



July 6, 2018

Attorney General Mark Herring
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219

RE: *Commonwealth v. Baughman*, Case No. CL 17-3009

Dear Attorney General Herring:

We are contacting you in connection with the above-titled case, currently pending in the Circuit Court for Arlington County, Virginia, in which the Office of the Attorney General (“OAG” or “your office”) is seeking the civil commitment of Mr. Baughman under Virginia’s Sexually Violent Predator Act (“SVPA”).

We are legal and criminal justice professionals, scholars, and leaders representing national and state organizations and communities, including a number of Virginia residents and voters. The concern we raise here is the OAG’s aggressive application of an already-flawed statute against a young gay man, Galen Baughman, essentially for juvenile offenses revived now on a technical probation violation.

Galen has committed no new crimes since a conviction 15 years ago,¹ and was on probation for approximately four years without incident prior to his current incarceration for a technical violation. That violation, for sending non-sexual text messages to a 16-year-old young man in another state, has prompted your office to seek Galen’s indefinite civil commitment as one of Virginia’s most dangerous sex offenders.

We believe that the OAG’s reliance on a first-time probation violation (that under normal circumstances likely would not even draw jail time) to justify civil commitment can only be explained as sexual orientation-based bias.

Your office is arguing that even completely legal conduct can serve as sufficient evidence that a gay man intends to engage in violent, illegal conduct at some point; and on that basis alone should be confined indefinitely to a facility for dangerous sex offenders who are unable to control their violent behavior. The

¹ As Galen’s attorneys have stated both in court documents and in their separate letter to you on this matter, Galen is a 34-year-old man who, between 2003 and 2012, served nine years on two offenses, both of which occurred before he turned 20 years old. One charge, for carnal knowledge, stemmed from a consensual sexual relationship that Galen had with a 14-year-old boy when Galen was 19 years old; the other, an aggravated sexual battery charge from 1997, was based on the claim that when Galen was 14 he had instructed a 9-year-old boy how to masturbate. Neither of these charges can reasonably be characterized as “sexually violent.”

OAG is aggressively pursuing this case against Galen despite a 2012 jury finding that Galen is *not* a sexually violent predator (SVP) and despite the finding of the expert psychologist initially appointed for the Commonwealth in the current proceedings that Mr. Baughman is not a SVP.

As one of your attorneys confirmed in court, “ultimately, the Attorney General has discretion on whether or not to file a new petition...the Attorney General has to look at the circumstances of the [probation] violation and determine whether or not they feel like that might be evidence of an inability to control predatory behavior such that the individual is likely to commit new sexually violent acts.”²

It is ethically and legally unacceptable that the OAG is squandering Commonwealth resources to secure the civil commitment of Galen in the absence of any allegation of criminal conduct or even evidence of the intent to engage in such conduct. The handling of Galen’s case is additionally strange in view of the fact that the Virginia civil commitment program is over-budget and its designated treatment facility overcrowded.³

While acknowledging that there was nothing that could be characterized as sexual in Galen’s text communications, your office argued that his texting “ultimately could lead to *additional predatory behavior*, making him more likely to engage in sexually violent acts.”⁴ But there was no predatory behavior here.

At a hearing on May 10, 2018, it became clear that the expert conclusions and bases for those conclusions, deemed insufficient for civil commitment in the OAG’s 2009 civil commitment application, are essentially the same as those of the current OAG expert, who was retained only after the state’s initial expert concluded that civil commitment was not warranted in Galen’s current case.⁵ Evidently, representatives of your office believe that once a gay man has been convicted of a sex offense, any communication with another young man, regardless of the nature or content, constitutes “grooming” of a future sex partner.⁶ It is shocking and inexcusable that Commonwealth attorneys could freely assert such patently homophobic notions as the basis for subjecting a young man to indefinite imprisonment.

To be clear, all of the undersigned have severe concerns with the Virginia version of civil commitment, what can only be described as a cruel and ineffective set of laws. The American Psychiatric Association vigorously opposes these laws. One clinical psychologist who worked at a civil commitment facility in Larned, Kansas calls the state’s civil commitment statute “an abomination.”⁷ Recent studies also document that LGBT citizens are arrested and punished at a rate that is disproportionate to their representation in the general population.⁸ The homophobic bias that drives this disparity was evident in

² Transcript at 11-12,15.

³ The Virginia Center for Behavioral Rehabilitation (VCBR) is operated by the Department of Behavioral Health and Developmental Services (DBHDS) *Virginia Center for Behavioral Rehabilitation*, <http://vcbr.dbhds.virginia.gov/>. The facility, which opened in 2006, was constructed with a maximum capacity of 300 individuals. The number of individuals civilly committed shot up dramatically in 2006, after lawmakers expanded number of crimes that would make someone eligible for commitment from four to 28. As of July 2016, there were 374 male and 3 female residents committed to VCBR. *Va. assessment of sex offenders flawed, study says*, Associated Press, November 15, 2011, https://www.washingtonpost.com/blogs/crime-scene/post/va-assessment-of-sex-offenders-flawed-study-says/2011/11/15/gIQAefmLON_blog.html?noredirect=on&utm_term=.f891c341bb12;

Virginia Center for Behavioral Rehabilitation, *Presentation to the House Appropriations Committee* (June 18, 2008), <http://hac.state.va.us/committee/files/2008/06-18-08/VCBR--06-18-08--Color.pdf>

⁴ *In the Matter of Commonwealth of Virginia v. Galen Michael Baughman*, Arlington Circuit Court, Judge Fiore presiding, Hearing Transcript, May 10, 2018, at 15. (Hereinafter “Transcript”). Following these comments, the judge suggested to counsel for Galen that his giving a young man a ride home to change from his funeral clothes was “grooming behavior” on Galen’s part, even though there was no allegation that Galen had said or done anything remotely inappropriate, because, as the judge put it, “well, but grooming sometimes takes a while.” Transcript at 15-16, 21-22.

⁵ Transcript at 21-22.

⁶ This characterization of Galen’s emails clearly had an impact on the judge, who in colloquy with counsel for Galen flatly states, “The reason why he is here is because he was grooming a 16-year-old.” Transcript at 83.

⁷ Koepfel, Barbara, “Sex Crimes and Criminal Justice: Formerly Incarcerated sex offenders say civil commitment programs deny proper rehabilitation.” May 4, 2018. Available: www.washingtonspectator.org/koepfel-sex-crimes-and-criminal-justice/

⁸ See, e.g., Ilan H. Meyer, PhD, et als., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012*, 107 *AJPH* 234, 238-239) (also noting that “because sexual minorities transgress societal norms, they are

the OAG's characterizations and assumptions of Galen's conduct at the May 10, 2018 hearing and by the Commonwealth Attorney at the probation violation and sentencing hearings, on November 21, 2016, November 29, 2016, and January 6, 2017.

For most people who are civilly committed, "indefinite" confinement morphs into a life sentence. While the OAG is seeking Galen's indefinite commitment as a dangerous sex offender for the purposes of mental health treatment, in fact nothing approaching real treatment is or would be available to Galen.

Galen is facing a civil proceeding, has no history of violence, and is not an escape risk, yet he has been confined for more than two years, many months past the sentence imposed for his technical probation violation, under restrictions more typically imposed on a terrorism suspect. Galen has limited access to books and reading material, no access to a library or computer, and is denied unmonitored communications with anyone other than with the attorneys representing him. There is no real mental health treatment since even therapist-patient conversations and records are not treated as confidential. Galen's professional career and personal reputation have been destroyed.

Beyond the tragic human costs of this prosecution, the financial costs are considerable. As of 2011, it cost the Commonwealth about \$91,000 per year for each of the individuals held in Burkeville.⁹ During the fiscal year that ended in June 2011, Virginia spent \$24.5 million on its civil commitment program.¹⁰ With this level of expense to the taxpayers and the mounting evidence that such programs are not only of limited use but harmful to the Commonwealth, we urge you to take a closer look at how cases for civil commitment are chosen and prosecuted. As an Attorney General who campaigned on a more progressive approach to policies affecting LGBT citizens, it is incumbent upon you to revisit the decision to invest resources in Galen's civil commitment as a "Sexually Violent Predator."

This prosecution is indefensible legally and ethically. It is impossible, frankly, to imagine such vigorous and expensive pursuit of a heterosexual man for non-sexual texts to a young person living in another state. We respectfully request that your office dismiss the petition, thereby permitting Mr. Baughman's release to probation, the terms of which currently are already equivalent to the intensive supervision that can be imposed under the SVPA as an alternative to institutional commitment.¹¹

The undersigned also ask that you meet with representatives of this group at your earliest convenience to discuss your office's criteria for selection of individuals for civil commitment as "Sexually Violent Predator" and how those criteria are applied to Galen and to other LGBT Virginians.

Very truly yours,

National Organizations

The Center for HIV Law and Policy

National Center for Lesbian Rights

The National LGBTQ Task Force

Sex Law and Policy Center

Transgender Law Center

Witness to Mass Incarceration

Blacks in Law Enforcement of America

Prison Policy Initiative

Prison and Justice Initiative at Georgetown University

Architects / Designers / Planners for Social Responsibility (ADPSR)

more likely than are their straight peers to be disciplined for even nonsexual behaviors..." See also Borchert J.W., *A new iron closet: failing to extend the spirit of Lawrence. v. Texas (2003) to prisons and prisoners*. In: Halperin D., Hoppe T., eds. *The War on Sex*, Duke University Press (2017).

⁹ See supra n.4.

¹⁰ *Id.*

¹¹ Galen has appealed the terms of the supervision imposed by the Court in response to his probation violation; that appeal currently is pending.

Women Against Registry National, Inc
The Dobbs Wire
CURE-Sex Offenders Restored Through Treatment
The Coalition for Prisoners' Rights
National Capital Crime Assistance Network
Defending Rights & Dissent
The Real Cost of Prisons Project
Human Rights Defense Center
National Religious Campaign Against Torture
National Juvenile Justice Network
National Incarcerated Veterans Ministry

Virginia Organizations

Social Action Linking Together
Citizens United for Rehabilitation of Errants- Virginia Inc (Virginia CURE)

Additional Organizations

Transformative Justice Law Project
International CURE
CURE Oregon
Heartwood Meditation Support Program
Center for Community Alternatives, Inc.
Middle Ground Prison Reform
TRANScending Barriers
Queeri

Virginia Residents

Peter Stearns, *professor, former Provost at George Mason University*
Timothy A. Gibson, *Associate Chair, Department of Communication, George Mason University*
Richard P. Melia, *Ph.D. Director, Research Sciences, National Institute on Disability and Rehabilitation Research (Retired)*
Heather Spence, *PhD behavioral neuroscience*
Rev. Dr. Elizabeth Braxton, *Parish Associate New York Avenue Presbyterian Church Washington, DC*
Rev. Dr. David Ensign, *Pastor Clarendon Presbyterian Church*
Carla Peterson
Thomas D. Edmondson
Lenora Thierry
Kevin Robins
Eleanor Robins
Janet Dunkelberger
Brent Spence
Moya Atkinson
Robert A. Gehring
Joan Ansheles
Karen Kallay
Garth A. Baughman, *PhD*
Sgt. Gabrielle Baughman, *USAF*
Garnett Robins-Baughman

Additional Individuals

Micol Seigel, *Professor, American Studies & History, Indiana University, Bloomington*
Dean Spade, *Associate Professor Seattle University School of Law*
Doug Bauder, *Director, LGBTQ+ Center, Indiana University*

Raphael Sperry, *Architect, President, Architects / Designers / Planners for Social Responsibility (ADPSR)*
Marc Morjé Howard, *Professor of Government and Law, Georgetown University*
Richard Wollert, *Ph.D., Member of the Mental Health, Law, and Policy Institute at Simon Fraser University*
Donna Leone Hamm, *Judge (ret.)*
Ken Faiver, *Former Director of the Medical Services in the Michigan Department of Corrections*
Marilyn Montenegro, *PhD., LCSW*
Andrea J. Ritchie, *Researcher in Residence on Race, Gender, Sexuality and Criminalization, Barnard Center for Research on Women*
Janine Bertram, *President, Disability Rights Center*
Pastor Roger Gench, *New York Avenue Presbyterian Church Washington, DC*
Eric Janus, *Professor of Law, Mitchell Hamline School of Law*
Judith Wouk, *LIB, kohenet, Acting Director, Citizenship and Immigration Canada, retired*
James Kilgore, *Center for African Studies, University of Illinois, Urbana'Champaign*
Michele Deitch, *Senior Lecturer, The University of Texas at Austin*
David Condliffe, *Esq, Executive Director, Center for Community Alternatives*
Virginia Raymond, *Esq.*
Lisa Sangoi, *Esq.*
Andrea Black, *Esq.*
Nkechi Taifa, *Esq.*
Dr. Pippa Holloway
Rev. Jason Lydon
Gene Guerrero
Marylib Pate
Lois Ahrens
Ron Hampton
Julie Suter
Mary Brown-Bay
Terry Kupers
Eugene Darden
Anne Laroche
Ronald Simpson Bay
Yinan Wang
Phyllis Lawrence
Michaelangelo Rodriguez
Ralph Douglas Norwood
Linda Zottoli
John Zottoli
Michael Cox

***Questions about this letter and requests for additional information can be directed to Rev. Jason Lydon. Contact: jasonmlydon@gmail.com - 312.543.5143**