



**NEW YORK STATE  
OFFICE OF THE ATTORNEY GENERAL  
SEX OFFENDER MANAGEMENT BUREAU**

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A REPORT ON THE 2007 LAW THAT ESTABLISHED  
CIVIL MANAGEMENT FOR SEX OFFENDERS IN NEW YORK STATE

APRIL 13, 2012



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## INTRODUCTION

In March 2007, the Legislature enacted the Sex Offender Management and Treatment Act (SOMTA), ch. 7, 2007 N.Y. Laws 108. SOMTA is designed both to protect society from sex offenders with mental abnormalities that predispose them to engage in repeated criminal sexual activity and to provide those offenders with specialized care and mental health treatment. *See* Mental Hygiene Law (MHL) § 10.01. SOMTA became effective April 13, 2007.

The centerpiece of SOMTA is MHL Article 10, which established new standards and procedures for the civil management of certain sex offenders upon their release from prison or other state custody or supervision. To qualify as a "sex offender requiring civil management," a person must, among other things, suffer from a "mental abnormality," 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.

MHL § 10.03(i).

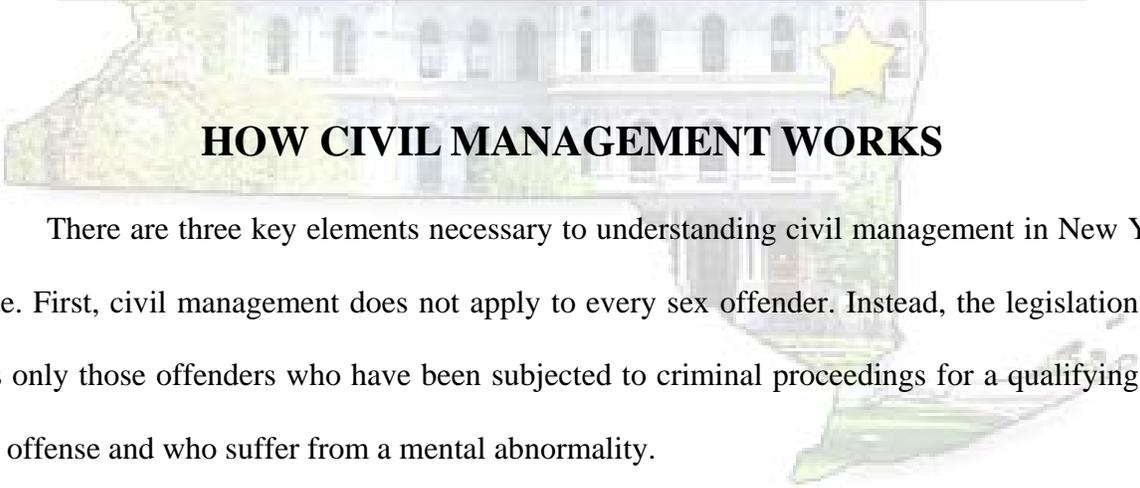
Upon the enactment of SOMTA, the Office of the Attorney General (OAG) created a statewide bureau to handle the influx of civil management cases and armed the bureau with the resources necessary to make the program a success. In the first five years, OAG filed 476 petitions, conducted 448 probable cause hearings, and tried 227 cases. As a result of that litigation, courts have committed 211 dangerous and mentally abnormal sex offenders to secure treatment facilities, while placing 96 mentally abnormal sex offenders on regimens of strict and intensive supervision and treatment (SIST) under community supervision.

This report provides an overview of the implementation of SOMTA. The report is divided into two parts: (1) an explanation of the civil management process; and (2) a snapshot of

the civil management system after five years, including recent updates. The statistics generated in this report are current as of April 1, 2012.

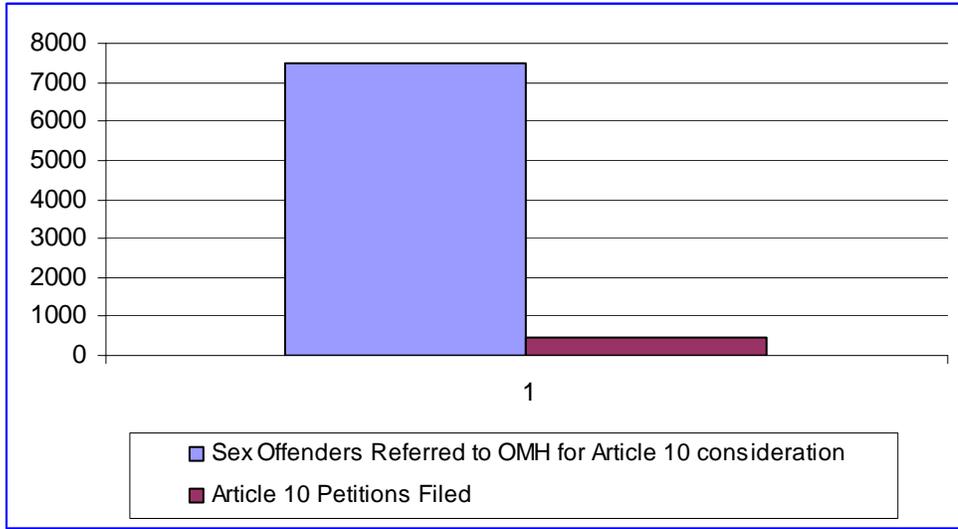
### ACCOMPLISHMENTS IN FIVE YEARS

- Civil management of sex offenders is now operational in New York State.
- OAG reviews cases, files petitions, and conducts litigation.
- OAG filed 476 civil management petitions.
- Courts civilly confined 211 dangerous sex offenders.
- Courts placed 96 offenders into the community under strict and intensive supervision and treatment (SIST).



### HOW CIVIL MANAGEMENT WORKS

There are three key elements necessary to understanding civil management in New York State. First, civil management does not apply to every sex offender. Instead, the legislation targets only those offenders who have been subjected to criminal proceedings for a qualifying felony offense and who suffer from a mental abnormality.



Referrals and Filings, April 13, 2007 - March 31, 2012

Second, New York's sex-offender management system is unique in the United States, since it offers two options for treating and supervising sex offenders suffering from a mental abnormality. Courts may choose between confining offenders to a secure psychiatric hospital or releasing the offenders to SIST, a choice which turns on each offender's likelihood of committing additional sex offenses if released to the community. SIST provides close supervision of mentally abnormal offenders who live in the community and ensures that they receive the treatment and support that they need.

Third, civil management enhances public safety by filling a void. Before SOMTA, mentally abnormal sex offenders were often released with no guarantee of supervision or treatment. SOMTA permits the state to petition the courts to have offenders treated and supervised on SIST or, for the most dangerous individuals, committed to a secure psychiatric facility for treatment until they can be safely released to the community. Those placements are not necessarily permanent. They are reviewable at any time, and, in the case of inpatient commitment, must be re-

viewed at least annually to determine whether the commitment continues to be appropriate.

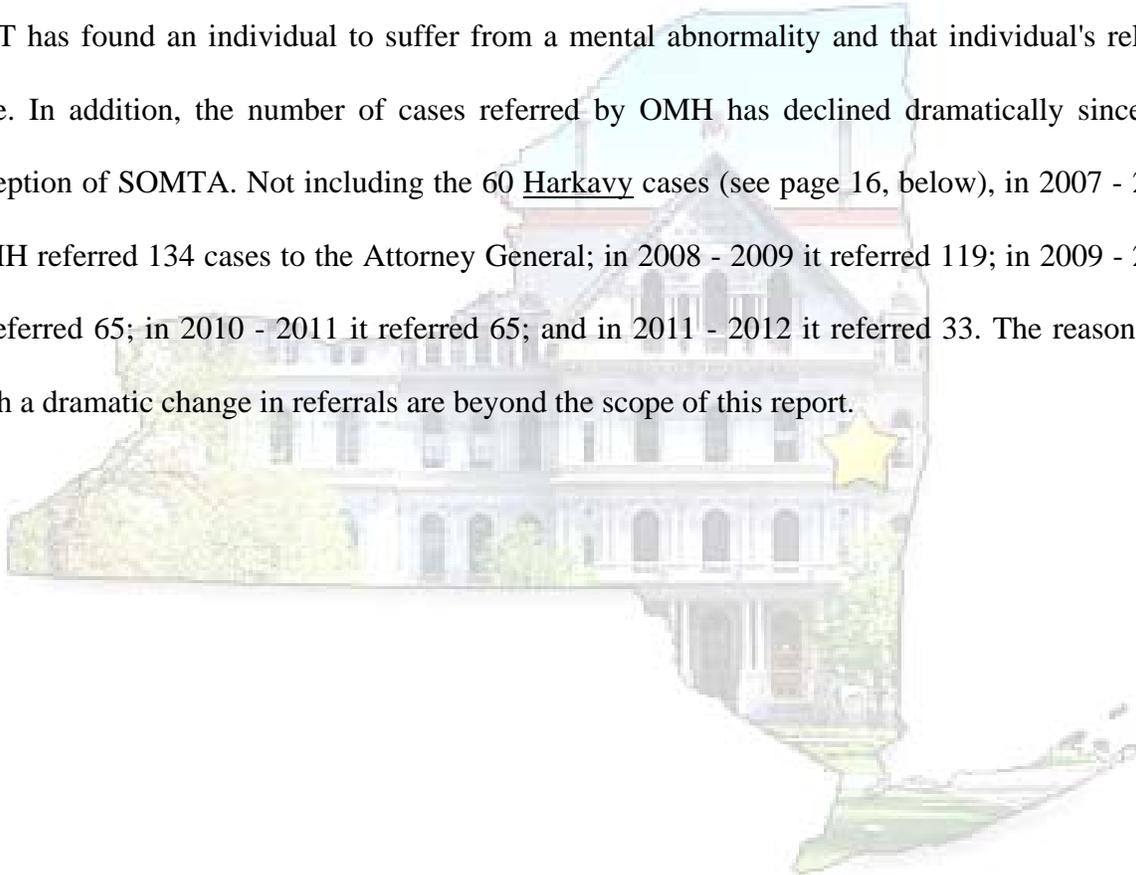
### KEY FACTS

- At present, excluding pre-SOMTA Harkavy cases (see page 16, below), civil management is being applied to only 2% of all sex offenders with qualifying convictions.
- New York has two options: (1) outpatient strict and intensive supervision and treatment (SIST) or (2) inpatient commitment to a psychiatric facility. Neither option is necessarily permanent and both are reviewable at any time.
- Public safety benefit: Before civil management, sex offenders were often released into the community with no supervision and no treatment. SOMTA allows the state to require inpatient treatment for the most dangerous offenders and to treat and supervise other offenders in the community.

### *The Referral Process*

The first stage in civil management is the referral process, which begins when an offender is about to be released from prison, from parole, or from detention by the Office of Mental Health (OMH) or by the Office for Persons with Developmental Disabilities (OPWDD). The agency responsible for the offender notifies OMH and the Attorney General of the offender's anticipated release. MHL § 10.05(b). OMH then appoints a multidisciplinary team of clinical and professional staff to review whether the offender requires civil management. The few offenders meeting the multidisciplinary team's screening criteria are referred to a case review team (CRT) for further review, which may include a psychiatric evaluation. MHL § 10.05(d), (e). If the psychiatric examiner and CRT conclude that the offender is a sex offender requiring civil management, OMH gives notice of that conclusion, together with the psychiatric examiner's report, to the Attorney General and to the offender. MHL § 10.05(g).

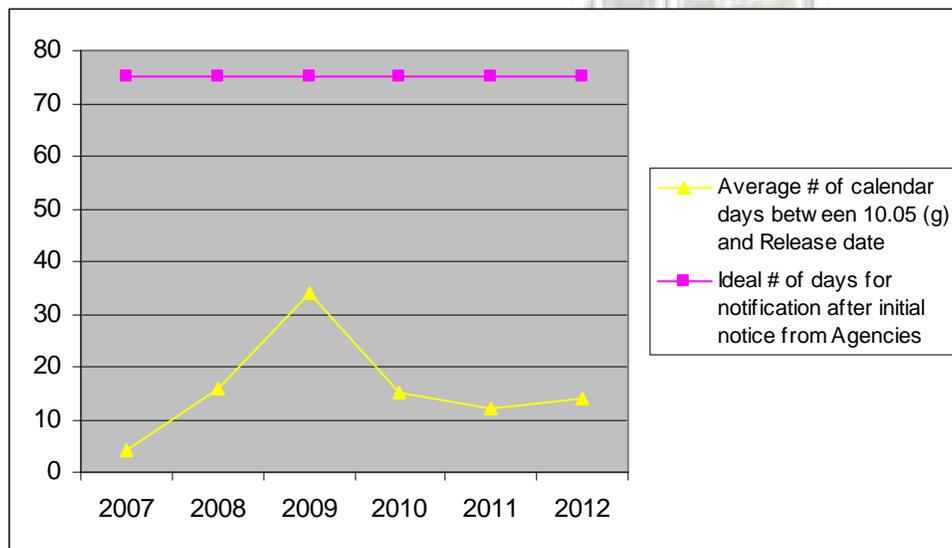
Pursuant to MHL 10.05(g) the case review team is required to provide its written notice to the Attorney General within 45 days of OMH receiving the notice of anticipated release. In 2007 the average time between the Attorney General's receiving such notification from OMH and the individual's release date was four days; in 2008 it was sixteen days; in 2009 it was 34 days; in 2010 it was fifteen days; and in 2011 it was 12 days. In 2012 through March 31, on average, there were 14 days between the Attorney General's receiving notice from OMH that the CRT has found an individual to suffer from a mental abnormality and that individual's release date. In addition, the number of cases referred by OMH has declined dramatically since the inception of SOMTA. Not including the 60 Harkavy cases (see page 16, below), in 2007 - 2008 OMH referred 134 cases to the Attorney General; in 2008 - 2009 it referred 119; in 2009 - 2010 it referred 65; in 2010 - 2011 it referred 65; and in 2011 - 2012 it referred 33. The reasons for such a dramatic change in referrals are beyond the scope of this report.

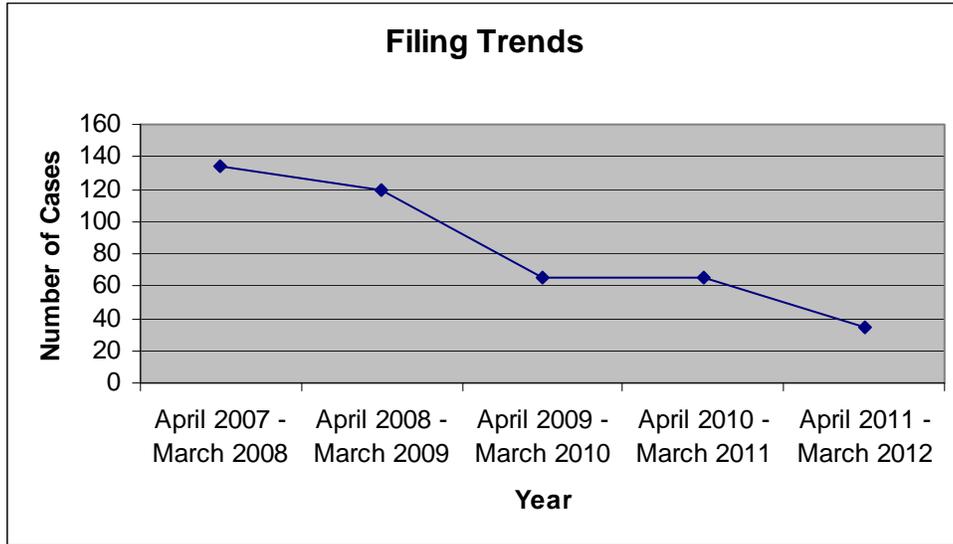


### OMH NOTIFICATION TO THE ATTORNEY GENERAL

Year	Avg # of calendar days between 10.05 (g) notice and release date	Ideal # of days for notification after initial notice from Agencies
2007	4	75
2008	16	75
2009	34	75
2010	15	75
2011	12	75
2012	14	75

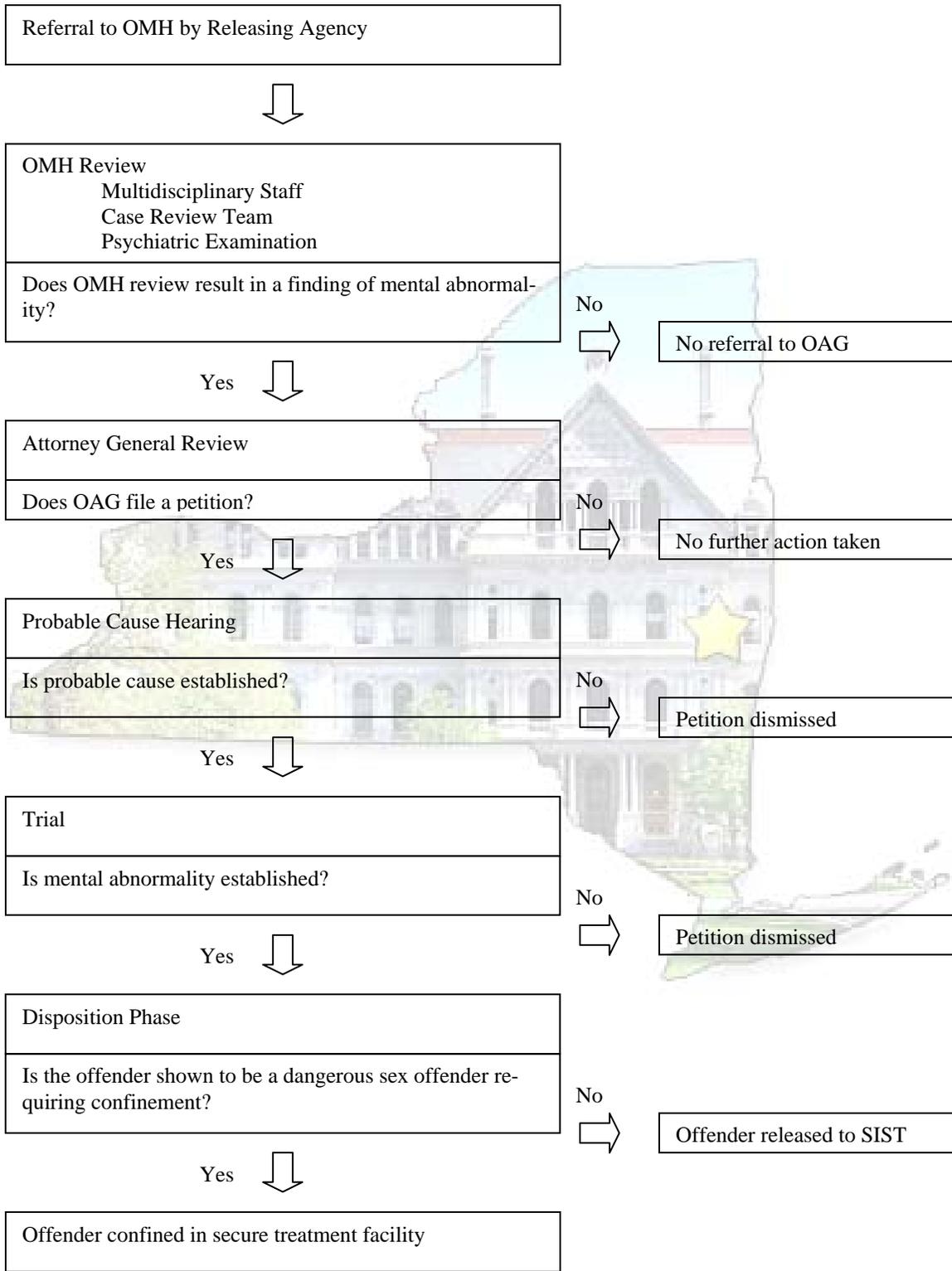
The figure for the ideal number of days for notification reflected in the table above is derived from Mental Hygiene Law Section 10.05. Section 10.05(b) sets 120 days before an offender’s release as the preferred time for DOCCS to serve notice on OAG and OMH of that anticipated release. In addition, Section 10.08(g) provides a preferred period for OMH to evaluate a case before providing notice to OAG of its findings, Those periods are both advisory, not mandatory, but together they establish an ideal 75-day period before an offender’s release for OAG to be notified of OMH’s action.





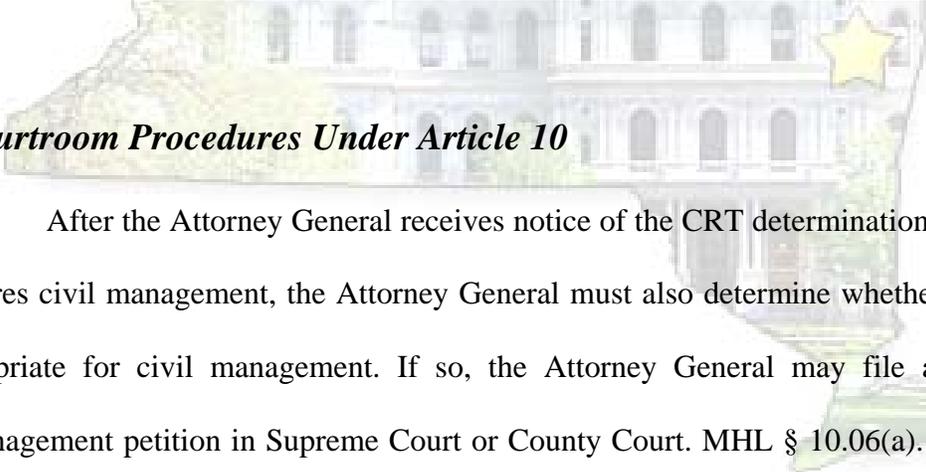
Year	Total Cases
April 2007 - March 2008	134
April 2008 - March 2009	119
April 2009 - March 2010	65
April 2010 - March 2011	65
April 2011 - March 2012	33

## THE MHL ARTICLE 10 CIVIL MANAGEMENT PROCESS



### **STAGES IN THE CIVIL MANAGEMENT PROCESS:**

- 1. Initial Referral:** The case is referred to OMH (usually from the Department of Corrections and Community Supervision).
- 2. Evaluation:** OMH evaluates each case, and refers to OAG those few cases where OMH finds that the offender suffers from a mental abnormality.
- 3. Litigation:** OAG files a petition in court. A trial ensues. If there is a unanimous verdict for civil management, or the court finds for civil management after a bench trial, the court decides between the inpatient and outpatient treatment options.
- 4. Supervision, Treatment and Review:** If an offender is placed in the community on SIST, he is closely monitored by the court and parole authorities. He must receive sex offender treatment. If the court orders confinement, the offender will be sent to a secure psychiatric facility for treatment. All offenders continue to be represented by counsel, and the court periodically reviews each case.



### ***Courtroom Procedures Under Article 10***

After the Attorney General receives notice of the CRT determination that the offender requires civil management, the Attorney General must also determine whether the offender is appropriate for civil management. If so, the Attorney General may file a sex-offender civil management petition in Supreme Court or County Court. MHL § 10.06(a). As soon as the petition is filed, the offender is entitled to representation, which continues throughout the litigation. The Mental Hygiene Legal Service (MHLS) typically represents Article 10 offenders, but if MHLS is unable to represent an offender, counsel will be appointed pursuant to County Law Article 18-B. MHL § 10.06(c).

Within a short time, the court must hold a hearing on the petition to determine whether

there is probable cause to believe that the offender is a sex offender requiring civil management. MHL § 10.06(g). At that hearing, and at any subsequent trial, the offender may testify in his own behalf, call and examine other witnesses, and produce other evidence. MHL §§ 10.08(g); 10.06(i). If the court determines that there is no probable cause, the petition is dismissed and the offender is released, provided he is not subject to confinement under other applicable law.

If, on the other hand, the court finds probable cause, it must order the offender into confinement in a secure psychiatric facility and schedule the matter for trial. MHL § 10.06(k). The offender has a right to have a twelve-person jury decide his case at trial, by a unanimous verdict, or may waive that right and be tried by the court. At trial, the state carries the burden of proving that the offender suffers from a mental abnormality by clear and convincing evidence, the most stringent standard applicable to civil proceedings. If the jury, or the court in a non-jury trial, finds that the state has not proved that the respondent suffers from a mental abnormality, the petition is dismissed and the offender is released, again, provided he is not subject to confinement under other applicable law. MHL § 10.07(e).

If, however, the jury, or the court in a bench trial, finds that the state has proved that the offender suffers from a mental abnormality, the court must order that the offender either be confined at a secure treatment facility or undergo a regimen of strict and intensive supervision and treatment (SIST) in the community. MHL § 10.07(d), (f). The court's decision concerning the type of treatment an offender receives turns on whether or not the court finds the offender to be a "dangerous sex offender requiring confinement," which Article 10 defines to be 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.

MHL § 10.03(e). If the court finds that the offender is not a dangerous sex offender requiring confinement and that he can safely be supervised in the community, he is placed on SIST under the supervision of parole authorities. He is allowed to live in the community as long as he complies with all the conditions set by the court and parole, including receiving the treatment he needs. On the other hand, should the court find that the offender is a dangerous sex offender requiring confinement, he is civilly confined in a secure treatment facility run by OMH.

The court may revisit a civil commitment determination at any time and such a commitment must be reviewed at least annually to ensure that the patient continues to suffer from a mental abnormality to such a degree that he is a danger to the community if he does not remain committed to a psychiatric hospital. Those safeguards are necessary to ensure that the offender's legal rights are respected and that civil commitment decisions withstand legal scrutiny. To date, 25 offenders have been stepped down from confinement to SIST based on annual review determinations.

### ***2012 SOMTA Amendments***

In March 2012, the governor signed into law three amendments to SOMTA that will affect future Article 10 litigation. First, MHL Section 10.06 was amended to provide for an administrative procedure allowing OMH in some circumstances to transfer disruptive Article 10 patients from confinement in an OMH psychiatric facility back to the custody of DOCCS. Second, MHL Section 10.08 was amended to provide for a procedure by which state psychiatric examiners may testify at Article 10 probable cause hearings by means of closed-circuit video connections. Third, MHL Section 10.09 was amended to provide clarity about the beginning of the one-year period applicable to the review of an offender's confinement, establishing that that period begins on the date that a court last determined the need for continued confinement or on

the date the offender last consented to remain in confinement, whichever is later.

### ***The Difference Between Strict and Intensive Supervision and Treatment and Civil Confinement***

SIST is intended for those offenders who can live safely in the community under close supervision, support, and monitoring. Before an offender is placed on SIST, the parole authorities under the Department of Corrections and Community Supervision (DOCCS) conduct an investigation to determine whether the offender's proposed living arrangements are lawful and appropriate. That investigation is done with the input of OMH, which researches available outpatient treatment options. The court ultimately decides which patients are placed on SIST and monitors each SIST offender's progress under community supervision and treatment.

All offenders on SIST are supervised by specially trained parole officers who carry a greatly reduced caseload ratio of ten offenders to each parole officer. In contrast, a normal parolee to parole officer caseload ratio is 60 to one, and a normal sex-offender parolee to parole officer caseload ratio is 25 to one. In addition, SIST offenders are required to have six face-to-face supervision contacts per month, twice as many as traditional parolees, allowing parole officers to closely monitor SIST offenders' progress. Parole officers charged with monitoring SIST participants are also responsible for conducting three collateral contacts per month.

Offenders on SIST are also required to abide by a set of conditions that specifically relate to known sex-offense risk factors and to the offender's prior behavior. For example, those conditions may mandate that the offender cannot have contact with minors, must abide by a curfew, and cannot use a computer. Offenders are required to attend sex offender treatment and are subject to sex-offender polygraph examinations and substance-abuse testing.

If an offender violates any SIST condition, his parole officer is authorized to take him

into custody. The Attorney General then decides what further action to take, including bringing the case before the court for modification or revocation of the SIST conditions. Under appropriate circumstances, the Attorney General may petition the court to confine an offender to a secure psychiatric treatment facility. It should be noted that not all violations of SIST result in civil confinement. In each case, the Court determines whether the Respondent is a dangerous sex offender requiring confinement based on the proof offered by the Attorney General.

Confinement, unlike SIST, is intended for the most dangerous mentally abnormal sex offenders, those who cannot safely live in the community. For both the public's safety and the treatment needs of the offender, those individuals must be confined in a secure mental hospital, where they can receive treatment. There are currently two such facilities in New York: Central New York Psychiatric Center (CNYPC), near Utica, and St. Lawrence Psychiatric Center (SLPC), in Ogdensburg. Confinement is not necessarily permanent. Each confined respondent is subject to review annually to ensure that confinement is still appropriate. In addition, a confined individual may petition the court for release at any time. OMH can also petition the court at any time to release a confined individual.

The number of Respondents on SIST is expected to grow geometrically as time passes. In every instance in which confined Respondents have been released at annual review, they have been found to continue to suffer from a mental abnormality and have been released to SIST.

## ***SIST***

After the first year of SOMTA, there were 21 Respondents on SIST. Nine of those Respondents ultimately violated one or more conditions of SIST. By the end of the second year, that number jumped to 65 Respondents released to SIST. Four of those Respondents were confined after they violated conditions of SIST, which resulted in the Attorney General filing

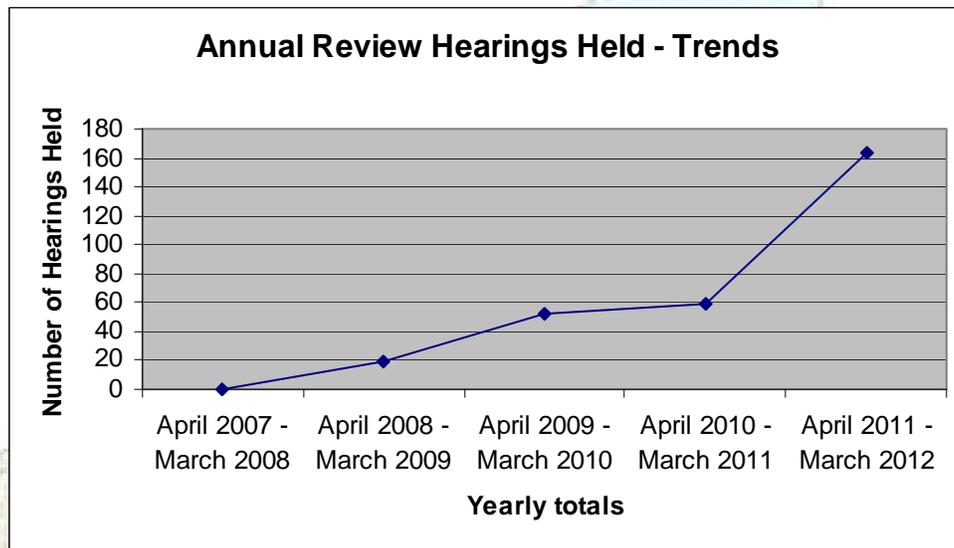
petitions for confinement in those cases, and the respective courts finding them to be dangerous sex offenders requiring confinement. Nineteen of those Respondents were incarcerated due to parole and/or SIST violations, leaving 42 in the community. One of those Respondents was hospitalized. At the end of the second year the SIST violation rate was 45%, with 38% of those violations taking place in the first month on SIST. By the end of the third year the number jumped to 82 Respondents released to SIST. Fifteen of those Respondents were confined after SIST violations. Twenty-one were incarcerated due to parole and/or SIST violations and 46 remained in the community. By the end of the third year the SIST violation rate was up to 55%. By the end of the fourth year the number jumped to 114 Respondents released to SIST. Twenty-eight of those Respondents were confined after SIST violations. Twenty-one were incarcerated due to parole and/or SIST violations, 18 remained in the community and had been released from SIST. By the end of the fourth year the SIST violation rate was 60%.

As of March 31, 2012 there are a total of 117 SIST cases, including some Respondents that began in confinement and were ultimately released to SIST at annual review. 71 of that 117 have been taken into custody as a result of SIST and/or parole violations. Overall, 71 Respondents have violated SIST, 49 of them - 69% - did so in the first year on SIST.

### ***Annual Reviews***

Pursuant to MHL § 10.09 each confined Respondent is entitled to an annual review of his status as a dangerous sex offender requiring confinement. The number of annual review hearings that are conducted is expected to grow dramatically each year as offenders continue to be confined as dangerous sex offenders requiring confinement, and offenders on SIST violate their conditions, resulting in some them being confined. In the second year of SOMTA, which is the first year that annual review hearings had to be conducted, nineteen annual review hearings were

held. In the third year of SOMTA, 52 hearings were held. In the fourth year of SOMTA, 59 annual review hearings were held. Finally, in the fifth year of SOMTA, 163 annual review hearings were held. Those hearings consist of the confined offenders obtaining independent expert witnesses to testify on their behalf, and the Attorney General calling psychologists from OMH. The past year of the offender's confinement, as well as any treatment records that are generated, must be reviewed, in addition to any other issues the court deems relevant.



Annual Review Hearings Held - Trends

Year	Number of Annual Review Hearings Held
April 2007 - March 2008	0
April 2008 - March 2009	19
April 2009 - March 2010	52
April 2010 - March 2011	59
April 2011 - March 2012	163

## A SNAPSHOT OF CIVIL MANAGEMENT AFTER FIVE YEARS

As noted, civil management applies only to a small percentage of sex offenders. During

the first five years under SOMTA, OMH screened 7,503 offenders who had been the subject of SOMTA-qualifying offenses. Only 476 of those offenders were referred to OAG for litigation, resulting in a 6.3% referral rate. That figure is deceiving, since almost 50% of the backlogged Harkavy (pre-SOMTA) cases were referred, making the overall percentage seem larger than it really was. The current referral rate has declined to a consistent 2%. In fact, in 2012 through March 31, OMH referred only eight offenders to the Attorney General for civil management, out of a total of 436 cases initially referred to OMH for evaluation. The chart below and the pyramid on the next page represent cases evaluated during the first five years of SOMTA.

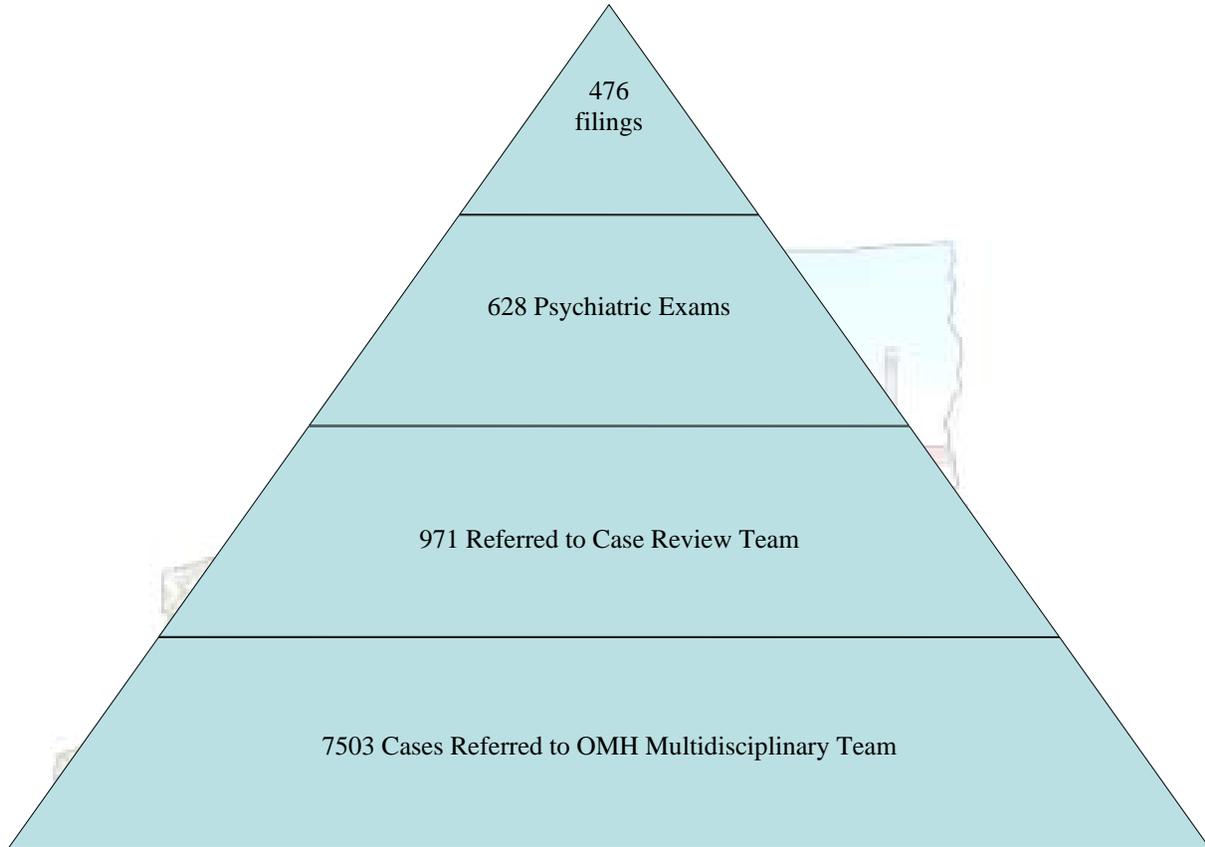
**Referrals to OMH, Reviewed for Civil Management**

	YTD						
	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>Totals</u>
DOCCS/Corrections:	794	1378	1473	1379	1410	404	6838
DOCCS/Community Supervision:	93	113	113	133	133	26	611
OPWDD:	4	1	3	2	3	1	14
OMH:	3	7	0	14	11	5	40
Cases referred to OMH:	894	1499	1589	1528	1557	436	7503
Average cases/month:	105	125	132	127	130	145	126

**OMH review and referral to OAG**

	YTD						
	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>Totals</u>
Cases referred to OMH:	894	1499	1589	1528	1557	436	7503
Cases not referred to CRT:	686	1212	1393	1388	1448	405	6532
Cases referred to CRT:	208	287	196	140	109	31	971
Psychiatric exams:	134	188	104	111	70	21	628
Recommended for Civil Mgmt:	105	128	64	67	43	8	415
% of Cases referred to CRT	23%	19%	12%	9%	7%	7%	13%
% of Cases recommended for Civil Mgmt	12%	9%	4%	4%	3%	2%	6%

Total Cases Evaluated Under SOMTA, April 2007- March 2012

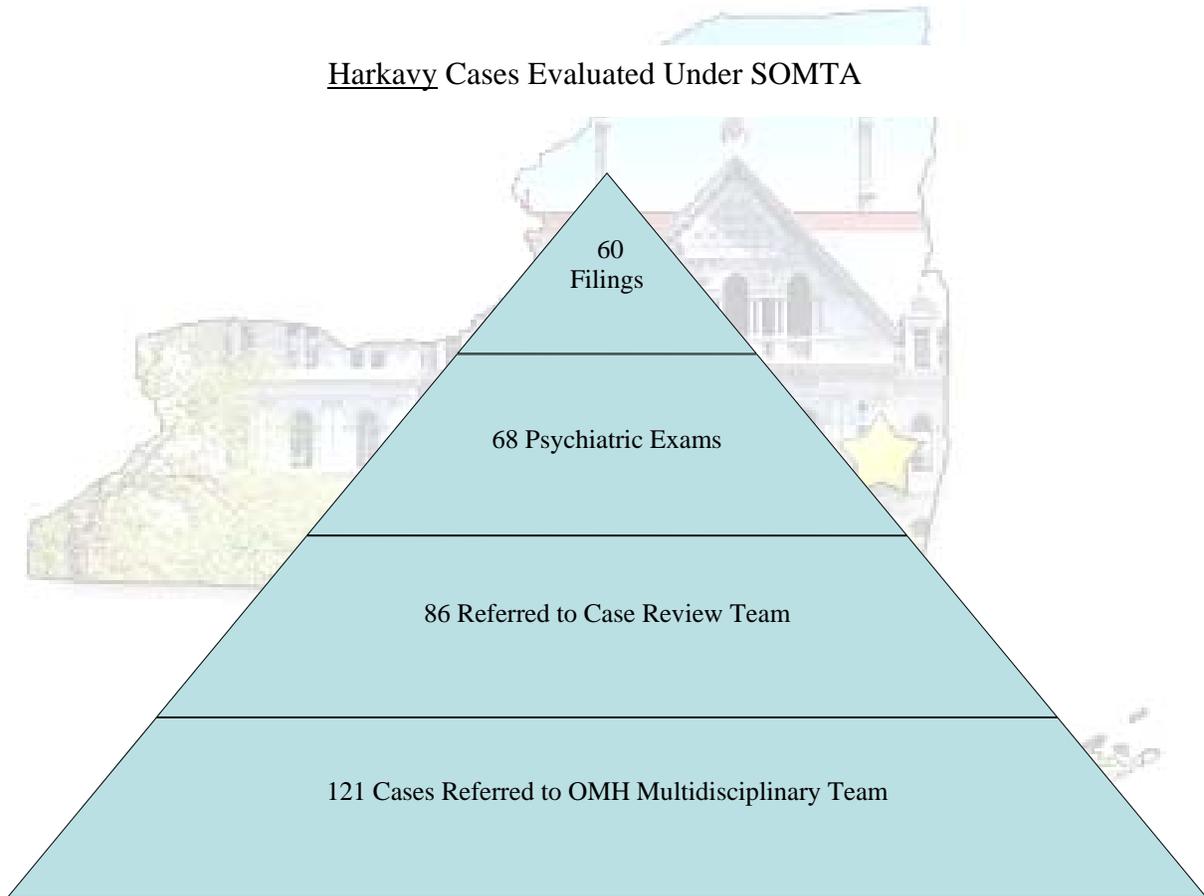


***The Harkavy Cases***

In addition to cases concerning individuals who were about to be released from prison or whose parole term was ending, OMH evaluated 121 sex offenders that had been hospitalized at OMH facilities prior to SOMTA's enactment. Those patients, referred to as the "Harkavy" patients, consisted of individuals who were civilly confined before SOMTA was enacted, under the direction of former Governor Pataki, using the provisions of Mental Hygiene Law Article 9. In State ex rel. Harkavy v. Consilvio, 7 N.Y.3d 607 (2006) (Harkavy I), the Court of Appeals held that MHL Article 9 had been improperly used to confine Harkavy offenders. Then, on April 13,

2007, SOMTA became law, establishing the current civil management process. On June 5, 2007, the Court of Appeals decided State ex rel. Harkavy v. Consilvio, 8 N.Y.3d 645 (2007) (Harkavy II), holding that sex offenders still being held under the Harkavy should not be released, but rather should be re-evaluated under SOMTA. As a result, OMH re-evaluated 121 Harkavy patients under SOMTA. OMH found that about half of those offenders met criteria for civil management under MHL Article 10 and referred those cases to the Attorney General.

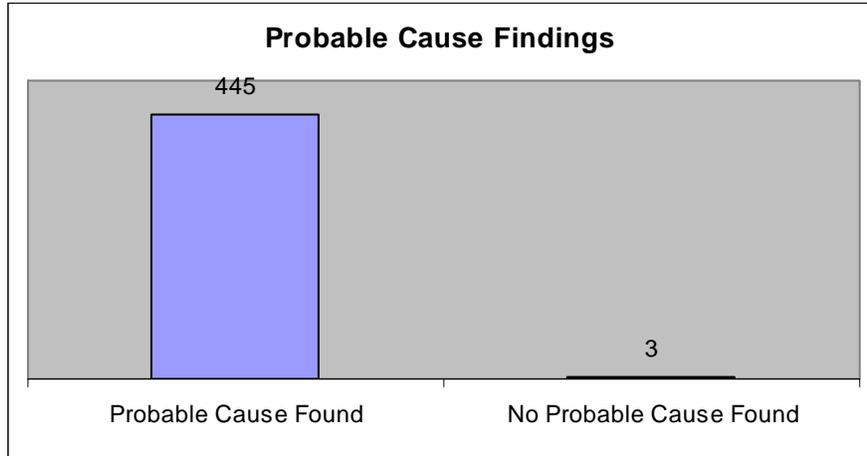
### Harkavy Cases Evaluated Under SOMTA



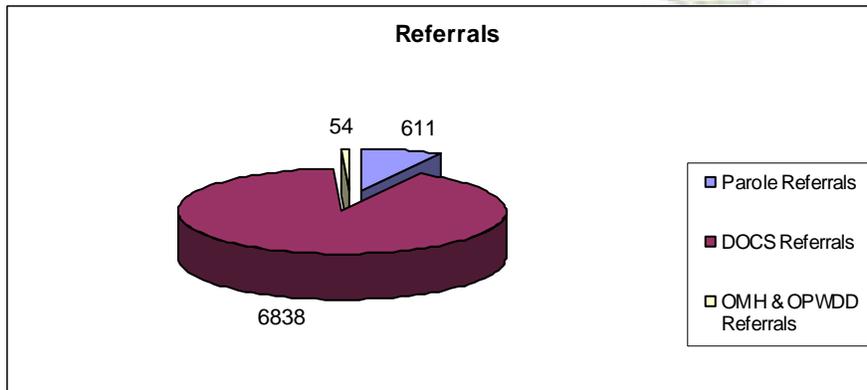
### ***Statistics***

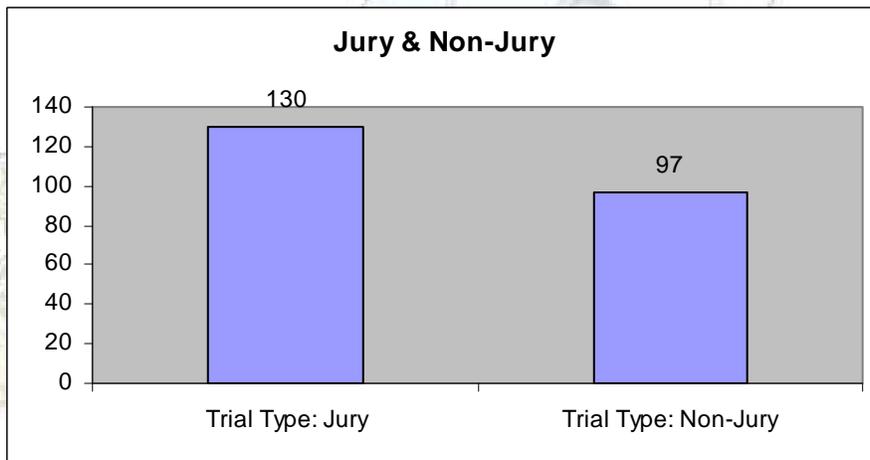
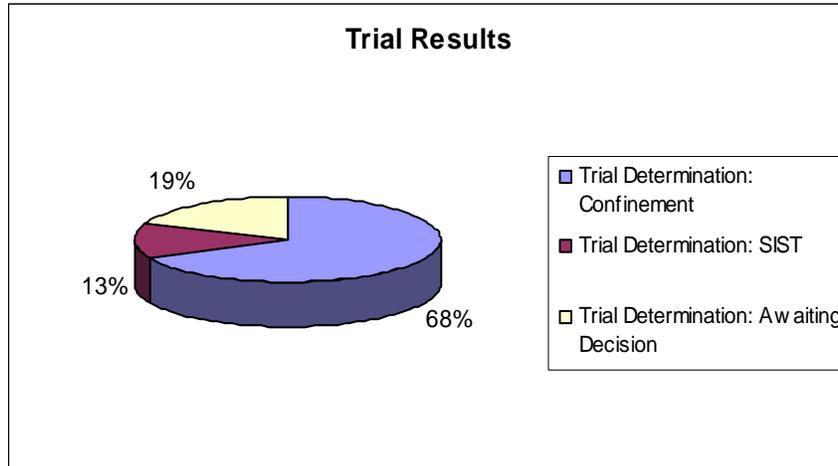
In SOMTA's first five years, OMH referred a total of 476 individuals to the Attorney General for civil management, including the Harkavy offenders. The Attorney General has filed 476 petitions and conducted 448 probable cause hearings. The courts found probable cause to be-

lieve the offender was mentally abnormal and in need of management in 445 of the hearings held to date. So far, the Attorney General has petitioned courts for civil management of people in the custody or under the supervision of DOCCS, or in custody of OMH and OPWDD.

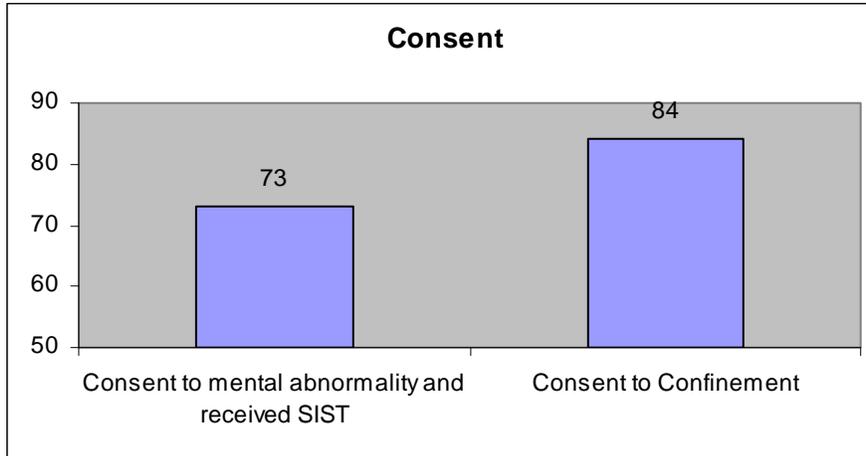


New York courts have held 227 civil management trials, 130 of those trials before a jury, 97 before the court alone after the offender waived his right to a jury. In 188 trials, the jury or the judge found that the patient warranted civil management. In 39 trials, the offender was found not to warrant management.





In addition to the cases decided at trial, there have been a number of settlement dispositions. In 84 cases, the offender, represented by counsel, consented to inpatient treatment in a secure psychiatric facility. In each of those cases, the patient admitted he suffered from a mental abnormality and that he was likely to commit a sex offense if not confined in a secure facility. In another 73 cases, the patient admitted his mental abnormality and successfully persuaded the court to impose SIST.



In total, the courts have committed 211 civil management offenders to secure psychiatric treatment facilities. That figure includes 127 post-trial confinements and 84 confinements by consent. In another 96 cases, the courts imposed an outpatient SIST regimen. Litigation is ongoing in the remaining cases.

### ***Significant Legal Developments In Article 10 Practice***

Between April 1, 2011, and March 31, 2012, New York State and federal courts decided a number of cases that have an impact on the litigation of Article 10 proceedings.

1. In the ongoing federal lawsuit, MHLS v. Cuomo, 785 F.Supp.2d 205 (S.D.N.Y. 2011), U.S. District Judge Deborah Batts made several significant rulings, in part making permanent the temporary injunction that has been in place since November 2007: (a) The court upheld MHL § 10.06(f), which permits the Attorney General to file a securing petition in order to hold an offender in custody for up to 72 hours past his scheduled release, so that a CRT may complete its evaluation. (b) The court ruled unconstitutional MHL § 10.06(k), requiring pretrial detention of all offenders after a determination of probable cause to believe that they are sex offenders requiring civil management, in the absence of a finding of pretrial dangerousness. But see State v. Enrique T., infra. (c) The court invalidated MHL § 10.07(d), which permits civil management based on proof by clear and convincing evidence of offenders who have been found incapacitated to stand trial under CPL Article 730. The court determined that such an offender's underlying crime must be proven beyond a reasonable doubt. (d) The court invalidated MHL § 10.07(c), which permits civil management based on proof by clear and convincing evidence of offenders alleged to have committed designated felonies which were sexually motivated. The court determined that such an offender's sexual motivation must be proven beyond a reasonable doubt. (e) The court

upheld MHL § 10.05(e), which permits psychiatric examinations of Article 10 offenders without counsel before the filing of a petition, ruling that an offender's constitutional right to counsel does not extend to those examinations. OAG has appealed to the United States Court of Appeals for the Second Circuit those portions Judge Batt's decision that are adverse to the state.

2. In State v Enrique T., 2012 NY Slip Op 00476 (1st Dept. 2012), the First Department broke with one of the rulings of the federal Southern District in MHLS v. Cuomo. The state appellate court reversed a trial court's release of an offender following a finding of probable cause, and the trial court's constitutional invalidation of MHL § 10.06(k), which requires pretrial confinement of Article 10 offenders after a probable cause determination. The court ruled that a finding of probable cause that the offender suffers from a mental abnormality is sufficient to permit pretrial confinement, since it incorporates a finding of a respondent's pretrial dangerousness.

3. New York's appellate courts made several significant rulings concerning the evidentiary standards applicable to Article 10 litigation. (a) In State v. Andre L., 84 A.D.3d 1248 (2nd Dept. 2011), the court ruled that expert witnesses are allowed to give opinions concerning sexual motivation of designated felonies. (b) In State v Andrew J.W., 85 A.D.3d 805 (2nd Dept. 2011), the court determined that a diagnosis of antisocial personality disorder is sufficient to meet the Article 10 definition of "condition, disease or disorder" that can lead to finding of mental abnormality. (c) In State v. Gierszewski, 81 A.D.3d 1473 (4th Dept. 2011), the court permitted the state to call at trial both the OMH expert who examined the offender prior to the filing of the petition and an independent expert that the Attorney General retained pursuant to MHL § 10.06(d). (c) In State v Lester, \_\_\_ AD3d \_\_\_, 2012 N.Y. Slip Op. 03296 (4th Dept. 4/27/2012), the court reversed a jury's verdict finding the absence of a mental abnormality, determining that the trial court erred in refusing to instruct the jury that it could consider evidence of the offender's 1980 kidnapping conviction offered to prove the respondent's intent and sexual motivation, where the Article 10 qualifying offense was a 1984 attempted kidnapping conviction.

4. In State v John P., 85 A.D.3d 1189 (2nd Dept. 2011), the court ruled that an Article 10 respondent has no right to counsel before the filing of the petition. Accordingly, the trial court properly denied the offender's request to preclude the testimony of the OMH examiner who interviewed him without counsel present as part of the case review team's evaluation process, since he had no right to counsel at the time of that interview.

5. In State v. Myron P., 86 A.D.3d 26 (3rd Dept. 2011), the court ruled that an Article 10 respondent has no right to a jury trial in the disposition phase concerning the court's decision between confinement and SIST. The statute does not provide for a jury trial at that stage, and the court rejected the offender's constitutional claims to one. On a related issue, in Matter of Carmelo M., 2011 NY Slip Op 84307 (2d Dept. 9/21/2011), the court dismissed the offender's interlocutory appeal of the trial court's decision denying his motion for a jury trial at the disposition phase. The court ruled that such a decision was not appealable.

6. In State v. Nelson, 89 A.D.3d 441 (1st Dept. 2011), the court ruled on two constitutional issues concerning Article 10 litigation, holding that (a) SOMTA proceedings are non-punitive civil proceedings to which the ex post facto clause is inapplicable; and (b) application of

the clear and convincing evidence proof standard, rather than the beyond a reasonable doubt standard, to designated felony offenders convicted prior to SOMTA's effective date, does not violate equal protection guarantees, since providing treatment for those with Article 10 mental abnormalities and protecting the public from the danger of sexual predators are both compelling governmental objectives.

### ***Examples of Offenders in Civil Management Litigation***

The following are examples of cases that the Attorney General litigated under SOMTA during the past year. Names have been represented by initials to protect the identity of the offenders.

1. State v. LS: The offender, who had a history of other sex offenses and of assault, in the early morning hours of August 27, 1993, broke into an occupied residence in Wayne County while armed with a shotgun. Two children living there, a nine-year-old girl and her eleven-year-old brother, were sleeping downstairs, and the offender awakened them. Their parents came downstairs in response to the children's screams, to find the offender holding their daughter and pointing the shotgun at them as he threatened to kill them. The offender backed out of the house and took the girl into the woods behind the home. Her mother called the police and her father, now armed himself, unsuccessfully searched for his daughter, while the offender forcibly raped her and repeatedly orally sodomized her until he ejaculated into her mouth. An Article 10 jury found that the offender suffers from a mental abnormality, and the Supreme Court found him sufficiently dangerous to order his confinement in a secure treatment facility.

2. State v. WR: This Orange County offender had a history as a young man of multiple incidents of public lewdness. In 1977, he accosted a fifteen-year-old girl and forced her to accompany him to some nearby railroad tracks, where he twice forcibly raped her. He was convicted by a jury in connection with that offense. While still on parole in 1992, in two separate events, the offender attempted to expose himself to a ten-year-old girl at a Sears store, and sexually abused two young girls and a boy who were picking berries in a field. After spending nearly eighteen years in prison for the 1992 offense combined with a parole violation on the 1977 rape case, the offender became the subject of this Article 10 proceeding. A jury found the offender to suffer from a mental abnormality, and the Supreme Court ordered him confined to a secure treatment facility.

3. State v. AN: This Orleans County offender has five prior convictions for sexual-assault related offenses involving former girlfriends, acquaintances, and strangers. In June 2003, the offender broke into his estranged wife's home and ambushed her when she came through the door, hitting her in the face with a hammer. He told her he was going to rape her, kill her and then kill himself. He forced her to undress and lie face down on her bed. The victim was able to escape and ran for help. The offender pled guilty to Attempted Burglary in the Second Degree, and the Article 10 petition alleged that offense as a designated felony which was sexually motivated. A jury determined that the offender suffers from a mental abnormality and that the underlying of-

fense was sexually motivated. Supreme Court has indicated that it will release the offender to SIST, over the objection of the Attorney General.

4. State v. RL: The same day that the East Coast blackout of August 2003 ended, this then-fifteen-year-old Orange County offender broke into the home of his neighbor while she slept. Once inside, the offender struck the woman in the back of the head with a blunt object. While she was unconscious and bleeding profusely from her head, the offender anally sodomized her, then left her for dead. After a nearly year-long police investigation finally netted the offender's DNA, he was charged with the crime, and convicted by a jury. After spending several years in facilities of the Office of Children and Family Services, then DOCCS, the offender became the subject of this Article 10 proceeding. After a bench trial, the Supreme Court determined that the offender suffers from a mental abnormality. Disposition of the case is pending.

5. State v. HR: This male Saratoga County pedophile has been victimizing children since his childhood, with sexual abuse convictions dating to 1976. In November 2001, at age 55, he sexually abused a seven-year-old girl. After waking up in bed with semen all over himself, the girl, and the bed, he cleaned up the semen by licking it off the victim. After the Attorney General filed of an Article 10 petition against him, the offender waived his right to a trial and consented to Supreme Court's finding that he suffers from a mental abnormality. After a disposition hearing, the court ruled that the offender is a dangerous sex offender requiring confinement, and ordered him confined to a secure treatment facility.

6. State v. AP: This 49-year-old male pedophile has two prior convictions for sexually abusing his five-year-old adopted daughter. In 2000, after his release from custody on those convictions, he was convicted in Saratoga County of raping the nine-year-old daughter of his girlfriend multiple times over a period of two years. In 2008, an Article 10 jury found that the offender has a mental abnormality. Supreme Court determined that he is a dangerous sex offender requiring confinement, and ordered him confined in a secure treatment facility. The Court of Appeals later reversed those determinations on evidentiary grounds. In February 2012, on the eve of his retrial, the offender admitted to having a mental abnormality. A disposition hearing is pending.

### ***SOMTA'S Impact on Public Safety***

SOMTA has only been in effect for five years. It is therefore difficult to gauge its long-term impact. Civil management is intended to apply only to a small number of offenders, and New York's civil management system, like any system, has its limitations. It appears, however, that civil management is making a difference in helping to protect communities from dangerous sex offenders. Accepted research shows that sex offender treatment can reduce recidivism. (See Hanson, K. et al., First Report of the Collaborative Outcome Data Project on the Effectiveness of

Psychological Treatment for Sex Offenders, in Sexual Abuse: A Journal of Research and Treatment, Vol.14, No. 2, 169-194: 2002; Blanchette, K., Sex offender assessment, treatment and recidivism: A literary review (Report # R-48)(1996) Correctional Service of Canada). After five years, 307 men are currently being civilly managed. Had OAG not brought those cases, those recidivistic, mentally abnormal sex offenders would have been released into the community, possibly without treatment or supervision. Now, those offenders are receiving treatment for their mental disorders under supervision of parole officials or as inpatients in OMH facilities.

The goal of SOMTA is to provide sex offenders with the therapy that they need to live an offense-free life. That goal, together with the goals of the criminal justice process, will protect the public, reduce recidivism, and ensure offenders receive needed treatment.

## **CONCLUSION**

In April 2007, New York State passed the Sex Offender Management and Treatment Act to provide a new mechanism to protect New Yorkers from mentally abnormal, dangerous sex offenders. During the last five years, tremendous strides have been made toward implementing that goal. Currently, the civil management system is functioning across New York State and patients are being treated either under civil confinement or under supervision in the community. Although it may be too early to predict SOMTA's long-term impact, one thing is clear: If not for SOMTA, mentally abnormal and recidivistic sex offenders might be released into the community with little or no oversight or treatment. Because SOMTA gives New York more tools and more resources to treat the state's mentally abnormal and most dangerous sex offenders, New York's communities are safer.