SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of a Commitment Order
Pursuant to Section 330.20 CPL in Relation to

DARIUS M. (Anonymous),

Defendant-Appellant.

App. Div. Case No.
2018-14953

Kings County Indict. No.
9270/2015

NOTICE OF MOTION OF THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE AUTISTIC SELF ADVOCACY NETWORK, THE ARC OF THE UNITED STATES, AND THE NATIONAL DISABILITY RIGHTS NETWORK FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Warren Feldman
4 Times Square
New York, NY 10036
(212) 735-2420
warren.feldman@probonolaw.com

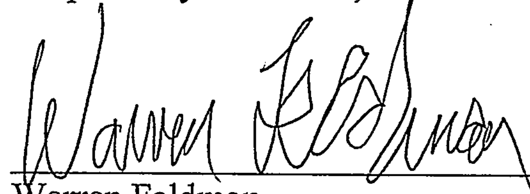
Attorney for Amici Curiae

RECEIVED
18 DEC 20 PM 4:16
APPELLATE DIVISION
SECOND DEPARTMENT

PLEASE TAKE NOTICE that, upon the annexed affirmation of Warren Feldman, dated December 20, 2018 (the "Feldman Affirmation"), and attached exhibits thereto, the Bazelon Center for Mental Health Law, the Autistic Self Advocacy Network, The Arc of the United States, and the National Disability Rights Network, by and through their counsel, will move this Court, at a term for motions to be held on January 7, 2019, at the Appellate Division Courthouse, 45 Monroe Place, Brooklyn, NY 11201, at 10:00 a.m., or as soon thereafter as counsel may be heard, for an order, pursuant to 22 N.Y.C.R.R. § 670.4, granting leave to file a brief as *amici curiae* in support of Defendant-Appellant Darius M.'s motion for leave to appeal from the decision and order dated October 5, 2018, in this matter by the Supreme Court, Kings County. A copy of the proposed amicus brief is attached as Exhibit A to the Feldman Affirmation.

Dated: New York, New York
December 20, 2018

Respectfully submitted,



Warren Feldman
4 Times Square
New York, NY 10036
(212) 735-2420
warren.feldman@probonolaw.com

Attorney for Amici Curiae

AFFIRMATION

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of a Commitment Order
Pursuant to Section 330.20 CPL in Relation to

DARIUS M. (Anonymous),

Defendant-Appellant.

App. Div. Case No. 2018-14953

Kings County Indict. No. 9270/2015

AFFIRMATION OF WARREN FELDMAN IN SUPPORT OF MOTION OF THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE AUTISTIC SELF ADVOCACY NETWORK, THE ARC OF THE UNITED STATES, AND THE NATIONAL DISABILITY RIGHTS NETWORK FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

WARREN FELDMAN, an attorney duly admitted to practice in the State of New York, hereby affirms under penalty of perjury as follows:

1. I am counsel of record for the Bazelon Center for Mental Health Law, the Autistic Self Advocacy Network, The Arc of the United States, and the National Disability Rights Network. I submit this affirmation in support of these organizations' motion for leave to file the accompanying brief as *amici curiae* in support of Defendant-Appellant Darius M.'s motion for leave to appeal.

2. Attached hereto as Exhibit A is a true and correct copy of the brief that the organizations seek leave to file as *amici curiae*.

3. The attached brief draws upon the special expertise of the proposed *amici*, which are national organizations that advocate for the rights of individuals with mental disabilities, including autism. These organizations have a wealth of knowledge regarding the supports and services that individuals with such disabilities require to live successfully in community-based settings, and a compelling interest in ensuring that the due process rights of all individuals with mental disabilities are protected.

4. The Judge David L. Bazelon Center for Mental Health Law (the "Bazelon Center") is a national nonprofit advocacy organization founded in 1972 that provides legal and other advocacy assistance to people with mental disabilities. Through litigation, public policy advocacy, education, and training, the Bazelon Center works to advance the rights and dignity of people with disabilities in all aspects of their lives, including community living, employment, education, health care, housing, voting, parental rights, and other areas. The Bazelon Center has long worked to promote the availability of services that enable individuals with disabilities to live in their own homes, and has served as a resource for lawyers and advocates addressing these issues across the country. It has also litigated numerous

cases concerning the due process rights of individuals subject to civil commitment proceedings, including *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

5. The Autistic Self Advocacy Network ("ASAN") is a national, private, non-profit organization, run by and for individuals on the autism spectrum. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities, promoting access to health care and long-term supports in integrated community settings, and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals to participate fully in community life and enjoy the same rights as others without disabilities.

6. The Arc of the United States ("The Arc"), founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities and consists of over 600 state and local chapters across the country. The Arc seeks to promote and protect the human and civil rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the

community throughout their lifetimes. The Arc has a vital interest in ensuring that all individuals with intellectual and developmental disabilities receive the protections and supports to which they are entitled by law.

7. The National Disability Rights Network ("NDRN") is the non-profit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

8. As organizations with a longstanding commitment to community-based living with appropriate supports and services for individuals with mental disabilities, the prospective *amici* have a unique perspective and

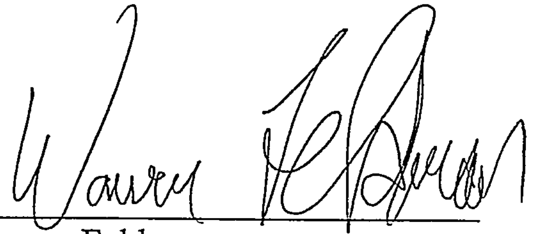
substantial expertise on the design and efficacy of community-based treatment programs. The prospective *amici* view involuntary confinement as inappropriate where adequate community-based alternatives are available, including for a person who has been diagnosed with Autism Spectrum Disorder. These organizations respectfully believe that institutionalization in such circumstances represents a failure of the justice system to understand the people whom the organizations serve, or at least to understand the range of available and effective treatment options.

9. As organizations that advocate for the legal rights of people with mental disabilities, the prospective *amici* also have a compelling interest and considerable expertise in the development of New York law regarding due process and involuntary commitment. The prospective *amici* share a strong belief that fundamental due process rights of people with mental disabilities require that, at a minimum, the criteria for involuntary commitment must be clear and consistent to avoid unnecessary or arbitrary institutionalization. They also share a deep concern that the trial court's decision in this case, if allowed to stand, would not only violate Darius M.'s rights but also undermine critical due process protections more broadly for the individuals they represent and for whom they advocate.

10. The prospective *amici* believe that the attached brief, which presents pertinent information within their area of interest and expertise, could assist the Court in its consideration of Defendant-Appellant Darius M.'s motion for leave to appeal.

WHEREFORE, I respectfully request that this Court enter an order granting the organizations leave to submit their brief as *amici curiae* in support of Defendant-Appellant Darius M.'s motion for leave to appeal.

December 20, 2018
New York, New York



Warren Feldman
4 Times Square
New York, NY 10036
(212) 735-2420
warren.feldman@probonolaw.com

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of a Commitment Order
Pursuant to Section 330.20 CPL in Relation to

DARIUS M. (Anonymous),

Defendant-Appellant.

App. Div. Case No.
2018-14953

Kings County Indict. No.
9270/2015

BRIEF OF *AMICI CURIAE* THE BAZELON CENTER FOR MENTAL HEALTH LAW, THE AUTISTIC SELF ADVOCACY NETWORK, THE ARC OF THE UNITED STATES, AND THE NATIONAL DISABILITY RIGHTS NETWORK IN SUPPORT OF DEFENDANT-APPELLANT DARIUS M.'S MOTION FOR LEAVE TO APPEAL

Clifford M. Sloan
Brendan B. Gants
Kathleen Shelton
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@probonolaw.com
brendan.gants@probonolaw.com
kathleen.shelton@probonolaw.com

Warren Feldman
Counsel of record
4 Times Square
New York, NY 10036
(212) 735-2420
warren.feldman@probonolaw.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

ARGUMENT **4**

I. INVOLUNTARY CONFINEMENT IS NOT APPROPRIATE FOR A PERSON WITH A DEVELOPMENTAL OR OTHER DISABILITY FOR WHOM COMMUNITY-BASED SERVICES CAN PROVIDE EFFECTIVE BEHAVIORAL SUPPORTS **6**

A. Research Shows That Individuals With Disabilities—Including Those With Challenging Behaviors—Can and Should Be Served in Community-Based Services Like Those Available to Mr. M. 7

B. Ignoring the Availability of Effective Community-Based Services Undermines the Balance of Individual Rights and Community Safety Intended by CPL § 330.20 13

C. The Trial Court's Erroneous Application of CPL § 330.20 Would Create Unnecessary Conflict With Federal Law 16

II. THE TRIAL COURT'S STANDARDLESS ANALYSIS IN THIS CASE IS UNPRECEDENTED, AND THREATENS TO UNDERMINE FUNDAMENTAL DUE PROCESS RIGHTS **18**

A. Involuntary Commitment Proceedings Implicate Fundamental Liberty Interests and Due Process Rights 19

B. The Trial Court's "Dangerous Mental Disorder" Analysis is Unprecedented and Untethered to Any Legal Standard 21

C. The Trial Court's Conflation of Having a "Dangerous Mental Disorder" with Being "Mentally Ill" Creates Confusion in the Law and Undermines Due Process Rights 25

D. Institutionalization Continues to Fail Individuals With Mental Disabilities, as Mr. M.'s Case Illustrates 28

E. The Trial Court's Unprecedented Commitment of a Defendant to a Secure Psychiatric Facility Based On a Diagnosis of ASD Merits Further Review 30

CONCLUSION 32

TABLE OF AUTHORITIES

CASES

Bakery Salvage Corp. v. City of Buffalo,
175 A.D.2d 608, 573 N.Y.S.2d 788 (4th Dep't 1991) 21

Eckerhart v. Hensley,
475 F. Supp. 908 (W.D. Mo. 1979), *aff'd*, 664 F.2d 294 (8th Cir. 1980) 30

FCC v. Fox Television Stations, Inc.,
567 U.S. 239 (2012) 20

Foucha v. Louisiana,
504 U.S. 71 (1992) 19, 20

Jones v. United States,
463 U.S. 354 (1983) 16, 19

Matter of Arto ZZ.,
121 A.D.3d 1272, 994 N.Y.S.2d 455 (3d Dep't 2014) 14, 15

Matter of David B.,
97 N.Y.2d 267, 766 N.E.2d 565 (2002) 13, 20, 27

Matter of Eric F.,
152 A.D.3d 586, 60 N.Y.S.3d 44 (2d Dep't 2017) 26

Matter of George L.,
85 N.Y.2d 295, 648 N.E.2d 475 (1995) 20, 22, 23, 24, 27

Matter of Jamie R. v. Consilvio,
6 N.Y.3d 138, 844 N.E.2d 285 (2006) 28

Matter of Norman D.,
3 N.Y.3d, 818 N.E.2d 16, 28, 29

Matter of Sharone T.,
33 A.D.3d 87, 818 N.Y.S.2d 710 (4th Dep't 2006) 26

O'Connor v. Donaldson,
422 U.S. 563 (1975) 2

Olmstead v. L.C.,
527 U.S. 581 (1999) 4, 17, 19, 21

Vitek v. Jones,
445 U.S. 480 (1980) 19

Woe v. Cuomo,
638 F. Supp. 1506 (E.D.N.Y.), *aff'd in part, remanded in part*, 801 F.2d 627 (2d Cir. 1986) 29

STATUTES

42 U.S.C. § 12101(a)(2) 17

N.Y. Crim. Proc. Law § 330.20 .... 4, 5, 6, 13, 15, 16, 17, 18, 25, 26, 30, 32

REGULATIONS

14 N.Y.C.R.R. § 57.2(a)(1)-(2) 27

22 N.Y.C.R.R. § 500.23(a)(4)(iii) 1

28 C.F.R. § 35.130(d) 17

OTHER AUTHORITIES

Association of University Centers on Disabilities, *Community Living and Participation for People with Intellectual and Developmental Disabilities: What the Research Tells Us* (July 24, 2015), https://bit.ly/1TCHvdO 7

Centers for Disease Control and Prevention, *Autism Spectrum Disorder (ASD)* (Nov. 15, 2018), https://bit.ly/2kg1Prj 30

Charlie Lakin, Sheryl A. Larson & Shannon Kim, *Behavioral Outcomes of Deinstitutionalization for People with Intellectual and/or Developmental Disabilities: Third Decennial Review of U.S. Studies,* 1977-2010 8, Policy Research Brief (Apr. 2011), https://bit.ly/2Gybzx0 8

Dawn Hendricks,
Employment and Adults with Autism Spectrum Disorders:

Challenges and Strategies for Success, 32 J. of Vocational Rehabilitation (2010) 10

James W. Conroy and Valerie J. Bradley,
The Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis 56-63 (March 1985), https://bit.ly/2RbEsTG 8, 10

James W. Conroy et al.,
Initial Outcomes of Community Placement for the People Who Moved from Stockley Center, Center for Outcome Analysis (June 2003), https://bit.ly/2EDN4g4 8

Jennifer Hall-Lande et al,
A National Review of Home and Community Based Services (HCBS) for Individuals with Autism Spectrum Disorders, Policy Research Brief (Dec. 2011), https://bit.ly/2PNJ0uJ 10

Julia Young et al.,
Autism Spectrum Disorders (ASDs) Services Project, Final Report on Environmental Scan 42, IMPAQ International, LLC (2010), https://bit.ly/2CqI6AW 9, 10

Marguerite Brown et al., *Eight Years Later: The Lives of People Who Moved from Institutions to Communities in California*, Center for Outcome Analysis (July 1, 2001), https://bit.ly/2CqnuZL 8

Michael L. Perlin,
"Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "Us" and "Them", 31 Loy. L.A. L. Rev. 775 (1998) 21

Missouri Autism Guidelines Initiative,
Autism Spectrum Disorders: Guide to Evidence-based Interventions (2012), https://bit.ly/2QMfcnS 31

National Autism Center,
Findings and Conclusions: National Standards Project, Phase 2 at 74 (2015), https://bit.ly/2Evsi1o 9, 10, 11

National Council on Disability,
Home and Community-Based Services: Creating Systems for Success at Home, at Work and in the Community (Feb. 24, 2015), https://bit.ly/2S6Gu4B 8

National Wraparound Initiative,
Rigorous Research on Wraparound's Effectiveness (Oct. 2017), https://bit.ly/2SivlxG 9

Office for People With Developmental Disabilities,
Learn More About Managed Care (Oct. 25, 2018), https://on.ny.gov/2SCYBjh 13

Peter F. Gerhardt,
The Current State of Services for Adults with Autism 3, Organization for Autism Research (2009), https://bit.ly/2HOPAxn 11

Shannon Kim, Sheryl A. Larson & K. Charlie Lakin,
Behavioral Outcomes of Deinstitutionalization for People with Intellectual Disabilities: A Review of Studies Conducted Between 1980 and 1999 6, Policy Research Brief (Oct. 1999), https://bit.ly/2GAVruz 8

The National Professional Development Center on Autism Spectrum Disorder,
Evidence-Based Practices, https://unc.live/2EbWVbJ 10

INTEREST OF *AMICI CURIAE*[1]

Amici are national organizations that advocate for the rights of individuals with mental disabilities, including autism. *Amici* have a wealth of knowledge regarding the supports and services that individuals with such disabilities require to live successfully in community-based settings, and a compelling interest in ensuring that the due process rights of all individuals with such disabilities are protected. *Amici* respectfully submit that a brief presenting pertinent information within their expertise may assist the Court in its consideration of Defendant-Appellant Darius M.'s motion for leave to appeal.

The Judge David L. Bazelon Center for Mental Health Law (the "Bazelon Center") is a national nonprofit advocacy organization founded in 1972 that provides legal and other advocacy assistance to people with mental disabilities. Through litigation, public policy advocacy, education, and training, the Bazelon Center works to advance the rights and dignity of

---

[1] Consistent with the Court of Appeals Rules set forth in 22 N.Y.C.R.R. § 500.23(a)(4)(iii), counsel notes that no person or entity other than *amici* or counsel for *amici* prepared this brief, contributed content to this brief, or made a monetary contribution to the preparation or submission of this brief. Counsel also notes that some attorneys for *amici* listed on this brief represented Defendant-Appellant for a brief period of time after the decision below, but terminated that representation before beginning to represent *amici*.

people with disabilities in all aspects of their lives, including community living, employment, education, health care, housing, voting, parental rights, and other areas. The Bazelon Center has long worked to promote the availability of services that enable individuals with disabilities to live in their own homes, and has served as a resource for lawyers and advocates addressing these issues across the country. It has also litigated numerous cases concerning the due process rights of individuals subject to civil commitment proceedings, including *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

The Autistic Self Advocacy Network ("ASAN") is a national, private, non-profit organization, run by and for individuals on the autism spectrum. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities, promoting access to health care and long-term supports in integrated community settings, and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals to participate fully in community life and enjoy the same rights as others without disabilities.

The Arc of the United States ("The Arc"), founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities and consists of over 600 state and local chapters across the country. The Arc seeks to promote and protect the human and civil rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes. The Arc has a vital interest in ensuring that all individuals with intellectual and developmental disabilities receive the protections and supports to which they are entitled by law.

The National Disability Rights Network ("NDRN") is the non-profit membership organization for the federally mandated Protection and Advocacy ("P&A") and Client Assistance Program ("CAP") agencies for individuals with disabilities. The P&A and CAP agencies were established by the United States Congress to protect the rights of people with disabilities and their families through legal support, advocacy, referral, and education. There are P&As and CAPs in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Territories (American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands), and there is a P&A and CAP affiliated with the Native American Consortium which includes the Hopi, Navajo and San Juan Southern Piute Nations in the Four Corners region of the

Southwest. Collectively, the P&A and CAP agencies are the largest provider of legally based advocacy services to people with disabilities in the United States.

ARGUMENT

Involuntary commitment proceedings implicate fundamental questions of constitutional and statutory rights. Before an individual may be committed against his will to a psychiatric institution, courts must ensure that the individual's due process rights are protected and that the law is clearly and consistently applied.

The trial court's decision flies in the face of the legal and medical necessity to limit involuntary commitment to circumstances in which it is "essential." The relevant New York statute, N.Y. Crim. Proc. Law § 330.20 ("CPL § 330.20"), includes this explicit requirement—and a contrary approach would conflict with the Americans with Disabilities Act ("ADA") and Supreme Court precedent. The principle of community integration—reflected in CPL § 330.20 (as properly interpreted), and enshrined in the Americans with Disabilities Act as recognized by the Supreme Court in *Olmstead v. L.C.*, 527 U.S. 581 (1999)—requires public entities to avoid needless institutionalization of individuals with disabilities who can be served in community settings. Decades of research and experience compel

the conclusion that community-based services deliver better outcomes for individuals who do not require institutionalization, and better serve the purpose of CPL § 330.20 to balance individual rights and public safety.

This case thus presents an opportunity—and a need—for this Court to underscore the importance of intensive community-based services as an alternative to institutionalization. Judicial attention to such alternatives is needed and important for individuals with a wide range of mental disabilities, including Autism Spectrum Disorder ("ASD"), the diagnosis at issue. Further, the decision below appears to be the first reported case in which an autistic defendant was found to be "mentally ill" or to have a "dangerous mental disorder," and committed to a secure psychiatric facility, on the basis of his autism. That is an unprecedented aspect of this case which calls out for this Court's review.

In addition, the trial court's decision raises numerous important questions warranting this Court's review. These questions include whether a defendant who has never committed a violent crime, or threatened to do so, may be involuntarily institutionalized in a secure facility for the most dangerous offenders. The questions presented also include whether the defendant may be ordered so committed by a court that acknowledges that the defendant does not satisfy the factors enumerated by the Court of

Appeals to justify such an order. The trial court's affirmative answers to these questions are unprecedented, deeply disturbing, and contrary to both legal authority and medical and clinical understanding. For all these reasons, this Court's review is necessary and appropriate to ensure clear and consistent application of New York law and to avoid undermining the rights of people with mental disabilities.

I. INVOLUNTARY CONFINEMENT IS NOT APPROPRIATE FOR A PERSON WITH A DEVELOPMENTAL OR OTHER DISABILITY FOR WHOM COMMUNITY-BASED SERVICES CAN PROVIDE EFFECTIVE BEHAVIORAL SUPPORTS

The decision below reflects a fundamental failure to understand the legal and medical importance of community-based services and supports available to Darius M. (hereinafter "Mr. M.") as a person with mental disabilities, as well as the differences between mental health and developmental disability diagnoses that are critical to ensuring individuals with disabilities receive appropriately tailored services. Research shows that people with disabilities—including individuals with challenging behaviors—generally are better served by, and achieve greater progress with, community-based services and supports like those available to Mr. M. This is important because a defendant in New York may be found "mentally ill" under CPL § 330.20 only if commitment to a state psychiatric facility is "essential," in keeping with the statute's purpose to balance individuals'

rights with public safety—and with the federal mandate to avoid unnecessary institutionalization, which the Supreme Court has recognized is a violation of the ADA.

A. Research Shows That Individuals With Disabilities—Including Those With Challenging Behaviors—Can and Should Be Served in Community-Based Services Like Those Available to Mr. M.

An extensive body of research and professional literature clearly demonstrates that people with significant disabilities benefit greatly from living in community settings with the aid of regular, intensive community-based supports. As summarized in a recent report, "large institutions do not promote positive outcomes for people with [intellectual or developmental disabilities]," and as a result, society has moved from a focus on institutionalization of people with developmental disabilities toward providing services in community settings. Association of University Centers on Disabilities, *Community Living and Participation for People with Intellectual and Developmental Disabilities: What the Research Tells Us* 2 (July 24, 2015), https://bit.ly/1TCHvdO. In this case, as addressed in expert testimony before the trial court, a variety of wrap-around services and supports available to Mr. M. could have helped him to live safely in the community.

Community-based settings are proven to increase safety, including the safety of people with significant challenging behaviors. When provided with needed supports and services in the community, people with disabilities reduce challenging behaviors and see improvements in adaptive skills, independence, self-care, social interactions, and vocational skills.[2] Indeed, a recent report from the National Council on Disability surveying the research concluded that individuals with intellectual and developmental disabilities in small community settings "exhibited the best-developed adaptive behavior and the least challenging behavior" compared to such individuals who were institutionalized. National Council on Disability, *Home and Community-Based Services: Creating Systems for Success at Home, at Work and in the*

---

[2] *See, e.g.*, James W. Conroy & Valerie J. Bradley, *The Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis* 56-63 (March 1985), https://bit.ly/2RbEsTG (hereinafter "Pennhurst Study"); Shannon Kim, Sheryl A. Larson & K. Charlie Lakin, *Behavioral Outcomes of Deinstitutionalization for People with Intellectual Disabilities: A Review of Studies Conducted Between 1980 and 1999* 6, Policy Research Brief (Oct. 1999), https://bit.ly/2GAVruz; Charlie Lakin, Sheryl A. Larson & Shannon Kim, *Behavioral Outcomes of Deinstitutionalization for People with Intellectual and/or Developmental Disabilities: Third Decennial Review of U.S. Studies,* 1977-2010 8, Policy Research Brief (Apr. 2011), https://bit.ly/2Gybzx0; James W. Conroy et al., *Initial Outcomes of Community Placement for the People Who Moved from Stockley Center* 47-48, Center for Outcome Analysis (June 2003), https://bit.ly/2EDN4g4; Marguerite Brown et al., *Eight Years Later: The Lives of People Who Moved from Institutions to Communities in California*, Center for Outcome Analysis (July 1, 2001), https://bit.ly/2CqnuZL.

Community 30 (Feb. 24, 2015), https://bit.ly/2S6Gu4B; *see also* National Wraparound Initiative, *Rigorous Research on Wraparound's Effectiveness* 1-2 (Oct. 2017), https://bit.ly/2SivlxG (reviewing studies that assessed the effects of wraparound services on children).

Behavioral interventions, for example, can help to identify and teach positive behaviors, which in turn minimize negative behaviors. *See* National Autism Center, *Findings and Conclusions: National Standards Project, Phase 2* at 74 (2015), https://bit.ly/2Evsi1o (hereinafter "National Standards Project Phase 2"). These strategies have been found to improve self-regulation, increase personal responsibility, and reduce problem behaviors. *Id.* The gains achieved extend even beyond the intervention period. Julia Young et al., *Autism Spectrum Disorders (ASDs) Services Project, Final Report on Environmental Scan* 42, IMPAQ International, LLC (2010), https://bit.ly/2CqI6AW.

Employment programs, which connect individuals to jobs in their communities, also benefit autistic people and others with mental disabilities. Research shows that community-based employment supports "lead to an increase in job performance as well as increase[] an individual's ability to find work," *id.* at 42, which not only can help autistic people financially support themselves but also "has been demonstrated to . . . improve [their]

cognitive performance." Dawn Hendricks, *Employment and Adults with Autism Spectrum Disorders: Challenges and Strategies for Success*, 32 J. of Vocational Rehabilitation 125, 126 (2010).

Similarly, research shows that community-based services foster positive behaviors and decrease challenging behaviors in people with ASD. *See, e.g.*, Young, *supra*, at 73; The National Professional Development Center on Autism Spectrum Disorder, *Evidence-Based Practices*, https://unc.live/2EbWVbJ (last visited Dec. 19, 2018) (discussing 27 evidence-based interventions).

Recent research has only strengthened longstanding scientific understanding that community living arrangements support behavioral growth better than institutionalization. *See, e.g.*, Pennhurst Study at 186 ("We have found, by every scientific design and test available, that people who went to [community living arrangements] are better off in this regard.").

In contrast, long-term institutionalization often *worsens* challenging behavior. Studies have found that long-term institutionalization degrades independent living skills and self-regulation—important components of succeeding in communities once released. *See generally* Jennifer Hall-Lande et al, *A National Review of Home and Community Based Services (HCBS) for Individuals with Autism Spectrum Disorders*, Policy Research

Brief (Dec. 2011), https://bit.ly/2PNJ0uJ; *cf.* Peter F. Gerhardt, *The Current State of Services for Adults with Autism* 3, Organization for Autism Research (2009), https://bit.ly/2HOPAxn ("The smaller the unit of service (e.g., individual supervised living or customized employment) the greater the likelihood for community integration."). Opportunities to make decisions and choices, which necessarily are restricted in institutional settings, are important in the behavioral development and growth of people with ASD. *See* National Standards Project Phase 2 at 74.

In this case, as the record below shows, a variety of wrap-around services and supports are available to Mr. M. In New York, the OPWDD offers housing support, funding for live-in caregivers or other sources of supportive supervision, and peer support. Medicaid can provide alternative transportation so that Mr. M. would not need to take mass transit. Community-based services would afford Mr. M. access to the mental health supports he needs, from psychoeducation and Cognitive Behavioral Therapy ("CBT")—from which Mr. M. has already benefitted—to trauma-informed counseling.

The available services and supports could include, as proposed by Dr. Cox, a 24-hour aide provided by OPWDD, who could help Mr. M. manage his behavior until he develops better coping strategies. *See* Decision and

Order dated October 5, 2018, annexed to Defendant-Appellant's Motion as Exhibit O (hereinafter "Decision and Order Below") at 61. Together with housing and vocational help and assistance with developing natural community-based supports, such a plan could help Mr. M. "find ways to replace problematic behaviors with those that are less so." *Id.* at 59.

These services and supports are consistent with standard, well-accepted strategies to support people with behavioral challenges in the community, in contrast to psychiatric institution, which—as the trial court noted—are not presently equipped to provide ASD treatment. *See id.* at 60. Moreover, community-based services and supports can be structured to promote positive social interactions, in contrast to institutional settings where people with disabilities can face isolation and abuse, leading to depression and behavioral regression. For Mr. M., who was sexually assaulted in an institutional setting as a juvenile, such a setting is a "major trauma reminder" for him, which can exacerbate his trauma and challenging behaviors. *Id.* (citation omitted). Community-based settings, however, can be easily individualized and designed to avoid triggers that cause an individual's challenging behaviors.

In short, community-based services and supports are the well-established standard of care today for people with ASD, including

individuals with challenging behaviors like Mr. M. As the OPWDD puts it, "The system of supports for people with developmental disabilities has evolved over the years from an institution-based system to a community-based support system based on meeting the needs of each person." Office for People With Developmental Disabilities, *Learn More About Managed Care* (Oct. 25, 2018), https://on.ny.gov/2SCYBjh. Particularly in light of the trial court's opinion, it is important for this Court to recognize the effective non-institutional methods of delivering care for people with mental disabilities, and particularly people with ASD.

B. Ignoring the Availability of Effective Community-Based Services Undermines the Balance of Individual Rights and Community Safety Intended by CPL § 330.20

The trial court failed to give meaningful consideration to community-based treatment options when evaluating whether Mr. M. is "mentally ill." This Court should correct that statutory error.

Under CPL § 330.20, a defendant may not be found mentally ill unless institutionalization is essential. *See* CPL § 330.20(1)(d) ("'Mentally ill' means that a defendant currently suffers from a mental illness for which care and treatment *as a patient, in the in-patient services of a psychiatric center under the jurisdiction of the state office of mental health, is essential* to such defendant's welfare . . . .") (emphasis added)); *see also Matter of*

David B., 97 N.Y.2d 267, 277, 766 N.E.2d 565, 571 (2002) (noting that a mental illness under the statute must be "of a kind that requires *inpatient care and treatment*"); *Matter of Arto ZZ.*, 121 A.D.3d 1272, 1274 & n.1, 994 N.Y.S.2d 455, 457-58 & n.1 (3d Dep't 2014) (upholding track three designation for defendant who "had a psychiatric diagnosis and still needed supervision" for "more than one mental illness," where State's expert failed to recognize that supervision could be required pursuant to an order of conditions).

In this case, however, the court below did not expressly find that inpatient services were essential, and failed to meaningfully consider the effectiveness of intensive community-based services (sometimes known as "wraparound" services). To the contrary, the court found that Mr. M. is mentally ill in part because "his judgment is not sufficient in order to be released into the community *without any additional treatment and support*." Decision and Order Below at 65 (emphasis added). But no one below proposed releasing Mr. M. into the community without treatment or support, an arrangement that presumably also would not suffice for many track three defendants (who are typically subject to an order of conditions). While the trial court did observe at the end of its decision that progress in Mr. M.'s condition "may lead to the wrap-around services proposed by . . . forward-

thinking psychiatrists," *id.* at 69, the court failed to recognize that such wrap-around services are not imaginative or "forward-thinking" but are instead the standard of care today for people with ASD. Moreover, the court did not explain why appropriate community-based services for ASD must be deferred until after Mr. M. is involuntarily committed in a psychiatric institution (nor how an institution lacking treatment or support that could effectively address his needs might ever make him "ready" for community-based services).

Indeed, the court recognized that the facilities to which it ordered Mr. M. provide psychiatric treatment and "primarily house violent offenders," and that they do not usually treat, nor do they have expertise in the treatment of, individuals with autism, which is a developmental disability. *Id.* at 69. It is unclear, and unexplained, how institutionalization in such a facility could possibly be "essential" to Mr. M.'s welfare. The court's failure to engage with the possibility of effective community-based services under an order of conditions *even where institutional treatment is admittedly deficient* is strikingly inconsistent with the statute, and demonstrates a disregard for community-based alternatives that this Court should correct.

Additionally, disregarding the availability of effective community-based services undermines the purpose of CPL § 330.20, which is to protect

the liberty interest of the individual while ensuring the safety of the public. *See Matter of Norman D.*, 3 N.Y.3d at 154, 818 N.E.2d at 644 ("The Act was structured to strike a balance between public safety and the individual rights of the acquittee."); *see also Jones v. United States*, 463 U.S. 354, 368 (1983) ("The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness."). Striking the proper balance between these interests requires recognizing that involuntary commitment is not appropriate when effective community-based solutions are available.

C. The Trial Court's Erroneous Application of CPL § 330.20 Would Create Unnecessary Conflict With Federal Law

New York's prohibition against involuntary institutionalization that is not "essential" accords with the community integration principle embedded in federal law. The court below, in disregarding the availability of effective community-based services and effectively bypassing that crucial statutory provision, would create an unnecessary conflict between federal law and CPL § 330.20.

The Supreme Court has held that the Americans with Disabilities Act ("ADA") requires public entities, including state and local governments, to avoid needless institutionalization of individuals with disabilities who can be

served in community settings. *See Olmstead*, 527 U.S. at 581. In passing the ADA, Congress recognized that "historically, society has tended to isolate and segregate individuals with disabilities" and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). Accordingly, the ADA includes a mandate that a state must "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).

The ADA's "integration mandate" affords people with disabilities the right to receive services in the community where, as here, effective community-based services are available. Unnecessary institutionalization is a form of discrimination prohibited by federal law. *See Olmstead*, 527 U.S. at 600-01. If New York courts interpret CPL § 330.20 such that it no longer actually requires inpatient services to be "essential"—as the trial court did here—then the statute would allow for discrimination under the ADA. This Court should correct the trial court's error to avoid unnecessary conflict with federal law.

II. THE TRIAL COURT'S STANDARDLESS ANALYSIS IN THIS CASE IS UNPRECEDENTED, AND THREATENS TO UNDERMINE FUNDAMENTAL DUE PROCESS RIGHTS

Because involuntary commitment dramatically curtails an individual's right to liberty, courts must scrupulously ensure the protection of due process rights in such proceedings. The trial court in this case, however, issued a "track one"[3] order in unprecedented circumstances, involving a defendant who has never committed a violent offense and who plainly does not satisfy the factors the New York Court of Appeals has specified for finding a dangerous mental disorder. Additionally, in reaching this unprecedented decision, the trial court erroneously conflated the required inquiries into a dangerous mental disorder, on the one hand, and being mentally ill on the other. As the first reported case in New York to find that a defendant diagnosed with ASD is "mentally ill" or has a "dangerous

---

[3] While CPL § 330.20 does not use the "track" nomenclature, this language is commonly used by courts, policymakers, and advocates to refer to the determinations courts make under the statute regarding a defendant's confinement. For "track one" (the most severe designation), the court finds that the defendant has a dangerous mental disorder and issues a commitment order for confinement in a secure facility. CPL § 330.20(6). For "track two," the court finds that the defendant is mentally ill and meets a threshold level of dangerousness (but not the higher level needed to find a "dangerous mental disorder"), and the defendant is committed to the custody of the commissioner. CPL § 330.20(7). For "track three," the court finds that the defendant does not have a dangerous mental disorder and is not mentally ill and must discharge him, either unconditionally or (as is common) subject to an order of conditions. *Id.*

mental disorder" for the purpose of involuntary commitment in a secure psychiatric facility, this case has especially significant implications for the large and growing population of people diagnosed with ASD, who may now be at risk of involuntary long-term placement in institutions that are incapable of meeting their needs. This Court's review is urgently needed.

A. Involuntary Commitment Proceedings Implicate Fundamental Liberty Interests and Due Process Rights

Involuntary commitment proceedings, whether criminal or civil, implicate liberty interests of enormous weight and gravity. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (emphasizing "the importance and fundamental nature of the individual's right to liberty" that is at stake in such proceedings (citation omitted)); *Vitek v. Jones*, 445 U.S. 480, 491 (1980) ("commitment to a mental hospital produces a massive curtailment of liberty," which "is more than a loss of freedom from confinement" (citation omitted)); *see also Olmstead*, 527 U.S. at 601 ("[C]onfinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment."). Accordingly, courts—including the U.S. Supreme Court and the New York Court of Appeals—have vigorously protected the due process rights of people with mental disabilities in these proceedings. *See, e.g.*, *Jones*, 463

U.S. at 361 ("It is clear that 'commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection" (citation omitted)); *Matter of David B.*, 97 N.Y.2d at 276, 766 N.E.2d at 570 ("Neither a showing of mental illness alone, nor dangerousness alone, will satisfy the requirements of due process when an individual's right to liberty is at stake."); *see also Foucha*, 504 U.S. at 80 ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.").

The Court of Appeals has recognized that secure confinement of an insanity acquittee is justified only where proof of dangerousness "clearly evidenc[es] a defendant's threat to himself or society." *Matter of George L.*, 85 N.Y.2d 295, 308, 648 N.E.2d 475, 481 (1995). Neither a "track one" nor a "track two" involuntary commitment may be imposed without both a finding of "mental illness" and a finding of at least a threshold level of dangerousness. *See Foucha*, 504 U.S. at 83; *Matter of David B.*, 97 N.Y.2d at 276, 766 N.E.2d at 570.

In light of the enormous interests at stake, it is essential that the criteria for involuntary commitment be clearly and consistently applied. *Cf. FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (when the Due Process Clause is implicated, "precision and guidance are necessary so

that those enforcing the law do not act in an arbitrary or discriminatory way"); *Bakery Salvage Corp. v. City of Buffalo*, 175 A.D.2d 608, 609, 573 N.Y.S.2d 788, 789 (4th Dep't 1991) ("The test for determining whether due process has been accorded '[is] whether there has been protection of the individual against arbitrary action'" (alteration in original) (citation omitted)). The need for such consistency is especially important—and heightened—in light of harmful myths and stereotypes about individuals with mental disabilities. *See, e.g.*, *Olmstead*, 527 U.S. at 600 (1999) (unwarranted institutionalization "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"); Michael L. Perlin, *"Where the Winds Hit Heavy on the Borderline": Mental Disability Law, Theory and Practice, "Us" and "Them"*, 31 Loy. L.A. L. Rev. 775, 785-87 (1998) (discussing numerous myths and stereotypes about people with mental disabilities, including some related to dangerousness). Unfortunately, the trial court's analysis here introduces substantial arbitrariness into this area of law.

B. The Trial Court's "Dangerous Mental Disorder" Analysis is Unprecedented and Untethered to Any Legal Standard

The trial court's analysis of whether Mr. M. has a "dangerous mental disorder" is vague, subjective, and untethered from controlling case law. Two important aspects of the court's analysis are unprecedented and, if

allowed to stand, would dramatically expand the category of people eligible for involuntary confinement in a secure facility, to the point that virtually any person found not responsible by reason of mental disease or defect could be deemed to have a dangerous mental disorder.

First, the trial court found that Mr. M. has a "dangerous mental disorder" even though he has never committed a violent crime and has never threatened to commit a violent crime. This determination, the trial court acknowledged, is both unprecedented and contrary to the intent of the Legislature. *See* Decision and Order Below at 69 ("This Court is well aware that the law, as it now exists, appears to be aimed at or at least has been utilized with respect to those who have committed violent crimes or threatened to do so."). The unprecedented involuntary commitment of a nonviolent person to a secure facility intended only for those who have committed violent offenses is a harrowing prospect, and, on its own, plainly merits this court's review.

Second, the trial court ruled that Mr. M. has a "dangerous mental disorder" despite recognizing that he does *not* meet the factors enumerated by the Court of Appeals to govern that very inquiry. As the court acknowledged, under the seminal Court of Appeals case *Matter of George L.*, the State may meet its burden to prove dangerousness

> [(1)] by presenting proof of a history of prior relapses into violent behavior, substance abuse or dangerous activities upon release or termination of psychiatric treatment, or [(2)] upon evidence establishing [(a)] that continued medication is necessary to control defendant's violent tendencies and [(b)]that defendant is likely not to comply with prescribed medication because of a prior history of such noncompliance or because of threats of future noncompliance.

Decision and Order Below at 66 (quoting *Matter of George L.*, 85 N.Y.2d at 308, 648 N.E.2d at 481).

The court below—observing that Mr. M. has no history of violent behavior or substance abuse and has never received adequate mental health treatment, or indeed any appropriate services or supports for his ASD—expressly declined to find that Mr. M. met the first criterion. *See id.* at 66-67. Nor does Mr. M. meet the second criterion, both because he lacks violent tendencies and because, as the trial court found, there is *not* "a real issue with failure to comply with prescribed medication" in this case. *Id.* at 68.

Rather than straightforwardly apply controlling authority by holding that the state had failed to meet its burden, the court below simply swept that case law aside. "As to dangerousness, this case is unusual," the court claimed, "in that it does not fit neatly within the factors enumerated in *Matter of George L.* For instance, Mr. M. does not have a history of relapses into violent behavior." *Id.* at 66. Without citing any authority, the court then proceeded to find that the State had met its burden to prove

dangerousness based on Mr. M.'s admitted history of operating buses and trains without authorization; his age of 53 years; the fact that he has some hearing loss; his Autism Spectrum Disorder; and his purported "lack of insight and judgment into" that condition. *Id.* at 69. The court cited, and undersigned counsel has found, no support in New York cases for a dangerous mental disorder finding based on a defendant's nonviolent offense conduct, age, hearing, or ASD diagnosis.[4] As discussed below, a defendant's lack of insight into his condition is a factor in determining whether he is *mentally ill*, but not whether he has a dangerous mental disorder.

The Court of Appeals enumerated the factors in *Matter of George L.* because satisfaction of such factors "is warranted to justify the significant limitations on an insanity acquittee's liberty interest which accompany secure confinement." 85 N.Y.2d at 308, 648 N.E.2d at 481. If the decision below is allowed to stand, and courts are empowered to disregard these

---

[4] By contrast, in *Matter of George L.*, for example, the Court of Appeals held that the State had met its burden because of the *combined* impact of: the violent nature of the defendant's crime (attempting to murder his father with a hunting knife); the fact that George L. had already experienced a relapse after being hospitalized and medicated; and statistical evidence that people with paranoid schizophrenia who previously exhibited violent and delusional behavior were "highly likely" to do so again. 85 N.Y.2d at 307-08, 648 N.E.2d at 481.

factors whenever a defendant does not "fit neatly within the factors" (*i.e.*, does not meet them), then there is no meaningful constraint on courts' discretion in ordering track one status. Such an outcome violates the fundamental due process rights of defendants with mental disabilities, and warrants this Court's review.

C. The Trial Court's Conflation of Having a "Dangerous Mental Disorder" with Being "Mentally Ill" Creates Confusion in the Law and Undermines Due Process Rights

The trial court confused the legal criteria for finding a defendant "mentally ill" (required for track two status) with the criteria for finding that a defendant has a "dangerous mental disorder" (required for track one status). While *amici* respectfully submit that the only appropriate track designation for Mr. M. is track three (with an order of conditions)—as discussed *supra*, he is not "mentally ill" as defined by CPL § 330.20 but rather is an individual with a developmental disability who cannot be served in a secure psychiatric facility and does not meet the requirements for either track one or track two—it is clear that "track one" status is especially inappropriate. Moreover, it is essential to the rights of people with mental disabilities throughout New York that the criteria for a "dangerous mental disorder" finding and the criteria for a "mentally ill" remain distinct and separate. The trial court here erroneously conflated those inquiries in two ways.

First, the court found that Mr. M. has a dangerous mental disorder on the basis, at least in part, of his purported "lack of insight and judgment into" his ASD. Decision and Order Below at 69. But the statute instructs courts to consider "lack of insight and judgment" in evaluating whether a defendant is *mentally ill*, not whether he has a dangerous mental disorder. *See* CPL § 330.20(1)(d) (defining a "mentally ill" defendant, in part, as a defendant whose "judgment is so impaired that he is unable to understand the need for such care and treatment"); *Matter of Sharone T.*, 33 A.D.3d 87, 90, 818 N.Y.S.2d 710, 711-12 (4th Dep't 2006) ("the 'insight factor' . . . is included in . . . the definition of 'mentally ill'").

This Court has intervened before to correct a similar error. In *Matter of Eric F.*, this Court reversed a ruling that the State had met its burden to establish that a defendant had a dangerous mental disorder, noting that the State's case relied on expert testimony that the defendant "currently presented a danger to himself and others because he lacked a full understanding of the chronic nature of his mental illness." 152 A.D.3d 586, 588-89, 60 N.Y.S.3d 44, 46-47 (2d Dep't 2017). This Court ruled the State had failed to meet its burden, and noted that—as is also true here—the defendant had "no history of relapses into violent behavior" and "no notable history of substance or alcohol abuse." *Id.* at 589, 60 N.Y.S.2d at 47.

Second, the court below disregarded the Court of Appeals' narrow definition of a "dangerous mental disorder," which specifically references *violent* behavior. *Matter of George L.*, 85 N.Y.2d at 308, 648 N.E.2d at 481. It did so by conflating the narrow concept of a violence-related "dangerous mental disorder" (required for the especially restrictive conditions of track one) with the threshold finding of *some* dangerousness that is necessary to find a defendant mentally ill (required for confinement under either track one or track two). Decision and Order Below at 68-69. Here again, the court's analysis is unprecedented and, if it stands, substantially expands track one eligibility. For purposes of track two, "dangerousness is not coterminous with violence." *Matter of David B.*, 97 N.Y.2d at 278, 766 N.E.2d at 572. However, confinement in a secure facility for track one patients (the most secure and restrictive confinement) is not appropriate for nonviolent behavior.[5] Indeed, the Court of Appeals has explicitly emphasized the difference between dangerousness (required for track two or

---

[5] Notably, the Legislature has also provided that a patient in a track two facility may not be transferred to a secure track one facility except on application supported by a statement of facts showing that "there is a substantial risk that such patient may cause physical harm to other persons, as manifested by *homicidal or other violent behavior* by which others are placed in reasonable fear of serious physical harm" and that reasonable efforts at treatment have failed to eliminate such risk. 14 N.Y.C.R.R. § 57.2(a)(1)-(2) (emphasis added).

track one) and a violence-related "dangerous mental disorder" (required for the especially restrictive conditions of track one):

> As we explained in *Matter of David B.*, . . . this threshold [mentally ill] standard encompasses a showing that the patient is dangerous, although the concept of danger necessary to justify confinement in a nonsecure facility is not equivalent to the heightened dangerousness finding—dangerous mental disorder—that justifies placement in a secure facility. With respect to the constitutionally required minimum level of dangerousness to oneself or others that must be shown before an insanity acquittee may be retained in a *non-secure* facility, dangerousness is not coterminous with violence.

Matter of Jamie R. v. Consilvio, 6 N.Y.3d 138, 152 n.12, 844 N.E.2d 285, 294 n.12 (2006) (emphasis added) (citations omitted). The trial court's decision here ignores this precedent, blurring the distinction between tracks one and two and threatening to subject people who are nonviolent but mentally ill to a "significantly more restrictive" status—track one instead of track two—than the Court of Appeals and the legislature have contemplated. *Matter of Norman D.*, 3 N.Y.3d at 155, 818 N.E.2d at 645.

D. Institutionalization Continues to Fail Individuals With Mental Disabilities, as Mr. M.'s Case Illustrates

The trial court's decision to order institutionalization is particularly concerning in this case because it effectively punishes Mr. M. for not having received adequate treatment previously—including during decades of his life

spent in State custody—and at the same time commits him to State institutions concededly not equipped to provide such treatment.

Though Mr. M. has spent decades of his life in State custody, there is no dispute that he has "never received adequate mental health treatment either while he was incarcerated nor during his past two inpatient admissions at Valley Ridge and Kirby." Decision and Order Below at 68. Now, he has been committed to institutions that have no experience or expertise treating someone with Mr. M.'s disability. *Id.* The trial court's decision therefore raises the disturbing prospect of a person with mental disabilities, committed to a State facility based in part on the State's own failure to provide him adequate treatment, being held indefinitely by the State without the effective services necessary to secure his release. This custodial Catch-22—resulting from the trial court's erroneous finding that Mr. M. is dangerous although he has no history of relapse after treatment—further highlights the need for courts to consider the availability of community-based services in involuntary commitment determinations. So long as the State is unable or unwilling to provide proper treatment, such services are essential to fill gaps in the State's provision of care and to protect individuals' due process rights. *See, e.g.*, *Woe v. Cuomo*, 638 F. Supp. 1506, 1518 (E.D.N.Y. 1986) (an involuntarily committed patient has a right to adequate treatment "to provide

him a reasonable opportunity to be cured or to improve his mental condition"), *aff'd in part, remanded in part,* 801 F.2d 627 (2d Cir. 1986); *Eckerhart v. Hensley*, 475 F. Supp. 908, 915 (W.D. Mo. 1979) ("[I]f a mental patient is involuntarily confined because he is dangerous, due process requires a specific focus to the treatment which is his right"), *aff'd*, 664 F.2d 294 (8th Cir. 1980).

E. The Trial Court's Unprecedented Commitment of a Defendant to a Secure Psychiatric Facility Based On a Diagnosis of ASD Merits Further Review

Because the decision below is the first reported case in which a person has been found mentally ill or to have a dangerous mental disorder under CPL § 330.20 based on a diagnosis of ASD, this case has enormous ramifications for the large and growing population of people diagnosed with autism. ASD is a relatively common developmental disability, occurring in nearly two percent of people. Centers for Disease Control and Prevention, *Autism Spectrum Disorder (ASD)* (Nov. 15, 2018), https://bit.ly/2kg1Prj. It affects all racial, ethnic, and socioeconomic groups. *Id.* The measured prevalence of ASD has increased in recent years. *Id.* ASD symptoms vary widely between individuals and can include difficulty with social

interactions and communications, a need for routine, difficulty developing relationships, and intense, focused personal interests.[6]

As the trial court acknowledged, "with time and the proper treatment plan, there is the real potential for progress in [Mr. M.'s] condition." Decision and Order Below at 69. But because the needs and abilities of each autistic person are unique, services must be tailored to the individual. This requires the kind of comprehensive and coordinated approach available in community-based settings. *See, e.g.*, Missouri Autism Guidelines Initiative, *Autism Spectrum Disorders: Guide to Evidence-based Interventions* 15 (2012), https://bit.ly/2QMfcnS ("Intervention outcomes are significantly enhanced when professionals collaborate across service delivery systems . . . ."). In contrast, as discussed in detail above, secure psychiatric facilities are unable to meet the needs of people with ASD.

The trial court's ruling that Mr. M. is mentally ill and has a dangerous mental disorder as a result of his ASD is unprecedented, erroneous, and deeply injurious to Mr. M. and others with developmental disabilities. If the decision below were allowed to stand, the large and growing community of

---

6 ASD encompasses what was previously known as Autistic Disorder and Asperger's Disorder, per the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-5").

people in New York diagnosed with autism would face severe risks to their liberty. Moreover, people with mental disabilities subject to involuntary commitment proceedings would face an involuntary commitment system that fails to recognize the availability of effective community-based service options that better satisfy the goals of CPL § 330.20 than institutionalization.

In light of this case's significant and disturbing implications for the rights of people with mental disabilities, this Court should grant review and reverse the decision below that Mr. M. has a dangerous mental disorder and is mentally ill.

CONCLUSION

For the reasons set forth, and those in the brief of Mr. M., this Court should grant the motion for leave to appeal and reverse the decision of the court below.

RESPECTFULLY SUBMITTED this 20th day of December, 2018.

Warren Feldman
Counsel of record
4 Times Square
New York, NY 10036
(212) 735-2420
warren.feldman@probonolaw.com

CERTIFICATE OF COMPLIANCE PURSUANT TO 22 N.Y.C.R.R. § 1250.8(j)

The foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point Size	14
Line Spacing	Double

The total number of words in this brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, and certificate of compliance, is 6,902.

Dated: New York, New York
December 20, 2018