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A Report On The Sex Offender Management Treatment Act

April 1, 2020 to March 31, 2021

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INTRODUCTION

In passing the Sex Offender Management and Treatment Act of 2007 (SOMTA), the New York State Legislature recognized that sex offenders pose a danger to society. [1] Finding that some sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses, the Legislature amended New York's Mental Hygiene Law, creating Article 10, as opposed to amending the criminal laws.[2] The Legislature endeavored to create a comprehensive system which protects society, supervises offenders, manages their behavior to ensure they have access to proper treatment, and reduces recidivism.[3]

The legislature found that the most dangerous sex offenders need to be confined by civil process to provide long-term specialized treatment and to protect the public from their recidivistic conduct.[4] It also found that for other sex offenders, effective and appropriate treatment can be provided on an outpatient basis under a regimen of strict and intensive outpatient supervision.[5]

In response to the enactment of SOMTA, the NYS Office of the Attorney General (OAG) created the Sex Offender Management Bureau (SOMB). This Bureau represents the State of New York in all MHL Article 10 litigation. SOMB develops statewide protocols in conjunction with the NYS Office of Mental Health (OMH), the NYS Department of Corrections and Community Supervision (DOCCS), the NYS Office for People with Developmental Disabilities (OPWDD), and the NYS Division of Criminal Justice Services (DCJS) to further the goals of Article 10 and ensure public safety.

[1] See Mental Hygiene Law (MHL) §10.01 (a) – Chapter 27 of the Consolidated Laws: Title B - Mental Health Act, Article 10 - Sex Offenders Requiring Civil Commitment or Supervision; and see also the Sex Offender Management and Treatment Act (SOMTA), ch. 7, 2007 N.Y. Laws 108, effective April 13, 2007.
[2] See MHL §10.01 (a-b).
[3] See MHL §10.01 (d).
[4] See MHL §10.01 (b).
[5] See MHL §10.01 (c).

This report provides an overview of the application of SOMTA since its inception. Part one, "The Civil Management Process," explains how convicted sex offenders are screened, evaluated, and referred for civil management, as well as how the subsequent legal process works. Part two, "Civil Management After 14 Years," provides updated statistics and case data that are current as of March 31, 2021. Part three, "Significant Legal Developments," highlights the most significant decisions rendered in Article 10 cases over the last year. Part four, "Profiles of Sex Offenders Under Civil Management," provides case synopses of sex offenders who entered the civil management system over the past year. Finally, the report concludes with part five, "SOMTA's Impact on Public Safety." An appendix containing resources for victims is also provided.

I. THE CIVIL MANAGEMENT PROCESS

A. OVERVIEW

At the outset, it is important to understand three key elements of New York's civil management of sex offenders. First, civil management does not apply to every convicted sex offender. Instead, the statute applies only to a specific group of sex offenders who:

- have been convicted of a sex offense or designated felony; and
- are nearing anticipated release from parole or confinement by the agency responsible for the offender's care, custody, control or supervision at the time of review; and
- have been determined to suffer from a mental abnormality.[6]

Second, New York's civil management system is unique in the United States. While at least twenty states and the Federal government have similar civil confinement laws for dangerous sex offenders, New York is unique in that it provides an alternative to civil confinement and allows

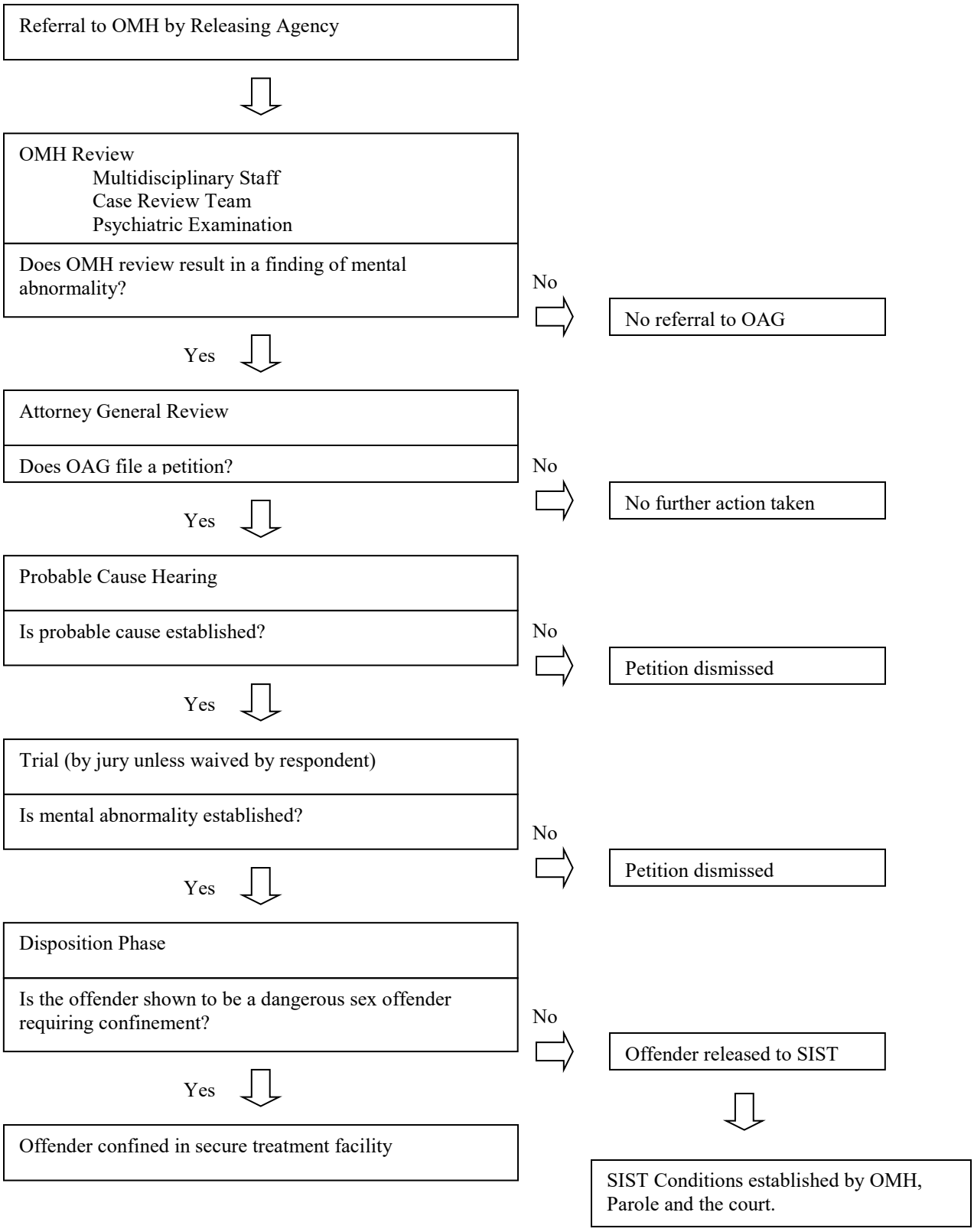
[6] MHL §§10.05, 10.03(a),(q),(g) and (i).

some offenders to be managed in the community under strict and intensive supervision and treatment (SIST). After a legal finding that an offender suffers from a "mental abnormality," MHL Article 10 contemplates two distinct dispositional outcomes; civil confinement or SIST. The modality of treatment an offender receives depends upon whether he or she has such a strong predisposition to commit sex offenses, and such an inability to control their behavior, that he or she is likely to be a danger to others and commit sex offenses if not confined to a secure treatment facility.[7] [8] The final disposition is made by the court after a hearing on dangerousness requiring confinement. If the court does not find dangerousness requiring confinement, it is required to find the offender appropriate for SIST in the community.[9]

Third, civil management is part of a comprehensive system designed to protect the public, reduce recidivism, and ensure offenders have access to proper treatment. The legislature expressly identified the need to protect the public from a sex offender's recidivistic conduct. Prior to SOMTA, a detained sex offender who suffered from what is now defined as a mental abnormality would often be paroled from prison into the community under standard supervision conditions or released with no supervision at all, and in either case, the offender would not receive treatment specific to his sex offending conduct. Under SOMTA, an offender may still be released into the community under the supervision of parole, but will be subject to enhanced conditions of supervision and treatment that specifically address the sexual offending behavior. Whether an offender is subject to treatment in a secure facility or in the community, the treatment and supervision will continue until such time that a court determines the offender is no longer a "sex offender requiring civil management."

[7] Also known as a dangerous sex offender requiring confinement and referred to hereafter as DSORC.
[8] MHL §10.07(f).
[9] *Id*.

THE MHL ARTICLE 10 CIVIL MANAGEMENT PROCESS



B. THE EVALUATION PROCESS

When an individual who may be a "detained sex offender" is nearing anticipated release from custody of an agency with jurisdiction,[10] the agency gives notice of the offender's anticipated release to both OMH and the OAG.[11] The two most common referrals are made when a convicted sex offender nears a release date from prison or parole supervision.

Once OMH receives notice of an offender's anticipated release date, the case is screened by the OMH multidisciplinary team (MDT).[12] After review of preliminary records and assessments, the MDT either refers the matter to a case review team (CRT) for further evaluation or determines that the individual does not meet the criteria for further evaluation and the case is closed. If a case is referred to the CRT, notice of that referral is given to the OAG and the offender. The CRT reviews records and arranges for a psychiatric examination of the offender.[13] If the CRT and psychiatric examiner determine the offender is appropriate for civil management, the case is referred to the OAG to commence legal proceedings. If the CRT and psychiatric examiner find the offender does not require civil management, the case is not referred and is closed.

When an individual who may be a "detained sex offender" nears anticipated release, the statute requires the agency with jurisdiction to provide OMH and the OAG 120 days-notice of the upcoming release. Within 45 days of its receipt of such notice, OMH is required to provide the offender and the OAG with written notice of its determination whether the case will be referred for civil management.[14]

[10] The agency with jurisdiction can include the Department of Corrections and Community Supervision (DOCCS), the Office of Mental Health (OMH), and the Office for People with Developmental Disabilities (OPWDD). See MHL §10.03(a).
[11] MHL §10.05(b).
[12] MHL §10.05(d)
[13] MHL §10.05(e).
[14] MHL §10.05(g).

In practice, the actual time in which the OAG receives OMH's determination is much less. In 2007, the actual average time between the OAG's receipt of such notification and the offender's release date was 4 days; in 2008 it was 16 days; in 2009 it was 34 days; in 2010 it was 15 days; in 2011 it was 12 days; in 2012 it was 11 days; in 2013 it was 8 days, in 2014 it was 12 days, in 2015 it was 16 days, in 2016 it was 16 days, in 2017 it was 9 days in 2018 it was 12 days and in 2019 it was 22.5 calendar days; in 2020 it was 14 days; in 2021 it was 11 days.

These notification time frames are advisory, not mandatory, but together recognize that OMH should give the OAG approximately 75 days-notice of its determination of referral for civil management. The number of cases referred by OMH had declined dramatically since the inception of SOMTA in 2007, and though it slightly increased in, or about, the 2013 time-period it has now leveled off.

In the 2007-2008 fiscal year, OMH referred 134 cases to the OAG for filing a civil management proceeding. In 2008-2009 OMH referred 119 cases, and in 2009-2010 there were 65 cases referred. In 2010-2011 OMH referred 65 cases; in 2011-2012, 34 cases; in 2012-2013, 99 cases; 2013-2014, 84 cases; and in 2014 - 2015, 56 cases. In 2015-2016, OMH referred 51 cases. In 2016-2017, 49 cases. In 2017-2018 44 cases. In 2018-2019, 97 cases. In 2019-2020, 45 cases, in 2020-2021 it was 45 cases. The various and complex factors driving annual referrals exceed the scope of this report.

C. LEGAL PROCEEDINGS

If upon referral by OMH, the OAG determines that civil management is appropriate, a petition is filed on behalf of the State of New York by the OAG in the supreme or county court where the sex offender is located.[15] At the time a petition is filed, the sex offender is generally

[15] MHL §10.06(a).

"located" in a state prison responsible for his or her custody. Therefore, the petition is typically filed in the county within which the prison is located. Once a petition is filed, the offender is entitled to an attorney. Most sex offenders are represented by Mental Hygiene Legal Service (MHLS), a state-funded agency. If a court determines MHLS cannot represent the offender, it will appoint an attorney eligible for appointment pursuant to County Law Article 18-B.[16]

The statute authorizes the sex offender to seek the removal of the case to the county of the underlying sex offense conviction(s).[17] If an offender does not request venue to be transferred to the county of the underlying sex offense, the OAG may bring a motion for such transfer.[18]

Shortly after the petition is filed, a hearing is held to determine whether there is probable cause to believe respondent[19] is a sex offender requiring civil management.[20] If the court finds probable cause exists, the offender is transferred to an OMH secure treatment facility pending trial. The appellate courts have determined that a finding of probable cause is sufficient to hold a respondent in a secure treatment facility pending final disposition of the matter. In lieu of transfer to a secure treatment facility, an offender may request to remain in prison under the custody of DOCCS pending trial.[21] If the court determines that probable cause has not been established, it will dismiss the petition and the offender will be released in accordance with other provisions of Article 10. [22]

Once it is established there is probable cause to believe respondent is a sex offender requiring civil management, the case proceeds to trial to determine whether respondent is a

[16] MHL §10.06(c).
[17] MHL §10.06(b).
[18] *Id*., MHL §10.07(a).
[19] Once a petition is filed, the sex offender is referred to as the "respondent" in the legal proceedings.
[20] MHL §10.06(g).
[21] MHL §10.06(k).
[22] *Id*.

"detained sex offender" who suffers from a "mental abnormality."[23] The respondent is entitled to a twelve-person jury trial, but may waive the jury and proceed with a trial before the judge alone.[24]

A civil management trial is a bifurcated proceeding. The first part of the trial is to determine whether the respondent is a "detained sex offender" who suffers from a "mental abnormality" as those terms are defined by statute.[25] The State of New York has the burden to prove by clear and convincing evidence that the respondent is a "detained sex offender"[26] who suffers from a "mental abnormality."

A "mental abnormality" is statutorily defined as:

> a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct.[27]

The jury, or judge if the jury is waived, must find by unanimous verdict that the State of New York met its burden that the respondent is a "detained sex offender" who suffers from a "mental abnormality." If a jury does not reach a unanimous verdict, the sex offender will remain in custody and a second trial will be held. If the jury in the second trial is unable to render a unanimous verdict, the petition is dismissed.[28] On the other hand, if the jury unanimously, or the court if a jury is waived, determines the State of New York did not meet its burden, the petition is dismissed and the respondent is released in accordance with other provisions of law.[29]

When the jury, or court if a jury is waived, determines that the State of New York met its burden of proof and found that the respondent is a detained sex offender who suffers from a mental

[23] MHL §10.07(a).
[24] MHL §10.07(b).
[25] MHL §10.07(a), (d), MHL 10.03(g), (i).
[26] MHL §10.03(g)
[27] MHL §10.03(i).
[28] *Id*.
[29] MHL §10.07(e).

abnormality, the court must then determine what the disposition will be. The second part of the civil management trial is known as the dispositional phase and the court alone must consider whether the sex offender is a "dangerous sex offender requiring confinement" (DSORC) in a secure treatment facility or a sex offender requiring strict and intensive supervision and treatment (SIST) in the community.[30]

A "dangerous sex offender requiring confinement" is defined as:

> A detained sex offender suffering from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the person is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.[31]

If the court finds the respondent is a "dangerous sex offender requiring confinement," the offender is committed to a secure treatment facility for care, treatment, and control until such time as he or she no longer requires confinement.[32]

If the court finds the sex offender is not a "dangerous sex offender requiring confinement," then it must find that respondent is a sex offender requiring strict and intensive supervision and treatment in the community.[33] A sex offender placed into the community under a regimen of SIST is supervised by parole officers from DOCCS and is required to abide by conditions set by the court.

[30] MHL §10.07(d), (f).
[31] MHL §10.03(e).
[32] MHL §10.07(f).
[33] *Id*.

D. TREATMENT AFTER MENTAL ABNORMALITY IS ESTABLISHED

1. Dangerous Sex Offender Requiring Confinement (DSORC)

As reflected in the legislative findings of MHL Article 10, some sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses and it is those offenders who may require long-term specialized treatment to address their risk to re-offend. These are the offenders that a court determines to be "dangerous sex offenders requiring confinement" and in need of treatment in a secure treatment facility to protect the public from their recidivistic conduct.[34] Generally, a respondent found to be a dangerous sex offender requiring confinement is transferred to either Oakview in Marcy, New York, or Bridgeview in Ogdensburg, New York.

A determination that a respondent is found to be a dangerous sex offender requiring confinement does not mean the offender will serve the rest of his or her life in a secure treatment facility. An offender may at any time petition the court for discharge and/or release to the community under a regimen of SIST. The court may deny the petition finding it is frivolous or determining that it does not provide sufficient basis for re-examination at that time, or the court may order an evidentiary hearing be held.[35]

Furthermore, and by statute, each dangerous sex offender requiring confinement is examined once a year for evaluation of their mental condition to determine whether they are currently a dangerous sex offender requiring confinement.[36] Each such respondent is entitled to an annual review hearing based upon the findings of the annual evaluation. The court will hold an evidentiary hearing if the sex offender submits a petition for annual review or if it appears to the court that a substantial issue exists as to whether the offender is currently a dangerous sex offender

[34] MHL §10.01(b).
[35] MHL §10.09(f).
[36] MHL §10.09(b).

requiring confinement.[37]

At the annual review hearing, the OAG calls the OMH examiner to testify at the hearing and the respondent often presents independent expert testimony on his or her behalf. These safeguards ensure the offender's legal rights are protected and that civil confinement decisions withstand legal scrutiny. If the court finds by clear and convincing evidence that the respondent is currently a dangerous sex offender requiring confinement, it will continue respondent's confinement. If it finds respondent is not currently a dangerous sex offender requiring confinement, it will issue an order providing for the discharge of respondent into the community on a regimen of SIST.[38]

2. Strict and Intensive Supervision and Treatment (SIST)

The legislative findings further provide that some sex offenders can receive treatment under a regimen of strict and intensive supervision and treatment in the community, and still protect the public, reduce recidivism, and ensure offenders have proper treatment.[39]

Before a sex offender is released into the community, DOCCS and OMH conduct a SIST investigation to develop appropriate supervision requirements. These requirements may include, but are not limited to, electronic monitoring or global positioning satellite (GPS) tracking, polygraph monitoring, specification of residence, and prohibition of contact with identified past victims or individuals that may fall within the same category of the offender's established victim pool.[40]

A specific course of treatment in the community is also established after consulting with

[37] MHL §10.09(d).
[38] MHL §10.09(h).
[39] MHL §10.01(c).
[40] MHL §10.11(a)(1).

the psychiatrist, psychologist, or other professional primarily treating the offender.[41] Offenders placed into the community on SIST are required to attend sex offender treatment programs and often have to participate in anger management, alcohol abuse, or substance abuse counseling. Each case is examined on an individual basis and the treatment plan is tailored to that individual's needs. Strict and intensive supervision is intended only for those sex offenders who can live in the community without placing the public at risk of further harm.

Specially trained parole officers employed by DOCCS are responsible for the supervision of sex offenders placed into the community on SIST. These parole officers carry a greatly reduced caseload ratio of 10:1, whereas other sex offenders (not subject to civil management) and certain mentally ill persons are supervised at a ratio of 25:1. In contrast, the other parole cases are supervised according to their risk of recidivism and level of need with caseloads that can vary from 40:1, 80:1 and even 160:1.

Sex offenders in the community on a regimen of SIST are subject to a minimum of 6 face-to-face supervision contacts and 6 collateral contacts with their parole officer each month.[42] This minimum of 12 contacts with the parole officer each month ensures the offender is closely monitored. Furthermore, the court that placed the sex offender on SIST receives a quarterly report that describes the offender's conduct while on SIST.[43]

If a parole officer believes a sex offender under SIST has violated a condition of supervision, the statute authorizes the parole officer to take the offender into custody.[44] After the person is taken into custody, the OAG may file a petition for confinement and/or a petition to

[41] *Id*.
[42] MHL §10.11(b)(1).
[43] MHL §10.00(b)(2).
[44] MHL §10.11(d)(1).

modify the SIST conditions.[45] If the OAG files a petition for confinement, a hearing is held to determine whether the respondent is a dangerous sex offender requiring confinement. If the court finds the OAG has met its burden of establishing by clear and convincing evidence that a respondent is a dangerous sex offender requiring confinement, it will order the immediate commitment of the sex offender into a secure treatment facility. If the court finds the OAG has not met the threshold elements to establish that the respondent is a dangerous sex offender requiring confinement, it will return the offender to the community under the previous, or a modified, order of SIST conditions.[46] Not all violations of SIST conditions will result in confinement.

Unlike sex offenders in a secure treatment facility who are entitled to annual review, the offenders on SIST are entitled to review every two years. The offender may petition every two years for modification of the terms and conditions of SIST or for termination of SIST supervision.[47] Upon receipt of a petition for modification or termination, the court may hold a hearing. The party seeking modification of the terms and conditions of SIST has the burden to establish by clear and convincing evidence that the modifications are warranted.[48] However, when the sex offender brings a petition for termination of SIST supervision, the State of New York has the burden to show by clear and convincing evidence that the respondent remains a dangerous sex offender requiring civil management. If the State of New York does not sustain its burden, the court will order respondent discharged from SIST and released from civil management supervision.[49] From April 13, 2007 to March 31, 2021, 198 offenders who had been placed on

[45] MHL §10.11(d)(2).
[46] MHL §10.11(d)(4).
[47] MHL §10.11(f).
[48] MHL §10.11(g).
[49] MHL §10.11(h).

SIST have had their SIST conditions terminated and have been discharged from civil management supervision.

As time passes, it is expected that the number of offenders on SIST will grow considerably because of (1) the number of offenders that are released to SIST after trial, but also because (2) every time an offender is released from a secure treatment facility, the court has found he or she still suffers from a mental abnormality and releases him or her to SIST.

II. CIVIL MANAGEMENT AFTER 14 YEARS

A. REFERRALS AND CASES FILED

In the fourteen years since Mental Hygiene Law Article 10 became law, OMH has reviewed 23,672 sex offenders to determine whether they are appropriate for civil management referral to the OAG. Of the cases reviewed, OMH has referred a total of 991 sex offenders for civil management. Of the 991 cases referred, 973 have resulted in the OAG filing an Article 10 Petition. This includes what is considered the "Harkavy"[50] cases addressed in previous reports.

B. PROBABLE CAUSE HEARINGS

As referenced above, OMH has referred a total of 991 sex offenders for civil management to the OAG.[51] The OAG has filed 973 petitions and conducted 924 probable cause hearings. The courts found probable cause to believe the offender suffered from a mental abnormality and was

[50] There were 123 patients, referred to as the "Harkavy" patients, who were civilly confined before SOMTA under the direction of former Governor Pataki using the provisions of Article 9 of the Mental Hygiene Law. That initiative was challenged in court. In *State of N.Y. ex rel. Harkavy v. Consilvio*, 7 N.Y.3d 607 (2006) ("Harkavy I"), the Court of Appeals held that M.H.L. Article 9 had been improperly used to confine these offenders. On April 13, 2007, SOMTA became effective establishing the current civil management process. Subsequently, on June 5, 2007, the Court of Appeals decided *State of N.Y. ex rel. Harkavy v. Consilvio*, 8 N.Y.3d 645 (2007) ("Harkavy II"), holding that all sex offenders still being held in an OMH facility under the Pataki initiative had to be re-evaluated under SOMTA's new procedures established in M.H.L. Article 10.

[51] These referrals include the Harkavy cases.

in need of civil management 918 times out of the 924 hearings held to date.

C. MENTAL ABNORMALITY TRIALS

Since SOMTA's inception in 2007, 492 matters have proceeded to trial. Of the 492 trials, the jury or judge rendered a verdict that 415 of those sex offenders suffered from a mental abnormality and 77 were adjudicated to have no mental abnormality.

D. DISPOSITIONS

1. Dangerous Sex Offender Requiring Confinement (DSORC)

From April 13, 2007, to March 31, 2021, a total of 714 offenders have been found to be dangerous sex offenders requiring treatment in a secure OMH facility.

2. Strict and Intensive Supervision and Treatment (SIST)

From April 13, 2007 to March 31, 2021, a total of 416 offenders were placed on a regimen of SIST after a finding that they suffer from a mental abnormality.

3. SIST Violations

Presently, 120 offenders are currently on a regimen of SIST. The information below reflects the total number of offenders placed on SIST initially after trial, as well as those placed on SIST from confinement, and the number of those offenders who violated a condition of SIST. In SOMTA's second year, the violation rate was 32%, with 40% of those violations taking place the first month on SIST. By the end of the third year, the violation rate was up to 44%, increasing to 59% in the fourth year. In the fifth and sixth years it leveled to 61% and 62%, respectively. Since then however, the DOCCS policy that it would file a violation as to a Respondent if a Respondent violated any condition, e.g., late curfew, has changed. There has since been an implementation of the use of Incident Reports, in which DOCCS issues a report for informational purposes. The report contains the Respondent's concerning behavior and the report is then provided to the

Court. Along with Incident Reports, the Court now schedules Compliance Calendars in which the Respondent is brought to Court in an attempt to correct the behavior before a violation is filed. This new policy has led to less violations and to the overall success of Respondents on SIST.

E. ANNUAL REVIEW HEARINGS

The number of annual review hearings held each year trends consistently with the increases in the number of sex offenders who are receiving treatment in a secure facility. The number of dangerous sex offenders requiring confinement who petition for annual review is expected to rise. Since SOMTA's inception, while some offenders have waived their right to a hearing and consented to continued treatment in the facility. From April 13, 2007 to March 31, 2021, over 746 dangerous sex offenders have had an annual review hearing held by the court. In the current report period, April 1, 2020 to March 31, 2021, there have been 145 annual review hearings.

F. SIST MODIFICATION OR TERMINATION HEARINGS

Since 2007, 198 offenders have been released from SIST supervision altogether and are either being supervised under their standard conditions of parole or have reached their maximum expiration date for parole and are unsupervised in the community subject to the requirements of the Sex Offender Registration Act (SORA).

III. SIGNIFICANT LEGAL DEVELOPMENTS

In keeping with recent trends, between April 1, 2020, and March 31, 2021, the courts have decided a number of significant cases, each having a dynamic impact on Article 10 litigation.

A. FEDERAL CASES

1. Offender's Multiple §1983 Constitutional Claims Against Secure Treatment Fail to State a Cause of Action.

Decided April 20, 2020, in Brooks v. Hogan, 2020 U.S. Dist. LEXIS 74131, a Magistrate Judge of the U.S. District Court, Northern District of New York, issued an Order and Recommendation-Report that Plaintiff's consolidated complaint be dismissed with prejudice and that Defendants' motion for summary judgment be granted in its entirety.

Plaintiff, a sex offender confined to an OMH secure treatment facility under MHL article 10, brought numerous claims against named OMH officials and treatment staff alleging violations of his constitutional rights under §1983, including: denial of adequate and individualized mental health treatment; denial of adequate clothing; denial of access to courts/legal research resources; and punitive confinement as retaliation for claims against the state. After a second filed action and amended complaints, the District Court dismissed some claims, consolidated the remaining complaints, and allowed Defendants to file a motion for summary judgment. Of note, the Plaintiff, who is diagnosed with exhibitionism, claimed that the Defendants denied him adequate individualized treatment for his exhibitionism, and instead, gave him generalized aggression replacement therapy; failed to provide him meaningful treatment; and subjected him to retaliatory punitive confinement.

The Magistrate recommended that Defendants were entitled to summary judgment

because Plaintiff's claims of punitive conditions of his confinement were either time-barred or unsupported. Additionally, the Magistrate agreed with Defendants that Plaintiff had been offered meaningful treatment during his confinement and that he was given ample opportunity to participate in individualized service planning (ISP) to better meet his needs. The Magistrate noted however, that Plaintiff had refused to sign his ISP's and he refused to attend ISP meetings.

Additionally, while Defendants conceded there is no specific treatment for exhibitionism, the Magistrate credited Defendants with offering a comprehensive and multi-faceted treatment program targeted at Plaintiff's needs. However, the Magistrate noted that the Plaintiff often chose not to participate in group therapy or complete his assignments and was fixated on his legal challenges to the point that he would "intentionally masturbate" in public view within the facility in an apparent effort to bolster his claims that his exhibitionism was not being treated and to "build a case to take to court."

The Magistrate found that the Plaintiff was afforded meaningful treatment "based on professional judgment made by appropriate professionals." In citing the standard of review for such challenge, the Magistrate indicated that the "record is devoid of any evidence that the treatment program is such a gross departure from accepted standards, that an inference can be drawn that professional judgment was not exercised."

2. Psychiatric Examiner's Purported Testimony that Offender's Loss of Privileges Within the Secure Treatment Facility Was "Punishment" and that Specific Treatment for Exhibitionism Exists is Insufficient to Support a Cause of Action.

Decided June 1, 2020, in Brooks v. Hogan, 2020 U.S. Dist. LEXIS 95239, the U.S. District Court, Northern District of New York, adopted the Order and Recommendation-Report of the Magistrate (see above, 2020 U.S. Dist. LEXIS 74131), which recommended granting summary judgment to defendants and dismissing the plaintiff's consolidated complaints with

prejudice.

Subsequent to the Order and Recommendation-Report of the U.S. Magistrate, the Plaintiff filed timely objections, both procedural and substantive. One such substantive assertion was that his claim of punitive confinement was supported by the testimony of an OMH Psychiatric Examiner given at his MHL 10.09 Annual Review Hearing. Plaintiff argued that the examiner "purportedly testified: 'that was a punishment; that wasn't a treatment' and it was 'disciplinary for your behavior.'" The District Court noted that Plaintiff did not file a transcript of the testimony or previously present this evidence to the Magistrate to refute the Defendants' summary judgment motion. The Court further reasoned that there is no context provided for the purported testimony to "ascertain whether it is relevant to the alleged 'treatments' in Plaintiff's claim." Moreover, the Court agreed with the Magistrate's recommendation concerning Plaintiff's conditions of confinement.

Plaintiff also asserted that there are specific treatments for exhibitionism and qualified professionals available to provide him such treatment at the facility. The Court reviewed the records and determined that even if it were to assume that Plaintiff's assertions were correct, they are not material. The Court cited the detailed record of the Magistrate which demonstrated that the Defendants have offered the Plaintiff extensive treatment during his confinement to address his specific needs. Moreover, the Court found no evidence that the treatment provided to Plaintiff "is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment."

Accordingly, the District Court ordered the adoption of the Report-Recommendation of the Magistrate in its entirety, granted the Defendants' motion for summary judgment, and

dismissed, with prejudice, the Plaintiff's consolidated complaint in its entirety.

3. Motion for Reconsideration Based Upon Transcript of Psychiatric Examiner's Testimony Regarding Punishment Denied.

Decided March 22, 2021, in Brooks v. Hogan, 2021 U.S. Dist. LEXIS 52793, the U.S. District Court, Northern District of New York, denied the Plaintiff's motion to reconsider the Court's previous Order which dismissed, with prejudice, the Plaintiff's consolidated complaint in its entirety (see above, 2020 U.S. Dist. LEXIS 95239).

After the District Court ordered dismissal of the consolidated complaint, the Plaintiff "filed a fifty-five, page, single-spaced motion, asserting that reconsideration is warranted based on 'mistakes' in the Court's Order and 'newly discovered evidence.'" In support of his motion, Plaintiff submitted various State Court Orders and records, including the entire transcript of his MHL 10.09 annual review hearing, a document he had not provided in his pleadings or objections in prior proceedings. The transcript included the testimony of the OMH Psychiatric Examiner (PE) who indicated that the Plaintiff's "loss of privileges" at the secure treatment facility was not treatment for his exhibitionism, but instead "was a punishment" and "was disciplinary for [Brooks'] behavior." The Court acknowledged that the Magistrate's Report-Recommendation had discussed at length the Plaintiff's contention that the conditions of his confinement were punitive and restrictive. Further, the Court acknowledged that the Magistrate "concluded the 'record evidence demonstrates Plaintiff was placed on MOD status, suffered a loss of privileges, and/or was directed to complete a [Behavior Chain Analysis] as a result of his treatment interfering behavior and that the decision and the alleged punitive conditions at issue were made by professionals . . . based on their professional judgment.'"

In denying Plaintiff's motion to reconsider, the District Court stated that the PE's

testimony "does not provide a basis for inferring that the decisions regarding alleged punishments or privilege loss . . . were not supported by adequate professional judgment, even if the Court were to grant reconsideration, Defendants would still be entitled to summary judgment."

The Court was not persuaded by the Plaintiff's numerous other arguments for reconsideration and in denying his motion, and stated that even if it were to grant reconsideration, Defendants would still be entitled to summary judgment.

B. NEW YORK STATE COURT OF APPEALS

1. No Abuse of Discretion in Setting Aside Verdict Based Upon Juror Misconduct.

Decided March 30, 2021, in State v. Donald G., N.Y. Slip Op. 01935, the New York Court of Appeals reversed the order of the N.Y. Appellate Division, Fourth Department (see below, section C., paragraph 23, State v. Donald G., 186 A.D.3d 1127) and concluded that the Supreme Court, Cayuga County did not abuse its discretion as a matter of law when it set aside a jury verdict finding no mental abnormality and ordered a new trial. As indicated below, the trial court conducted an inquiry of jurors and made a finding of juror misconduct that warranted setting aside the verdict in the interests of justice. On appeal, the Fourth Department held that a new trial was unwarranted and that the Supreme Court abused its discretion in setting aside the verdict. The Court of Appeals disagreed: "Under these circumstances, Supreme Court did not abuse its discretion as a matter of law in ordering a new trial in the interest of justice on the ground of juror misconduct."

C. THE NEW YORK STATE APPELLATE DIVISIONS

Statewide, between April 1, 2020 and March 31, 2021, the Appellate Divisions decided a total of 23 cases addressing MHL Article 10 matters.

FIRST DEPARTMENT DECISIONS:

1. Jury Instruction Informing Jury that ASPD Alone Cannot Satisfy Mental Abnormality Requirement Should Have Been Given

Decided November 19, 2020, in State v. David S., 188 A.D.3d 584, the First Department reversed the Supreme Court's erroneous denial of respondent's request for a supplemental jury instruction, in accordance with Donald DD., 24 N.Y.3d 174 that anti-social personality disorder (ASPD) cannot, alone, form the basis for a finding of mental abnormality.

Four separate psychologists diagnosed David S. with ASPD, and at least two other experts had diagnosed him with conditions like psychopathy, hypersexuality, narcissistic personality disorder and substance abuse disorders. At trial, David S. asked the presiding judge for a supplemental instruction that ASPD alone was insufficient to find mental abnormality.

"Where the jury is asked to parse through multiple diagnoses, which include ASPD," the First Department wrote, it "should be instructed that ASPD cannot be the sole basis for its finding that someone suffers from a mental abnormality." The Court reasoned that without such instruction, "the jury may mistakenly find mental abnormality based solely on ASPD without the requisite finding of another diagnosis . . . that, combined with ASPD, may predispose one to commit a sex offense." In reversing and ordering a new trial, the First Department stated that the error here was not harmless "because there is a reasonable possibility that the jury would have reached another verdict had it been properly instructed on the law."

SECOND DEPARTMENT DECISIONS:

1. Supreme Court Applied Correct Legal Standard in Finding that Appellant is a Dangerous Sex Offender Requiring Civil Confinement

Decided August 5, 2020, in State v. Richard J., 186 A.D.3d 491, the Second Department affirmed the Supreme Court's finding that Richard J. is a dangerous sex offender requiring civil confinement. The Court wrote, "In reviewing a determination made after a nonjury trial or hearing, the power of the Appellate Division is as broad as that of the trial or hearing court, and it may render the judgment it finds warranted by the facts, taking into account that in a close case, the trial or hearing judge had the advantage of seeing and hearing the witnesses."

Further, the Court stated, "contrary to Richard J.'s contention, the Supreme Court applied the correct legal standard in determining that he is a dangerous sex offender requiring confinement in a secure facility, and clear and convincing evidence supported that determination."

2. Order Releasing to SIST Reversed - Appellate Court Finds the Unrebutted Expert Testimony Established Offender's Inability to Control Himself.

Decided August 12, 2020, in State v. Raul L., 186 A.D.3d 607, the Second Department reversed the decision and order of Supreme Court releasing Raul L. to SIST, and instead, found that he is a dangerous sex offender requiring confinement. The Second Department noted that when reviewing a determination made after a nonjury trial, its power is as broad as the trial or hearing court and it may render the judgment it finds warranted by the facts.

The Second Department acknowledged that in 2005, Raul L. was previously convicted of sodomy in the first degree, burglary in the first degree, and assault in the first degree, as a result of breaking into his neighbor's home at night while she was sleeping, striking her in the head with a baseball bat, and sexually assaulting her as she laid unconscious and bleeding.

Having reviewed the entire record, the Second Department found by clear and convincing evidence that Raul L. is a dangerous sex offender requiring confinement based in part upon the following: his failure to complete any sex offender treatment program or to even meaningfully engage in treatment; his persistent denial of responsibility for his actions, including refuting that he had ever committed a sex offense; his violent and destructive tendencies and threats to staff while confined, which included keeping a "revenge list" of persons he intended to retaliate against and/or kill comprised of facility staffers and the judge who sentenced him in the underlying criminal case; his admission that he derived excitement from "humiliating, tormenting, hunting, and hurting" people; and repeatedly "feigning psychiatric illness that he did not have in an attempt to manipulate his evaluators." The Appellate Division noted that "up until the time of the subject dispositional hearing, the respondent continued to make threats and express a desire to kill facility staff members."

Additionally, the Second Department found compelling what it described as the "unrebutted" testimony of the State's two expert witnesses, who opined that the respondent suffers from several disorders impacting his emotional, cognitive, or volitional capacity, which rendered him likely to engage in recidivist violent sexual offense behavior. Moreover, the Court noted the State established by clear and convincing evidence that the respondent is "presently unable to control his behavior . . . because he has steadfastly refused to meaningfully engage in any treatment program," and because he has "not successfully completed treatment to resolve his disorders, deviance, offense cycle, or triggers, the disorders remained untreated, and the respondent lacked the ability to control his behavior."

3. New Trial Necessary Where Diagnosis Not Generally Accepted Was Admitted.

Decided September 2, 2020, in State v. Ronald S., 186 A.D.3d 1227, the Second

Department upheld the Supreme Court's determination, in a post-trial *Frye* hearing ordered by the Second Department on remittitur, that the State failed to establish that the diagnoses of Paraphilia Not Otherwise Specified (nonconsent) (PNOS, nonconsent) and its successor diagnosis, Other Specified Paraphilic Disorder (biastophilia or nonconsent) with sexually sadistic traits in a controlled environment (OSPD, biastophilia or nonconsent), are generally accepted in the psychiatric and psychological communities. As a result, the court erred by admitting evidence of PNOS and OSPD at the appellant's underlying trial. The Second Department further concluded that the error was not harmless because his other diagnosis of antisocial personality disorder (ASPD) is insufficient on its own to establish mental abnormality and his diagnosis of personality disorder not otherwise specified, antisocial and borderline traits, is likewise insufficient to establish mental abnormality. Thus, the matter was remitted again to the Supreme Court, Nassau County, for a new trial on the issue of mental abnormality, and, if necessary, a new dispositional hearing.

4. Re-Confinement Pending Re-Trial Constitutional and Required.

Decided September 2, 2020, in State v. Kerry K., 188 A.D.3d 30, the Second Department concluded that the plain language of Mental Hygiene Law § 10.06(k) requires detention of an individual pending a new trial to determine whether he suffers from a mental abnormality. The court further determined that such pre-trial detention does not violate the individual's constitutional right to due process of law.

After a probable cause hearing, bench trial, and dispositional hearing, Kerry K. was found to suffer from a mental abnormality and he was released to the community on a regimen of SIST. While in the community on SIST, Kerry K. appealed the Court's mental abnormality finding. The Second Department reversed and ordered a new trial, having determined the trial

court erred in admitting certain inadmissible hearsay evidence. Upon reversal of the order finding mental abnormality, the State moved to re-confine Kerry K. under the MHL § 10.06 probable cause order, and the trial court granted that motion. Kerry K. appealed his re-confinement alleging a violation of due process where, as here, a previous finding held he was not sufficiently dangerous to warrant confinement and that he could be managed in the community on SIST, he could no longer be confined pending a retrial on the issue of mental abnormality.

The Second Department disagreed. While sympathetic to respondent's logic, the Court held that the express language of MHL § 10.06 stated that the trial court "shall" order his confinement in a secure treatment facility and that he "shall not be released pending the completion of such trial." Since the Second Department's reversal on the first appeal did not disturb the trial court's prior probable cause finding and the order confining him pending completion of his trial was still valid, Kerry K. was once again at the post-probable cause, pre-trial stage of article 10 proceedings and the State was required to confine Kerry K. in a secure treatment facility pending his retrial.

5. Trial Court Properly Exercised Discretion by Allowing Amended Petition; Sufficient Evidence Supported Finding of Mental Abnormality and Need for Confinement.

Decided February 17, 2021, in State v. Jermaine B., 191 A.D.3d 888, the Second Department affirmed the trial court's order upon a finding made after a jury trial that determined Jermaine B. suffers from a mental abnormality and a bench trial that determined him to be a dangerous sex offender requiring confinement. The Second Department concluded that the trial court properly exercised its discretion in allowing the State to amend its petition and that there was sufficient evidence to support the jury's finding that he suffered from a mental abnormality.

The Second Department also concluded that the trial court properly determined that Jermaine B. required confinement rather than strict and intensive supervision and that the conflicting expert opinions regarding his dangerousness presented a credibility determination for the court to resolve.

6. Mental Abnormality Supported by Combination of Mental Disorders - No Need to Charge Jury on Insufficiency of ASPD Alone.

Decided February 24, 2021, in State v. Francisco R., 191 A.D.3d 989, the Second Department affirmed an order granting civil confinement of Francisco R. based on a jury verdict finding that he suffers from a mental abnormality and the Court's determination that he is a dangerous sex offender requiring confinement. The Court acknowledged that civil commitment under MHL Article 10 cannot be based solely on a diagnosis of antisocial personality disorder (ASPD) and sex crimes. However, the Court emphasized that "the State's expert diagnosed the appellant with a combination of mental disorders, including ASPD, psychopathy, four substance use disorders, and a detailed psychological portrait, that altogether demonstrated that the appellant had serious difficulty in controlling his sex-offending conduct."

Additionally, the Court rejected the offender's claim that Supreme Court erred in declining to charge the jury that ASPD alone cannot form the basis for a finding of mental abnormality. The Court wrote, "the Supreme Court providently exercised its discretion in declining to charge the jury, inter alia, that ASPD cannot, alone, form the basis for a finding of mental abnormality. The requested charge was unwarranted given that both experts advised the jury that the ASPD diagnosis, alone, would not predispose the appellant to commit sex offenses, and the State's expert explained, in effect, that the appellant's mental abnormality arose from a combination of disorders and personality traits."

7. No Merit to Offender's Multiple Contentions on Appeal, Order for Civil Confinement Upheld.

Decided March 31, 2021, in State v. Karl M., 192 A.D.3d 1119, the Second Department upheld the trial court order for civil confinement upon a jury verdict finding mental abnormality and a dispositional hearing finding that he was a dangerous sex offender requiring confinement.

Karl M. appealed on multiple grounds. In affirming the trial court, the Second Department held most of his contentions meritless. Specifically, the Court determined the following: 1) the jury's finding that Karl M. suffered from a mental abnormality was not against the weight of the evidence; 2) clear and convincing evidence supported the trial court's dispositional finding that Karl M. is a dangerous sex offender requiring confinement; 3) the trial court properly denied Karl M.'s *pro se* motion to dismiss the petition based on his purported wrongful conviction, as MHL article 10 mandates that his status as a convicted sex offender shall not be relitigated; 4) the trial court did not err in precluding the Karl M.'s retained expert from testifying as a witness during the State's case in chief; 5) the Supreme Court did not err in allowing the State to refer to the instant offense conviction as "rape"; 6) the Supreme Court did not err by allowing the State's expert witness to testify about the appellant suffering from a mental abnormality as the ultimate question; 7) the Supreme Court did not deprive Karl M. of his right to present a defense when it denied his attorney's application to be relieved as counsel, so that they may testify at trial for the sole and impermissible purpose of collaterally impeaching the credibility of another witness; 8) reversal was not required based on remarks by the State's attorney during summation, as Karl M. failed to preserve the issue and they were nevertheless fair comments on the evidence; and 9) appellant's argument that he received ineffective assistance of counsel is without merit. While Karl M. asserted other challenges on appeal, without discussion, the Second Department held those remaining contentions were either

unpreserved or without merit.

8. Court May Choose to Credit One Expert Over Another.

Decided March 31, 2021, in State v. Robert H., 192 A.D.3d 1117, the Second Department concluded that there was clear and convincing evidence that appellant suffered from a mental abnormality and that he is currently a dangerous sex offender requiring confinement. In affirming the trial court, the Second Department stated that although Robert H.'s expert witness disagreed with some of the State's evidence, the Supreme Court's decision to credit the testimony of the State's expert witness instead of the testimony of the appellant's expert witness was supported by the record.

THIRD DEPARTMENT DECISIONS:

1. Mental Abnormality Finding Requires SIST or Confinement to STF, Commitment to MHL Article 9 Psychiatric Hospital Not an Option.

Decided May 14, 2020, in Matter of State of New York v. Garfield Q., 183 A.D.3d 1055, the Appellate Division, Third Department affirmed the trial court order for confinement after a bench trial. The trial court heard testimony from three experts who all agreed that Garfield Q. suffered from a mental abnormality. Thus, the only issue for the trial court to resolve was whether the offender required confinement or if he could be managed in the community on SIST. The trial court found the former and ordered him confined to a secure treatment facility.

On appeal, Garfield Q. conceded that he suffered from a mental abnormality, but he argued that "confinement would be unconstitutional as applied to him because his mental abnormalities render him completely incapable of benefitting from the treatment that a Mental Hygiene Law article 10 facility will provide to him." The Court acknowledged that Garfield Q.'s expert testified that he could not be released into the community, but additionally, that "he

would never benefit from sex offender treatment due to his mental illness," and that he should only be treated for his schizophrenia in a Mental Hygiene Law article 9 psychiatric hospital instead of an article 10 secure treatment facility.

The Third Department concluded this argument failed for two reasons. First, upon the Supreme Court's determination that the Garfield Q. suffered from a mental abnormality, it had only two dispositional options: confinement in a secure treatment facility or strict and intensive supervision and treatment in the community. "As the statute makes clear, it is not within the court's discretion to choose a third dispositional option, i.e., confinement in a Mental Hygiene Law article 9 psychiatric hospital," said the Appellate Division. Second, as the State's evidence indicated at trial, once Garfield Q.'s psychiatric condition is stabilized by an appropriate regimen of medication, he can benefit from sex offender treatment. Thus, the Court affirmed the order finding mental abnormality and confining Garfield Q. to a secure treatment facility for sex offender treatment as well as general psychiatric treatment.

2. Offender Not "Subject To" SIST While Incarcerated.

Decided June 25, 2020, in William MM. v. Sullivan, 184 A.D.3d 1035, the Third Department affirmed the Supreme Court's dismissal of William MM.'s petition for termination of his SIST regimen. The offender had only been in the community under SIST for approximately nine months when he was reincarcerated on a parole violation. William MM. argued on appeal that the two-year period of time required by statute to elapse before he could petition for discharge from SIST had elapsed while he was in prison on the parole violation. The trial court disagreed and dismissed his petition as unripe. In affirming, the Third Department analyzed the plain and unambiguous language, as well as the legislative history and intent of Mental Hygiene Law § 10.11(f),and concluded that petitioner was not "subject to" a SIST

regimen while incarcerated for a parole violation.

3. Failure to Request *Frye* Hearing on OSPD Deprived Offender of Effective Assistance of Counsel.

Decided October 22, 2020, in State v. Kenneth II., 190 A.D.3d 33, the Third Department considered the appeals of three orders from the Supreme Court. On the first appealed order, the Third Department concluded that respondent was not deprived of meaningful representation based on counsel's failure to preserve any legal insufficiency arguments, because the entire picture of respondent's life, behavior, and diagnoses demonstrated that he suffered from a mental abnormality that predisposed him to the commission of conduct constituting a sex offense, which he had serious difficulty controlling.

On the second appealed order the Third Department determined that respondent was not deprived of effective assistance of counsel because he did not establish that counsel lacked a strategy or tactical reason for choosing not to call an expert witness or other evidence regarding respondent's medical treatment for gender dysphoria.

Finally, on the third appealed order, the Third Department found that respondent was deprived of effective assistance of counsel because defense counsel failed to request a pretrial *Frye* hearing challenging the Respondent's diagnosis of other specified paraphilic disorder (OSPD) (nonconsent). The Court cited decisions of the Court of Appeals in *Shannon S.* and *Donald DD.*, wherein the scientific reliability of the predicate diagnosis, paraphilia not otherwise specified (PNOS), nonconsent, (later termed OSPD, nonconsent), were drawn into question, but were nevertheless decided in the absence of a *Frye* challenge. Having the benefit of those decisions, the Third Department stated, "there is no tactical reason for counsel not to have seized the opportunity presented by *Donald DD.* and the dissent in *Shannon S.* in the face of such diagnosis," and Respondent's counsel "had everything to gain and nothing to lose" by

challenging OSPD (nonconsent) in a *Frye* hearing. In remitting to the Supreme Court for a "posttrial *Frye* hearing," the Court stated that, "this single failing [of defense counsel] deprived respondent of the effective assistance of counsel."

4. SIST Revoked for Violation of Conditions of Release

Decided October 22, 2020, in Matter of State of New York v. Robert A., 187 A.D.3d 1326, the Appellate Division, Third Department accorded deference to Supreme Court's decision and affirmed respondent's confinement. Respondent has a history of committing sex offenses and in 2012 was found to be a dangerous sex offender and was confined to a secure treatment facility but was later released onto a regimen SIST. Respondent violated the conditions of his release by engaging his co-workers at a restaurant in sexual innuendo. When the female co-workers declined his advances, he made threats, including to strangle one woman until her brain fell out, and to strangle another while having sex with her, which the parole officer testified was alarmingly similar to his prior sex offenses. He also inappropriately probed another male co-worker for sexual details about his wife and became violent and harassing when the man declined to provide them.

The Court heard from the State's expert and Robert A.'s experts. The State expert opined that, in essence, Robert A. was dangerously sexually preoccupied, which combined with his other risk factors, rendered him imminently ready to sexually reoffend. Drawing a distinction between what Robert A. said and how he acts, his expert testified that, while prone to making stupid, offensive and inappropriate statements, which demonstrated horrendous judgment, he had demonstrated control over his sexual impulses. Robert A. also testified and largely denied that allegations of his behavior and insisted they were taken out of context.

The Third Department accorded deference to the Supreme Court's decision to credit and weigh the conflicting testimony of the witnesses, as it was in the best position to evaluate their credibility. Contrary to Robert A.'s assertion, the trial court was not limited to the facts underlying the SIST violation, but rather, "was entitled to rely on all the relevant facts and circumstances tending to establish that [Robert A.] was a dangerous sex offender." In affirming the SIST revocation and order for confinement, the Court found that the State met its burden of establishing by clear and convincing evidence that Robert A. is a dangerous sex offender requiring confinement.

5. SIST Violation: Confinement Upheld in Deference to Trial Court's Credibility Determination in Weighing Conflicting Expert Opinion.

Decided October 29, 2020 in State v. Justin R., 187 A.D.3d 1464, the Appellate Division, Third Department affirmed the Supreme Court's decision to revoke Justin R.'s regimen of SIST and confine him to a secure treatment facility after a SIST violation hearing established that he is a dangerous sex offender requiring confinement. At the hearing, Justin R.'s SIST officer testified to several ongoing violations of the conditions of SIST, including non-disclosure of sexual relationships with multiple unapproved partners; inappropriate use of his cell phone to access sexually explicit websites, including incest-related pornography; keeping an unapproved knife by his bedside; having contact with a person with a criminal record; his lack of participation in treatment; and his general deception, including failing four polygraph tests. The Court notes that these allegations were uncontroverted.

Additionally, the Court cited the differing expert testimony adduced at the hearing. The State's expert found particularly concerning Justin R.'s daily use of "incest-porn" and his masturbation up to 13 times a day, his frequent sex with multiple (unapproved and undisclosed)

women, despite having an intimate relationship with his girlfriend, and his use of sex to cope with emotional stress. The State's expert testified that these factors indicated Justin R.'s high level of sexual preoccupation and thus, an increase in risk of sexual offense recidivism, which was already 5.25 times higher than the typical offender based on actuarial risk assessments.

Justin R.'s expert did not find these behaviors particularly concerning, as they appeared consensual in nature and involved no sexually offensive behaviors. Further, he testified that Justin R.'s pornography use, frequent masturbation, and sex as coping is not illegal and that because he benefits from multiple consensual adult sexual partners, he should not be penalized for engaging in those relationships. Additionally, Justin R.'s expert testified that his failure to abide by his SIST conditions are consistent with his antisocial personality and that his conditions of SIST are "kind of difficult to comply with, even if you're not anti-social."

The Third Department indicated that where conflicting expert testimony and other credibility issues are presented, it accords deference to the trial court's assessment, since it is in the best position to make those determinations. Here, the Court acknowledged that the State and Justin R. presented conflicting expert opinion and that the record supported respondent's undisputed noncompliance with his SIST conditions. In deference to Supreme Court's weight and credibility determinations, the Third Department concluded that the trial court properly found by clear and convincing evidence that Justin R. is a dangerous sex offender requiring confinement.

FOURTH DEPARTMENT DECISIONS:

1. Annual Review: Change of Venue Denied for Lack of Necessity.

Decided May 1, 2020, in Matter of David G. v. State, 183 A.D.3d 1249, the Appellate Division, Fourth Department affirmed the trial court order denying David G.'s motion seeking a

change of venue of his annual review hearing. The Fourth Department acknowledged that a trial court may change the venue of an annual review proceeding to any county for good cause, including considerations relating to the convenience of the parties or witnesses, or the condition of the confined sex offender. However, to establish good cause for a change of venue, the party seeking such relief must set forth specific facts sufficient to demonstrate a sound basis for the transfer, as conclusory statements unsupported by facts are insufficient. Here, David G. failed to make a sufficient factual or evidentiary showing that a transfer was necessary for the convenience of the proposed witnesses.

2. SIST Violation: Weight of the Evidence at Hearing Proved Offender is a Dangerous Sex Offender Requiring Confinement.

Decided June 12, 2020, in State v. Jedediah H., 184 A.D.3d 1132, the Appellate Division, Fourth Department affirmed the trial court order for confinement issued after a SIST violation hearing wherein the State established that Jedidiah H. is a dangerous sex offender requiring confinement. The Fourth Department concluded that the trial court's finding was not against the weight of the evidence. Particularly, the Court found the evidence at the hearing established that the respondent poses a high risk of reoffending based on the Static-99R assessment tool; that respondent had failed to fully engage in sex offender treatment; that he had committed multiple SIST violations that bore the risk of sexually reoffending, including possessing a smart phone containing, among other things, sexually suggestive videos of young children; and that he had violated other conditions of SIST that increased his risk of recidivism.

3. Annual Review: No Due Process Violations for Admitting Reliable and Probative Hearsay – No Violation for Delays Caused by Offender – Sufficient Evidence of Dangerousness Warrants Confinement.

Decided June 12, 2020 in Wayne J. v. State, 184 A.D.3d 1133, the Appellate Division, Fourth Department affirmed the trial court order to continue the commitment of petitioner to secure a treatment facility after his annual review. The court rejected Wayne J.'s contention that the Supreme Court improperly admitted evidence of uncharged conduct through expert testimony. Here, the Supreme Court "properly concluded that the Administrative Law Judge's determination to revoke petitioner's parole based on the uncharged conduct was an adjudication of guilt, and thus the alleged hearsay is inherently reliable and may be admitted through expert testimony without offending due process" (internal quotations and citations omitted). The Court agreed that the "hearsay evidence was more probative than prejudicial on the issue of petitioner's current mental diagnosis and his current dangerousness."

The Fourth Department also rejected Wayne J.'s assertion that his due process rights were violated by a prolonged delay in holding his annual review hearing. Though attributing none to the State, the Court noted a number of causes of the delay, including Wayne J.'s lengthy appeal of his initial proceeding, completion of his expert's report, court calendar congestion, reassignment of the annual review hearing to a new presiding judge, as well as relief and reassignment of his attorney after Wayne J. threatened to kill his first assigned counsel.

The court further rejected petitioner's contention that the State's evidence was legally insufficient to establish that he is a dangerous sex offender requiring confinement. The State proved that Wayne J.'s narcissistic personality disorder "manifests with a strong sexual component, and linked his NPD diagnosis to his predisposition to commit sex offenses," thus satisfying the predisposition prong of the mental abnormality test. Additionally, the State proved

that Wayne J. refuses to admit that he is a sex offender, that he scores high on actuarial risk assessments, and that he has made little to no progress in his sex offender treatment program.

4. Annual Review: Evidence Sufficient to Order Continued Confinement.

Decided July 17, 2020, in Matter of Edward T. v. State of New York, 185 A.D.3d 1423, the Appellate Division, Fourth Department unanimously affirmed the trial court order for Edward T.'s continued confinement after his annual review hearing. The Court rejected the Edward T.'s contention that the evidence was legally insufficient to establish that he suffered from a mental abnormality. The State's expert diagnosed Edward T. with pedophilic disorder, zoophilia, alcohol and cannabis use disorders, which, when viewed in combination, predisposed petitioner to commit sex offenses.

Additionally, the Court rejected Edward T.'s contention that the evidence was insufficient to warrant his confinement. The Court cited testimony at the hearing establishing that Edward T. "has made very little progress in sex offender treatment based on his sporadic attendance and superficial participation, . . . he has shown a lack of interest in meaningfully discussing his prior offenses and has not been able to develop insight into his offense cycle." Further, the Court noted that he had failed to create a relapse prevention plan and, overall, had not reduced the risk that he would reoffend.

Finding no basis to disturb the trial court's decision to credit the testimony of the State's expert over that of Edward T.'s expert, and based on the clear and convincing evidence adduced at the hearing, the Fourth Department affirmed the finding that Edward T. remained a dangerous sex offender requiring confinement.

5. Juror's Misconduct Insufficient to Set Aside Verdict for a New Trial

Decided August 20, 2020, in Matter of State of New York v. Donald G., 186 A.D.3d 1127, the Appellate Division, Fourth Department, in a split decision, reversed and held the trial court abused its discretion in setting aside the jury verdict on the grounds of juror misconduct. *

Upon a special verdict, the jury found that Donald G., a serial rapist with multiple convictions, was predisposed to conduct constituting sex offenses, but that he did not have serious difficulty controlling said conduct. The State brought a CPLR 4404 motion to set aside the jury verdict on the grounds of juror misconduct. The trial court held an inquiry wherein all 12 jurors testified. As a result, the Supreme Court determined that during jury selection, the foreperson had concealed the fact that his father was a corrections officer, and he subsequently relied upon his father's status during deliberations to persuade other jurors concerning material issues in the case. As a result, the Cayuga County Supreme Court found that said juror misconduct had prejudiced the State and ordered a new trial in the interests of justice. Donald G. appealed.

The Fourth Department, in a 3-2 decision, reversed and reinstated the jury verdict. The majority held that the trial court abused its discretion in setting aside the verdict. Both the majority and dissenting opinion noted that a new trial may be warranted in the "interests of justice if there is evidence that substantial justice has not been done as a result of juror misconduct." The majority concluded however, that the State was not prejudiced by the foreperson's failure to disclose during voir dire that his father previously worked as a correction officer. "Indeed, because the trial was held in the shadow of Auburn Correctional Facility, it would have been difficult for the parties to select 12 qualified jurors with no connection to the

prison," the majority wrote. As such, the Court concluded that the remarks attributed to the foreperson's father are unlikely to have caused prejudice to petitioner.

The dissent noted that a "verdict may be set aside for juror misconduct 'on the ground that a juror had not truthfully responded to questions put to him [or her]' where 'the moving party . . . show[s] concealment of facts, bias or prejudice.'" "Moreover, a prospective juror is not only duty bound to truthfully answer all questions posed during voir dire, but is obligated to volunteer information which he or she has reason to believe would render him [or her] unacceptable to the litigants," the dissent wrote. In concluding that the trial court did not abuse its discretion by setting aside the verdict, the dissent stated, "the foreperson's concealment of relevant facts readily allowed the court to conclude that substantial justice was not done, warranting a new trial." In the dissent's view, "the foreperson prejudiced the jury's deliberations by introducing outside material related to the concealed facts."

Nevertheless, the majority dismissed the notion that the foreperson intentionally concealed relevant facts, and instead stated that he "was acting under a reasonable misunderstanding of the questions during voir dire." Though it acknowledged he had obtained a bachelor's degree and a master's degree, the majority noted that he "has no legal education and therefore is not schooled in answering the court's questions with the degree of precision that is expected of members of the bar." Finding abuse of discretion under these facts, the Fourth Department reversed the trial court and reinstated the jury verdict in favor of Donald G.*

*(See *supra*., section B. paragraph 4., State v. Donald G., N.Y. Slip Op. 01935, wherein the Court of Appeals by decision dated March 30, 2021 reversed this decision).

6. Offender Waived Right to Withdraw Consent to Mental Abnormality Upon Expressly Declining the Opportunity.

Decided October 9, 2020, in Matter of State of New York v. Juan U., 187 A.D.3d 1606 the Appellate Division, Fourth Department affirmed the trial court order for Juan U.'s confinement to secure treatment facility. The trial court order was based in part on a finding reached after Juan U.'s pre-trial waiver and consent to suffering from a mental abnormality, as well as a finding of the court reached after a dispositional hearing wherein the State proved that he was a dangerous sex offender requiring confinement.

In affirming, the Third Department rejected Juan U.'s contentions on appeal that among other issues, he was improperly denied the right to withdraw his consent to mental abnormality, denied effective assistance of counsel, and that the trial court's findings were against the weight of the evidence and based in part upon inadmissible hearsay.

Regarding the assertion that he was improperly denied the right to withdraw his consent to mental abnormality, the Court noted "that Supreme Court provided respondent with an opportunity to withdraw his consent to that finding and that respondent declined to do so." The Court held, "by expressly declining the opportunity to withdraw his consent, respondent waived any appellate contention that he should now be afforded the opportunity to do."

Further, the court held that Juan U. was not deprived of effective assistance of counsel premised upon his contention that his attorney should not have allowed him to consent to mental abnormality without a return concession. However, the Court notes that Juan U.'s attorney made assertions at the dispositional hearing that supported his suitability for release to SIST, and thus, Juan U. failed to meet his "burden of demonstrating the absence of strategic or other legitimate explanations for his attorney's alleged deficiencies." Likewise, the Court stated that Juan U. "would not have succeeded if he disputed [his consent to a finding of a mental abnormality], and

a respondent is not denied effective assistance of trial counsel merely because counsel [did] not make an argument that ha[d] little or no chance of success" (internal quotations and citations omitted).

In rejecting his contention that there was insufficient evidence, the Court stated that the State's experts opined that Juan U. suffers from pedophilia and is sexually attracted to young children; though he was participating in treatment, he had made only minimal progress; and that he lacked a relapse prevention plan. "Moreover," the Court pointed out, that "when initially released to parole, respondent reoffended by grabbing the buttocks of an 11-year-old girl in a public area." "The experts opined that respondent's impulsiveness and opportunistic conduct would make it extremely difficult to prevent a reoffense even if he were released to strict and intensive supervision and treatment," said the Appellate Division.

As to the as hearsay argument, the Court agreed that evidence of unindicted crimes should not have been admitted. It reasoned however, that there was "sufficient admissible evidence before the court from which it could determine that respondent is a dangerous sex offender requiring confinement, and there is no reasonable possibility that the court would have reached a different determination had the hearsay evidence been excluded."

Under these circumstances, the Third Department agreed that the State met its burden of establishing by clear and convincing evidence that Juan U. is a dangerous sex offender requiring confinement.

7. No Due Process Violation Where Delayed Hearing a Result of Offender's Knowing, Intelligent, and Voluntary Request to Proceed Pro Se.

Decided on December 23, 2020, in Matter of Richard R. v. State of New York, 189 A.D.3d 2119, the Appellate Division, Fourth Department affirmed the trial court order

continuing Richard R.'s confinement in a secure treatment facility after an annual review hearing. Richard R. appealed the order alleging several violations of his due process rights, including: excessive delay in holding the hearing, granting his request to relieve his lawyer and allowing him to proceed *pro se*, and insufficient evidence that he was a dangerous sex offender requiring confinement.

The Appellate Division concluded that petitioner was not deprived of his right of due process. It noted that the trial court warned Richard R. that his request to proceed *pro se*, made just two weeks prior to his scheduled hearing on August 2, would result in a delay. The Court stated that the nearly 6-month delay that resulted upon Richard R.'s request was not excessive or a violation of due process. In rejecting that premise, the Court cited language of MHL article 10 which states repeatedly that failure to comply with various deadlines for commencement of hearings, "does not affect the validity of the various actions subject to those deadlines," as such, they are more goals than actual deadlines.

Further, the court rejected the petitioner's contention that the court erred in allowing him to proceed *pro se*. The trial court held a hearing on Richard R.'s request, wherein the Court asked about his age, education, occupation, previous exposure to legal procedures and other relevant factors bearing on a competent, intelligent, and voluntary waiver of the right to counsel. The Court stated that this satisfied the searching inquiry requirement and adequately warned Richard R. of the inherent risks in proceeding as his own attorney.

Lastly, the court rejected Richard R.'s contention that the State failed to establish by clear and convincing evidence that he is a dangerous sex offender requiring confinement. The Court noted that Richard R.'s own independent psychiatric expert gave testimony consistent with that

of the State's expert, which established that petitioner is likely to be a danger to others and commit sex offenses if not confined to a secured treatment facility.

8. No Due Process Violation When Offender Caused Delays – No Deprivation of Effective Assistance of Counsel – Harmless Denial of *Frye* Hearing on Hebephilia Diagnosis - Searching Inquiry Sufficient to Grant *Pro Se* Application.

Decided December 23, 2020 in State v. Joseph R., 189 A.D.3d 2126, the Appellate Division, Fourth Department affirmed the trial court order and finding that Joseph R. is a dangerous sex offender requiring confinement. On appeal, Joesph R. asserts that his due process rights were violated in several ways.

Joseph R. alleged that delays in the proceeding, namely that more than 60-days elapsed from the probable cause hearing and trial, violated his right to due process. In rejecting that argument, the Fourth Department stated, "it is well settled that there is no due process violation where a delay in the proceeding is attributable to the respondent or otherwise beyond the control of the petitioner." Here, the record shows that the delay was largely attributed to the motions and requests of Joseph R., who consented to certain adjournments. The Court further reasoned that the 60-day provision in the statute is "not a strict time limit," and that "even if the delay had operated to deny respondent due process of law, the proper remedy under the circumstances would not be the release of respondent" from civil management.

The Appellate Division also rejected Joseph R.'s contention that he was denied effective assistance of counsel during the delay in the proceeding. The Court stated that it is Joseph R.'s burden to demonstrate the "absence of strategic or other legitimate explanations for his attorney's deficiencies," yet he failed to meet this burden. "Moreover, the record reflects that respondent's counsel filed appropriate motions on his behalf and that the delay was not attributable to inaction on the part of respondent's counsel," wrote the Court.

Furthermore, the Court assumed for purposes of argument that if it was error for the trial court to deny Joseph R.'s request for a *Frye* hearing on the diagnosis of hebephilia, it was harmless, as there was ample evidence to find that he suffered from a mental abnormality aside from hebephilia. There was no "reasonable possibility" that exclusion of the hebephilia diagnosis would have resulted in a different verdict.

Additionally, the Court rejected Joseph R.'s contention that the trial court erred in allowing him to proceed *pro se*. "Here, the [trial] court conducted the requisite searching inquiry to ensure that respondent's waiver was unequivocal, voluntary, and intelligent," wrote the Appellate Division.

9. No Violation of Due Process Where Hearing Delayed by Offender, Admission of Hearsay Was Harmless, and Legally Sufficient Evidence Supported Trial Court Finding.

Decided March 19, 2021, in Charles B. v. State, 192 A.D.3d 1583, the Fourth Department determined that Charles B.'s due process rights were not violated by a delay in holding his MHL 10.09 annual review hearing. The Court noted that much of the delay is attributable to Charles B.'s own actions, including the time it took his independent expert to conduct an evaluation and complete a report, a pre-hearing motion to dismiss, and his request to proceed *pro se*.

The Fourth Department further concluded that any error in allowing an expert witness to provide testimony based on hearsay evidence concerning petitioner's criminal history was harmless. Finally, the Fourth Department concluded that the evidence was legally sufficient to establish Charles B. as a dangerous sex offender requiring confinement and that, contrary to his contention, a finding of mental abnormality does not need to be based on a diagnosis of a sexual disorder. Regardless, the Court pointed out, consistent with his diagnosis of exhibitionism, there was ample evidence of Charles B.'s inability to control himself, as the record indicated that a

week prior to his annual review hearing, he was exposing himself and masturbating in front of female staff within the facility.

D. TRIAL COURT DECISIONS

1. Paraphilic Disorder is Not Necessary for Finding of Mental Abnormality.

Decided May 20, 2020, in State v. Jerome A., 127 N.Y.S.3d 702, the Supreme Court of New York County concluded that Respondent is a detained sex offender who suffers from a mental abnormality under Mental Hygiene Law Article 10. The Court reached this conclusion based on the fact that the "detailed psychological portrait" that resulted in Jerome A's sexual offenses arose from anti-social personality disorder and related conditions, not a paraphilia. In reaching its decision, the Court noted the number of cases decided after *Donald DD.* (ASPD alone is insufficient to find mental abnormality) and explained that the cases do not indicate that a "sexual" diagnosis or "paraphilic disorder" is required to find mental abnormality. What is required is a detailed "psychological portrait," showing the offender is predisposed to conduct constituting sex offenses and has serious difficulty controlling that conduct.

2. ASPD Plus Alcohol and Substance Abuse Disorders Sufficient to Prove Mental Abnormality.

Decided December 10, 2020, in State v. Kenneth W., 137 N.Y.S.3d 895, the Supreme Court of New York County, after a hearing held pursuant to MHL 10.06, found probable cause to believe that Kenneth W. suffered from a mental abnormality, and denied his motion to dismiss the petition for civil management. The Court found that a diagnosis of anti-social personality disorder, in conjunction with diagnoses of alcohol use disorder and cannabis use disorder, meets

the diagnostic predicates necessary to prove mental abnormality. The Supreme Court further determined that it was sufficient that the State's expert reached the conclusion that ASPD, along with the alcohol and substance use disorders, resulted in the Respondent's serious difficulty controlling his sexually offending behavior—it was not necessary to explicitly link the disorders to Respondent's predisposition to commit a sex offense.

The Court noted that the expert "opined that substance and alcohol abuse in this case were integral to the 'detailed psychological portrait' which resulted in Mr. W.'s commission of multiple sexual offenses, distinguishing him from the ordinary recidivist." Further, his "substance and alcohol abuse disorders have a 'strong sexual component' evidenced by their direct connection to sexual offending and have a 'particular tendency' to promote the Respondent's sex crimes, as those criteria have been outlined by New York's appellate courts." While Kenneth W.'s substance and alcohol abuse diagnoses "do not 'predispose' him to commit a sex offense . . . those disorders do significantly contribute to his serious difficulty in controlling sexually offending behavior."

IV. PROFILES OF OFFENDERS UNDER CIVIL MANAGEMENT

The following are examples of MHL Article 10 cases that the OAG litigated during the past year. The names of the sex offenders are represented only by initials.

State v. J.D. – J.D.'s documented criminal history began around age 16. He was arrested and convicted of Attempted Robbery. Records also reflect that in 2008, J.D. was arrested three separate times for multiple offenses, including sex offenses, for which no convictions were ultimately obtained due to speedy trial dismissals. While on parole for the Attempted Robbery, a 20-year old J.D. was arrested for Forcibly Touching an 18-year-old female stranger. J.D. followed the young woman into the subway station, where he sexually and physically assaulted her. He was convicted of this offense in 2012 by plea bargaining to Attempted Assault 3rd and

was given 90-days in jail concurrent with the parole violation.

At age 24, J.D. was charged with three separate sex offenses which he committed over a two-year period, including Attempted Rape 1st; Sexual Abuse 1st; Strangulation 2nd – Sexually Motivated, Assault 3rd, and Criminal Obstruction of Breathing. The first victim was a 20-year-old female stranger he stalked from the subway station to her building, where he sexually and physically assaulted her. He was also arrested for Rape 1st, Sexual Abuse 1st and Burglary 3rd, after again following a 21-year old female from the subway platform to her building, where he raped and beat her. These two cases were combined and by plea bargain, he was convicted of two counts of Forcible Touching (Class A Misdemeanors).

His third sex offense bore a strikingly similarly pattern of following a young female from the subway to her building where he secluded her in the stairwell and sexually assaulted her. For this offense, he was allowed to plead guilty to Sexual Abuse 1st, a Class D Felony, and was sentenced to a five-year term of incarceration, followed by a five-year term of post-release supervision.

J.D. has been diagnosed with antisocial personality disorder and high psychopathic traits, scoring a 25 on the PCLR. He scored a 9 on the Static 99R, placing him in the "well above average" relative risk group and when combined with his dynamic risk factors, J.D. is assessed as a high risk to reoffend.

State v. J.W. – J.W.'s first known sexual offense against a child occurred in 1983 when he was approximately 24 years old, he had sex with a 12-year old girl on three separate occasions. He was convicted of a misdemeanor Sexual Abuse 2nd and given probation after serving six months in jail. In 1992, at approximately 32 years of age, he was convicted of Sexual Abuse 2nd again, after victimizing both a two-year-old girl and a four-year-old boy on multiple occasions. He fondled the boy's penis and testicles on three separate occasions, and fondled and licked the girl's vagina, made her fondle his penis, sat her on his lap and made her thrust back and forth, and placed his penis in her mouth. He was sentenced to a three-year term of probation after serving 83 days in jail.

The article 10 qualifying offense is a felony conviction for Sexual Abuse 1st, involving the ongoing molestation of his girlfriend's 9-year old daughter. J.W. was sentenced to a seven-year term of incarceration and with three-years of post-release supervision. He was paroled

twice and violated parole both times for engaging in an unapproved relationship with a female sex offender and for failing to comply with housing requirements.

J.W. is diagnosed with Pedophilic Disorder, non-exclusive type, attracted to both males and females, as well as conditions of hypersexuality/sexual preoccupation. He is noted to have high risk factors including two prior parole violations, strong sexual preference for children, and he has yet to successfully complete prison-based sex offender treatment.

State v. N.W. – N.W. first known sex offense against children occurred in 2009 when he grabbed the buttocks of twelve-year-old twin boys on the subway. He was arrested for two counts of Forcible Touching, Endangering the Welfare of a Child and Resisting Arrest. He plead guilty to one count of misdemeanor Attempted Endangering the Welfare of a Child in full satisfaction.

His next offenses occurred in 2014, at age 28, when he was charged with Sexual Abuse 1st, Forcible Touching, and Endangering the Welfare of a Child. This resulted from his ongoing molestation of his eight-year-old nephew, which included him repeatedly placing the child's penis in his mouth, rubbing his buttocks and penis and taking pictures of the child's penis. Additionally, he was charged with Sexual Abuse 1st, after authorities learned that he had molested a seven-year old boy, a classmate of his nephew-victim, in the bathroom of a city park while chaperoning the boys on a school field trip.

These two cases combined are N.W.'s article 10 qualifying offenses, for which he received a seven-year determinate term of incarceration, followed by a 10-year term of post-release supervision. Additionally, records indicate that N.W. has acknowledged other sexual offenses for which he has not been charged, as well as an Assault 3rd conviction (reduced from Assault 2nd) after he punched his elderly grandmother in the face and chest knocking her to the ground on the street outside her home.

N.W. is diagnosed with Pedophilic Disorder, non-exclusive type, attracted to both males and females. He scored a nine on the Static 99R actuarial risk assessment, placing him in the "well above average" relative risk group. He also presents with several dynamic risk factors, including sexual preoccupation/hypersexuality; deviant sexual attraction with possible violence and multiple paraphilias; emotional congruence with children; and offense supportive attitudes, which increase his overall "high" risk to reoffend.

State v. J.T. – J.T.'s known sexual offense history began in 1980 when he was 17. He was adjudicated a Youthful Offender after his conviction of Attempted Unlawful Imprisonment – Second Degree, in full satisfaction of Sex Abuse 3rd, Assault 3rd, Unlawful Imprisonment 2nd, Endangering the Welfare of a Child, Public Lewdness, and Harassment.

Then, in 1987, at age 24, J.T. physically and sexually assaulted a 16-year-old girl at knifepoint after grabbing her off the street, punching her in the face, and dragging her into a park where he fondled her and raped her three times over a period of 45 minutes. The girl struggled against him which led to him biting her, ripping her clothes off and slashing her finger with his knife, requiring stitches. A passerby witnessed the attack and notified firefighters at a nearby station who responded to the scene and witnessed J.T. on top of the girl. They held him until police arrived and arrested him. Records indicate that he made several statements to officers at the scene, including that he "did it" and that he should "go to jail" and that officers "should kill [him] now." Records suggest that J.T. is unable to remember the events of this conviction to which he ascribes his alcohol and PCP use at the time of the attack. He was convicted of Rape 1st and Assault 2nd in full satisfaction of Sex Abuse 1st, Rape 3rd, and Criminal Possession of a Weapon 4th. He was sentenced to an 18 to 54-month indeterminate term of incarceration, on the Assault concurrent to a 63 to 189-month term of incarceration on the Rape.

The article 10 qualifying offense, Sodomy 1st, which he pled guilty to in satisfaction of Kidnapping, Attempted Rape, and Assault charges, resulted from the J.T.'s behavior in July 2001, just two weeks after being released to parole supervision from his prior 1987 sex offense conviction. In the late night, early morning hours, during his mandatory curfew, J.T. then age 38, approached a 34-year-old female-stranger on the street and asked her "what's up shorty," to which, the victim did not respond. He then proceeded to follow her to a van where he approached quickly and struck her in the face. When the victim fell to her knees, he continued punching her in the face numerous times. He eventually reached down, pulled her legs out from under her, grabbed her by the throat, and began dragging her down the sidewalk. He told her, "the reason why I hit you is because you didn't say nothing to me." He then got on top of her, straddling her with his knees and demanded that she suck his penis. When she refused, he forced his penis into her mouth. He then laid on top of her and ordered that she remove her panties so that he could penetrate her. He placed his penis at the opening of her vagina and pressed several

times, but he could not penetrate her. The victim told him that she had "not had sex in three years, maybe that's why you can't get it in," to which, he responded by punching her in the face. He then grabbed her clothes and ordered her to suck his penis again.

The victim, who had been screaming and fighting, noticed three passersby who saw portions of the attack. Another witness, who viewed the attack from a nearby window called 911. This same witness also yelled out of her window to "get off of her," but J.T. did not stop. Police arrived while he was still on top of her and arrested J.T. on the scene. He was sentenced to 19-years incarceration and a five-year term of post-release supervision. Also, records indicate that through DNA matching, J.T. was identified as the perpetrator of a previously unresolved Bronx County rape that took place around 2001, but that had been closed without arrest.

While incarcerated, he was adjudicated guilty of over 43 different Tier Ticket disciplinary infractions. He is diagnosed with Other Specified Personality Disorder, Antisocial Traits, Alcohol Use Disorder, Mild, In Sustained Remission, in a Controlled Environment, and Phencyclidine (PCP) Use Disorder, Mild, In Sustained Remission, in a Controlled Environment. He is also highly psychopathic, scoring a 32 on the PCLR and is above average risk based on the Static 99R actuarial assessment.

State v. H.B. – H.B. has a 50-year criminal history that began around age 17. He was convicted of Attempted Grand Larceny in 1974, and while on parole for that, he assaulted a 79-year old store clerk by hitting her over the head with a stick, causing a gash the required 58 stitches, and taking thirty dollars from her, for which, he was convicted of Attempted Robbery 3rd and was sentenced to four years in prison.

He was arrested in 1996 and charged with Burglary 2nd, Sodomy 1st, and Rape 1st, but he was allowed to plea to one count of Attempted Burglary 2nd in satisfaction and he was sentenced to one year in prison. He also was convicted of Criminal Possession of a Controlled Substance 3rd for which he served a prison sentence as well. He has four arrests for sex offense, including three against female children but he was not fully prosecuted for those.

The article 10 qualifying offense resulted from H.B.'s repeated rapes and sexual abuse of his girlfriend's granddaughter over a four-year period. The girl was seven when H.B., age 54, first sexually assaulted her, and eleven at the time of his arrest. During that period, H.B. repeatedly vaginally raped the girl, and repeatedly put his fingers into her vagina. H.B. gave

sworn statements to the police in which he admitted to raping the child.

H.B. was originally charged with sexually assaulting the victim's twin sister as well, but those charges were dismissed. H.B. was charged with multiple counts of Predatory Sexual Assault and Endangering the Welfare of a Child, and he was allowed to plead guilty to one count of Rape 1st in full satisfaction. He was sentenced to a 12-year term of prison and a 25-year term of post-release supervision.

He is diagnosed with Pedophilic Disorder, Nonexclusive type, Sexually attracted to females; Antisocial Personality Disorder; Alcohol Use Disorder, in sustained remission, in a controlled environment; and Borderline Intellectual Functioning. He has not completed sex offender treatment and was removed from prison-based sex offender treatment for poor participation.

State v. J.M. – J.M. committed his first known sex offense in 2000 at age 18. J.M. was charged with Attempted Rape in the First Degree. His victim was a 40-year-old woman, who he did not know. She was walking down the street when J.M. pulled up next to her in his car and offered her a ride home. On the drive, J.M. stopped with the excuse that he needed to urinate, but instead, he went around to the passenger side door and opened it and forcefully pulled the victim out of the car. J.M. had his penis out of his pants and was wearing a condom. He told the victim to just "give it to me" and "just let me have some." The victim attempted to struggle but he was able to rip her pants open by holding his forearm to her throat. When J.M. noticed the victim was wearing a sanitary napkin, he asked her if she had AIDS. When she answered that she did, hoping he would stop, he got back into the car and left her there.

Two days later, J.M. was out driving and pulled over to use a pay phone when he saw an unknown 19-year old girl. He approached her and forced her into his car by threatening to kill her. J.M. pulled over near a secluded building and turned the car off, at which point, the victim opened the car door and took off running. J.M. chased her with his penis exposed and a box of condoms in his hand. He eventually tackled her to the ground and began pulling her pants off. During her struggle, J.M. kept telling the victim to "stop playing with me" and "you know you want it." J.M. was able to remove the victim's pants, but by then, a police officer had arrived after he heard the victim yell "help he is trying to rape me." J.M. was arrested and charged with Kidnapping in the Second Degree and Attempted Rape in the First Degree. These charges were

consolidated with the Attempted Rape of the 40-year old from two days prior. Following a jury trial, J.M. was convicted of Attempted Rape in the First Degree and Unlawful Imprisonment and in 2002, he was sentenced to an eight-year term of imprisonment and a five-year term of post-release supervision.

Later, in 2014, the J.M. followed a female stranger with his penis exposed while yelling obscenities at her. A police officer witnessed the incident and arrested him. J.M. was charged with Exposure of a Person, Disorderly Conduct (two counts), Harassment Second Degree and Obstruction of Governmental Administration. J.M. pled guilty to Exposure of a Person and one count of Disorderly Conduct and was sentenced to fifteen days jail. While those charges were pending however, J.M. was also charged with Attempted Criminal Sexual Act, Exposure of a Person, Harassment, and Obstructing Governmental Administration. The victim in those charges asked J.M. if she could use his phone as she was attempting to secure a ride. J.M. offered to pay for a cab for the female stranger who agreed. The Respondent then pulled his pants down, exposing his penis, offered her money in exchange for oral sex. When she declined, J.M. jumped on her and she fell to the ground. She attempted to scream, but J.M. covered her mouth with his hand and she bit him. She was able to run away and flag down a police officer. Upon a positive identification, J.M. was arrested. Following a jury trial, he was acquitted of these charges.

The article 10 qualifying offense follows his arrest in June 2016, after J.M. (age 33) raped a 27-year-old female acquaintance, having recently met her in a train station. The victim was semi-conscious and fully clothed while hanging out in J.M.'s bedroom. After making sexual advances toward her, which she refused, J.M. forcibly raped her vaginally. At the time of the incident, J.M.'s grandmother and niece were present in the apartment and heard the victim say, "I said no three times." After this rape, J.M. fled to Nevada and a Fugitive Warrant was issued for his return. He was arrested in Las Vegas and extradited back to New York and charged with Rape 1st, Sexual Abuse 1st., and Rape 3rd. In September 2016, he pled guilty to Rape 3rd and was sentenced to 30 months of incarceration and ten 10 years post-release supervision. At the time of the qualifying offense, J.M. was already deemed a Level 3 Violent Sex Offender and in addition to the above charges, by separate arrest, he was charged with Failure to Verify Address Every 90-Days (Prior offense).

While incarcerated, J.M. was adjudicated guilty of 25 disciplinary tickets, of which, ten were for sexual behavior. These include masturbating while staring at female staff; making

inappropriate statements to female staff, such as "I love/like you"; asking female staff if they find him sexually attractive; grabbing a female CO by the arm after following her; and possessing pornography, violating a condition of sex offender treatment. He also has two parole revocations for, among other things, possession of pornography, failure to report, and failure to keep sex offender treatment appointments.

J.M. is diagnosed with Other Specified Personality Disorder (with Schizotypal and Antisocial traits). He is also noted to be sexually preoccupied/hypersexual. J.M. scored a nine on the Static 99R, indicating that he is well above average risk for sexual recidivism.

State v. R.T. – R.T.'s committed his first known sex offense in May 2003 at 18 years of age and while on probation for a non-sexual offense conviction. R.T. befriended a 15 year-old-girl and her 13-year-old friend. R.T. forced his penis into the 15-year-old's vagina even though she had refused him and said no. The victim told R.T. to stop but he refused and, instead, told her "just a couple more minutes." He also asked the girl to perform oral sex on him, but she again refused, and she was eventually able to leave the house with the13 year-old. After the victim reported the incident, R.T. was arrested and eventually convicted upon pleading guilty to Sexual Misconduct. He was sentenced to a six-year term of probation.

Two years later, in 2005 and while still on probation for the 2003 sexual offense, R.T. was arrested and charged with Rape 2nd and Acting in a Manner Injurious to a Child. R.T. was driving his car with 13-year-old female passenger, whom he forced into oral and vaginal sex with him. The victim reported that she said no "numerous times," but he refused to stop. R.T. claimed that the sex was consensual and that he did not know the victim was only 13 years-old, but he entered a plea of guilty to Acting in a Manner Injurious to a Child and was sentenced to three more years of probation.

R.T. committed his next offense in November of 2010. R.T. physically prevented his adult female victim from leaving his bedroom, restrained her, then forced his hands down her pants and touched her vagina. At the time of his arrest for this offense, he was found to be in possession of a large number of hydrocodone-acetaminophen tablets. Respondent was ultimately convicted, upon a plea of guilty, to of Unlawful Imprisonment 2nd and Criminal Possession of a Controlled Substance 7th.

R.T.'s article 10 qualifying offense occurred while on parole supervision. R.T. inserted

his fingers inside the vagina of the 6-year-old daughter of a female acquaintance that he had an "arrangement" with involving drugs for sex. The abuse occurred multiple times over several weeks. When confronted, R.T. claimed that he only touched the outside of her vagina in an effort to find out the identity of the person who was abusing the victim. R.T. was arrested and ultimately convicted in June 2016 of Sexual Abuse 1st: Sexual Contact with Individual Less than 11 years old. He was sentenced to 30-month determinate term of incarceration and a five-year term of post release supervision.

R.T. has a poor history of compliance with community supervision. In addition to crimes committed while on probation, R.T. violated parole in 2019 by possessing an unauthorized cell phone, viewing and downloading porn, accessing Facebook messenger, having contact with several individuals with criminal records, for biting a woman, and lying to his parole officer. He was returned to DOCCS custody for 15 months following those violations.

Likewise, R.T. has a poor history of compliance while incarcerated. In 2012, he received a ticket for drawing sexually inappropriate pictures during, which resulted in him being removed from his sex offender treatment program. More recently in 2018, R.T. was again removed from sex offender treatment after receiving a ticket for possessing and smuggling drugs.

R.T. is diagnosed with Antisocial Personality Disorder; Psychopathy; Hypersexuality/Sexual Preoccupation; Alcohol Use Disorder, severe, in sustained remission, in a controlled environment; and Opioid Use Disorder, severe. His Static 99R score is an eight, which is "well above average" risk to reoffend and when combined with his dynamic risk factors, like sexual deviance with psychopathy, emotional congruence with children, and his lack of sex offender treatment completion, he poses a high risk to reoffend.

V. SOMTA'S Impact on Public Safety

In April 2007, New York State passed the SOMTA. The goals of the legislation, to protect the public, reduce sex offense recidivism, and ensure that sex offenders have access to proper treatment, have been and continue to be realized. The civil management system is functioning

well across the State of New York, as the most dangerous sex offenders are being treated in a secure treatment facility or under enhanced supervision in the community.

Given that the stakes involved are the individual liberty interests of the sex offender and the public's safety, Article 10 cases are proving to be a complex and contentious area of litigation. Despite the dynamic and rapidly changing legal landscape, there are positive trends emerging from civil management in New York. As of March 31, 2021, 714 dangerous sex offenders with mental abnormalities are being civilly managed. Of that, 298 are being treated in a secure treatment facility, while 416 are being treated under a regimen of enhanced community supervision on SIST. But for SOMTA, these recidivistic, mentally abnormal sex offenders would have been released into the community, possibly without any treatment or supervision whatsoever. These offenders are now receiving treatment for their sexual offending behaviors and other mental abnormalities and conditions from which they suffer.

New York's civil management program applies to only a very small percentage of overall offenders. It is hoped that because of the narrow focus, the process identifies the most dangerous offenders. It is not possible to know just how many unsuspecting men, women, and children were saved from being victimized had these sex offenders not been placed into the civil management program. Nevertheless, it is obvious that civil management is making a difference in helping to protect communities from dangerous sex offenders.

APPENDIX

VICTIM RESOURCES

The OAG has a general Crime Victims Helpline number: 1-800-771-7755. The Crime Victims Advocate advises the OAG on matters of interest and concern to crime victims and their families and develops policy and programs to address those needs.

The New York State Office of Victim Services (OVS) is staffed to help the victim, or family member and friends of the victim to cope with the victimization from a crime. The website is *www.ovs.ny.gov*.

A victim can call Victim Information and Notification Everyday (VINE) to be notified when an offender is released from State prison or Sheriff's custody. For offender information, call toll-free 1-888-VINE-4-NY. You can also register online at the VINE website for notification by going to the website at: *www.vinelink.com*.

The New York State Department of Health offers a variety of programs to support victims of sexual assault. It funds a Rape Crisis Center (RCC) in every county across the state. These service centers offer a variety of programs designed to prevent rape and sexual assault and ensure that quality crisis intervention and counseling services, including a full range of indicated medical, forensic and support services are available to victims of rape and sexual assault. The agency also developed standards for approving Sexual Assault Forensic Examiner (SAFE) hospital programs to ensure victims of sexual assault are provided with competent, compassionate and prompt care. See the NYS Department of Health (DOH) website for more information, including a Rape Crisis Provider Report which is organized by county and includes contact information. Visit the DOH website at:
http://www.health.ny.gov/prevention/sexual_violence/resources.htm.

The New York State Division of Parole welcomes victims to contact its agency to learn more about being able to have face to face meetings with a parole board member prior to an inmate's reappearance for review. The toll-free number to the Victim Impact Unit is 1-800-639-2650. *www.parole.ny.gov.*

Lastly, the NYS Police has a crime victim specialist program to provide enhanced services to victims in the State's rural areas. *www.troopers.ny.gov/Contact_Us/Crime_Victims.*