 27, 2008, the defense files a motion saying it is not ready for trial in July, the failure to schedule and complete the trial by June 21, 2008, would cause the loss of jurisdiction, but for purposes of this report, that question is academic since the earlier ten day time period was not met.

<sup>14</sup> The probable cause hearing was required under the statute in Sawyer's case as he was expected to be released from prison on August 13, 2008, and with the trial pushed back, the proceedings would not be concluded by his release date.

STATE v. RICHARD HILTON, JR.

On April 29, 2008, the State, through the Hillsborough County Attorney's Office, filed a petition under RSA chapter 135-E to commit Richard Hilton as a sexually dangerous predator, seeking relief identical to the relief sought in the two earlier cases. Hilton was convicted in 1999 after he pled guilty to two counts of Aggravated Felonious Sexual Assault and was sentenced to 5 to 10 years at the New Hampshire State Prison. The petition was docketed by the Civil and Equity Department staff in the ordinary course of an equity proceeding and orders of notice were prepared for service on the defendant with a return date of June 3, 2008, requiring the defendant to file an answer by July 3, 2008. The case was assigned to Judge Barry. Although the prosecutor requested a finding of probable cause in the petition within 10 days, no separate motion was filed by the County Attorney's office requesting *ex parte* relief, and the file was not sent to a judge to make a finding of probable cause, consistent with ordinary processing of equity petitions

On May 9, 2008, the defendant filed a motion to seal, raising the same issues as were raised in the Fournier and Sawyer cases. Seven days later, the defendant filed a motion for discovery and probable cause hearing, or in the alternative for dismissal of the petition, requesting discovery and an adversarial hearing before *any* probable cause finding, or alternatively for dismissal of the petition, raising similar grounds as were raised in the Fournier case. Upon receipt of the objection by the State on these motions, on May 22, 2008, twenty-four days after the petition was filed, the Civil and Equity Department staff sent the motions to Judge Barry who directed that a hearing on

the motions be scheduled. This was the first time that the Hilton file was given to the judge. When the prosecutor notified the clerk's office in this case and in the Sawyer case by letter dated June 3, 2008, that no probable cause finding had been issued, the file was sent to Judge Barry who issued a probable cause finding the next day, June 4, 2008, but by that point the 10 day limit had long since passed before the judge ever saw the file.

Jury trial was scheduled for June 23, 2008, and on a parallel track, because the defendant was scheduled for release on July 10, 2008, the prosecutor, on June 6, 2008 requested a probable cause hearing under the statute in the event that the trial on the merits was not concluded by the defendant's release date. The Court held a trial management conference on June 17, 2008, in connection with the scheduled June 23, 2008 jury trial at which it was apparent that the parties could not be ready for the June 23, 2008 jury trial. In the order following the trial management conference, Judge Barry rescheduled the trial to September 2, 2008, anticipating a fifteen-day trial,<sup>15</sup> and set several interim discovery dates.

Meanwhile, the probable cause hearing was scheduled for July 8, 2008, days before the defendant's expected release. Following a hearing on July 9, 2008, Judge Barry found probable cause in a five-page ruling requiring the defendant to be held in custody pending further proceedings. On August 13, 2008, the defendant sought to transfer to the Supreme Court the question whether witnesses who treated the defendant at the New Hampshire State Prison whom the State intended to call at trial should be barred from testifying, as the defendant claimed he was entitled to a privilege

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<sup>15</sup> The State identified 28 witnesses and the defense identified 14 witnesses for trial.

with respect to persons who treated him at the state prison. This was the same issue that was raised in the *Fournier* case. On August 15, 2008, the court granted the defendant's motion to continue the trial set for September 2, 2008, with the defendant specifically waiving his speedy trial rights in connection with the scheduled trial.

Defendant Hilton filed two separate motions to dismiss the petition, neither of which raised the procedural failure to make the probable cause finding within 10 days. In the first motion, filed on July 3, 2008, along with the answer, counsel for Hilton sought to dismiss the petition for failing to state a claim upon which relief may be granted. On July 11, 2008, counsel for the defendant filed another motion to dismiss, making a broad constitutional challenge on multiple grounds to RSA chapter 135-E, but in neither motion did counsel for Hilton raise the jurisdictional issue ultimately decided by the New Hampshire Supreme Court in the *Fournier* opinion. It appears from all the circumstances that the jurisdictional challenge related to failing to make a probable cause finding within 10 days was somewhat of an afterthought by the defense. Had the defendant really thought that the case was dismissible on jurisdictional grounds ten days after the petition was filed, it is more than likely that such a challenge would have been promptly filed.

With the granting of the defendant's motion to continue the September 2, 2008 trial pending the interlocutory appeals of the privilege issue and the jurisdictional issue in *Fournier* and the public access issue in *DeCato*, no further substantive matters were scheduled until after the New Hampshire Supreme Court's ruling in the *Fournier* appeal on March 19, 2009. Following remand in that case, the privilege issue having been ruled against the defendant in the earlier *Fournier* opinion, the defendant sought

dismissal of the petition because no probable cause finding had been made within 10 days of the State's filing of the petition, and the defendant was not the cause of any delay. The court, following the opinion in *State v. Fournier, supra*, dismissed the petition on April 6, 2009.

### 2007 CASES

In total, there have been five cases filed by the Hillsborough County Attorney under RSA chapter 135 prior to the Supreme Court's opinion in *State v. Fournier*. Two of these cases were filed in 2007, shortly after the effective date of the statute, January 1, 2007: *State v. William Ploof*, Hillsborough County Superior Court, Northern District, No. 07-E-238 (filed on June 7, 2007); and *State v. Thomas Hurley*, Hillsborough County Superior Court, Northern District, No. 07-E-236 (filed on June 6, 2007). In each case the file was given to the assigned judge within days of the filing of the petition and a finding of probable cause was made within the statutory time frame. In *Hurley*, Judge Abramson issued a finding of probable cause on June 11, 2007, and in *Ploof*, Judge Barry issued a finding of probable cause on June 8, 2007. In both cases, the defendants were scheduled for release from prison within 30 days, so it was necessary to schedule probable cause hearings in both cases, as it was evident that no trial on the merits could be scheduled before each defendant would be released from prison. See RSA 135-E:4 (Supp. 2008).

These two earlier cases likewise became embroiled in proceedings to determine whether the hearings and files would be open to the public and press. Appearances were filed by counsel for major newspapers in New Hampshire, objecting to the closure

of proceedings as sought by the defendants. Eventually defendants in both cases waived their speedy trial rights, resulting in their remaining in custody beyond their release dates so that the parties could pursue the question of public access to the proceedings in interlocutory appeals to the New Hampshire Supreme Court. In both cases, that appeal was initiated by a petition for writ of *certiorari* in the New Hampshire Supreme Court filed by the defendant. Both appeals were held in abeyance while the DeCato case from Merrimack County, raising the same question of public access to proceedings, was litigated in the Supreme Court.<sup>16</sup>

The remainder of this report will focus on what appears to be the difference in the way the 2007 petitions were processed compared to how the 2008 petitions were handled. In the former findings of probable cause were timely made and trial was timely scheduled, or the defendant agreed to waive his statutory speedy trial rights. Ultimately, we look at why things went awry in 2008.

The documentary trail in these cases does not answer the question clearly. No separate motion was filed seeking the immediate attention of the assigned judge in either of the 2007 cases. From interviews with staff in the Clerk's Office, and confirmed by the County Attorney, it appears that in 2007 the prosecutors from the County Attorney's office actively sought out the Clerk and deputy clerks, to advise them that these 135-E petitions were being filed under the recently passed statute, and would

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<sup>16</sup> As noted earlier the Supreme Court answered the question of public access to RSA chapter 135-E proceedings in the affirmative in *State v. DeCato, supra*, holding that proceedings under RSA chapter 135-E were open to the public and the press. As this report was being prepared, the jury trial in the Hillsborough County Superior Court, Northern District, of *State v. William Ploof* was completed and the defendant was found to be a sexually violent predator, almost two years to the day from the filing of the petition.

require immediate action. This contact by the County Attorney or her staff assured that the file would be brought to a judge immediately for a ruling on probable cause within 10 days as required by the statute. This served to take the case out of the routine track for processing an equity petition, the functional equivalent of the State filing a separate motion seeking *ex parte* relief. As soon as the judge in each case received the file, the judge acted on the request, timely making the probable cause finding.

The statute contemplates that the judge assigned to the case would be presented with the petition in order to make the required finding. That did not happen in any of the three cases filed in 2008. In the Sawyer and Hilton cases the judges never saw the files until well after the 10 day time period had elapsed. And while Judge Barry had the Fournier file on the pending motions ten days after the petition was filed, he was presented with a defense claim that he could not constitutionally make a finding of probable cause without full discovery and an adversarial hearing. Judge Barry ultimately denied the defense's motion on April 9, 2008, but he could not have anticipated that by not making a formal determination of probable cause until April 25, 2008, the court would lose jurisdiction over the defendant, as the Supreme Court would decide almost one year later.

There was an extraordinary amount of litigation in all three of the chapter 135-E cases filed in 2008, on multiple issues. The files in each case are several inches thick, filled with pleadings, motions, memorandum and orders on the many issues raised by the defendants in each case. This heightened level of activity in all likelihood served in

some sense to mask the threshold issue that the statute required, that the petition be reviewed by a judge to determine probable cause based on the content of the petition.<sup>17</sup>

The absence of any specific procedure in the Clerk's Office in Hillsborough County Superior Court, Northern District, for processing RSA chapter 135-E petitions meant that the Civil and Equity Department of the Clerk's Office would process the petitions as ordinary equity petitions, and consequently, the timelines of the statute would not be met. Had the County Attorney's Office filed a separate motion in each case, or pursued the Clerk's Office staff as it apparently did in 2007, it is more likely than not that the file would have been presented to a judge for the required ruling, and jurisdiction would not have been lost. And although no separate motion was filed in any of the 2008 cases, the statute specifically places the responsibility for making a finding of probable cause within 10 days on the Court. RSA 135-E: 7, I. Because of the specific requirements and short time periods established by RSA chapter 135-E, the standard procedure by which equity cases are handled was not adequate to ensure compliance with the statute.

On April 7, 2009, you issued a memorandum to judges and staff in the Superior Court establishing mandatory procedures for the manner in which chapter 135-E cases are to be processed. Although I am unaware of any cases that have been filed under the statute since the date of your memorandum, it would appear that the procedures you introduced will adequately assure that the statutory deadlines will be met in future

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<sup>17</sup> Although it cannot be said that reduced staffing levels in the Clerk's Office in Hillsborough North directly contributed to not timely making the required findings in the three 2008 cases, it is probably important to note that between 2004 and 2008, staffing levels in the Clerk's Office fell from 22 filled positions to 18 filled positions, and there was no corresponding decrease in the number of cases handled by that office.

chapter 135-E cases.<sup>18</sup> Following your memorandum of April 7, 2009, the Clerk for Hillsborough North has prepared detailed forms for the processing of RSA chapter 135-E cases which track the language of, and timelines in, the statute.

As this report is being completed, Senate Bill 142, after a favorable conference committee report, passed both houses of the New Hampshire Legislature, and if signed by the Governor, would make a number of significant changes to RSA chapter 135-E, including a change that in almost all instances would legislatively mandate that the failure to meet the statutory deadlines for a probable cause finding and trial on the merits would not deprive the court of jurisdiction over proceedings for the commitment of sexually violent predators, nullifying prospectively, the Supreme Court's decision in *State v Fournier, supra*. The bill as passed has an effective date of September 1, 2009.

Respectfully submitted,

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Bruce E. Mohl, Senior Associate Justice  
June 30, 2009

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<sup>18</sup> In your memorandum of April 7, 2009, you indicated that a structuring conference should be held within 15 days of the date the petition is filed and that the case should be set for final hearing within 60 days of the date the petition was filed, absent a waiver of the time periods by the defendant. The statute provides that the trial on the merits must be held within 60 days of the date of the probable cause finding, or where jury has been elected, within 60 days of the demand for jury trial. In all of the cases filed in Hillsborough County Superior Court, Northern District, the state in its initial petition requested a trial by jury. In those instances, trial on the merits must be scheduled within 60 days of the date the petition is filed. Where a jury trial is demanded at a later date, and the statute requires a demand for a jury trial no later than 30 days after the date of the probable cause finding, the jury trial must be scheduled within 60 days of the date of demand for jury trial.

