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SEX OFFENDER MANAGEMENT BUREAU

A Report On The Sex Offender Management Treatment Act

April 1st, 2014 to March 31, 2015

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INTRODUCTION

In passing the Sex Offender Management and Treatment Act of 2007, 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 of 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.

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[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 over the past eight years. 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 of the report, "Civil Management After Eight Years," provides updated statistics and case data that are current as of March 31, 2015. 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," will provide 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 danger-

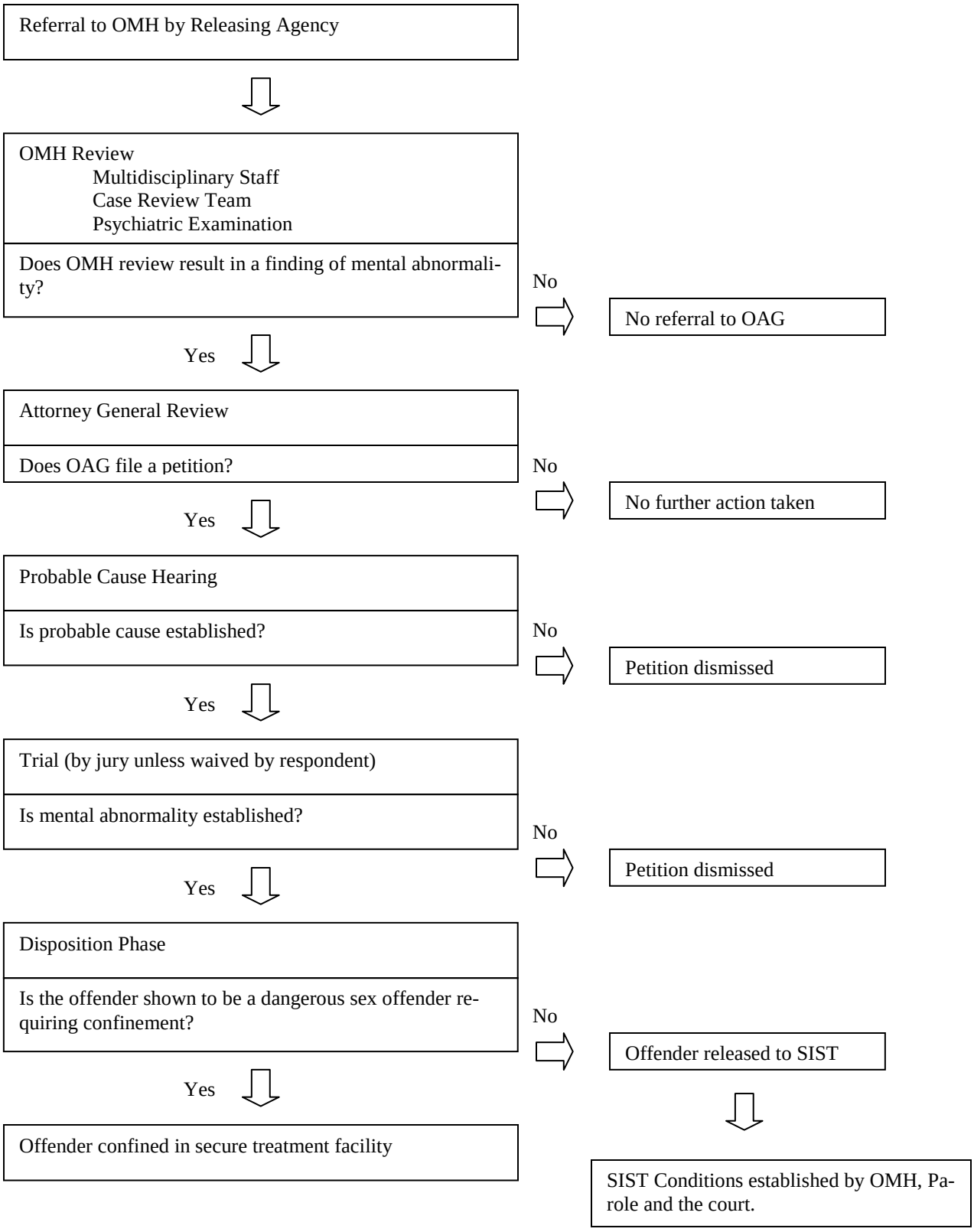
[6] MHL §§10.05, 10.03(a),(q),(g) and (i).

ous sex offenders, New York is unique in that it provides an alternative to confinement and allows 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; 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 identifies 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 the NYS Office of Mental Health (OMH) and the NYS Office of the Attorney General (OAG).[11] The two most common referrals are made when a convicted sex offender nears a release date from prison or parole supervision.

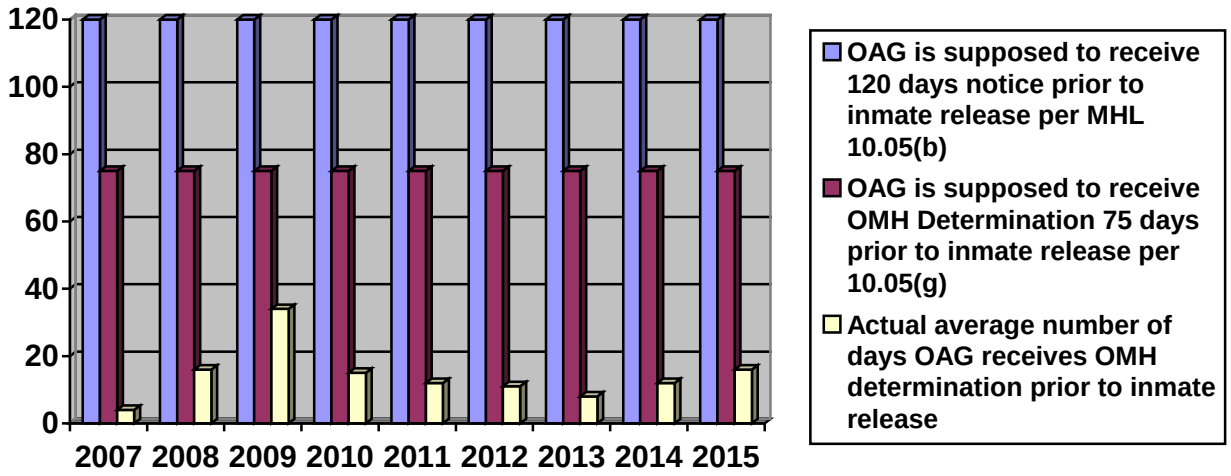
Once OMH receives notice of an offender's anticipated release date, the case is screened by the OMH multidisciplinary team (MDT).[12] After review of preliminary records and assessments, the MDT either refers the matter to a case review team (CRT) for further evaluation or determines that the individual 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 examiner find the offender does not require civil management, the case is not referred and is closed.

When 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]

In practice, the actual time in which the OAG receives OMH's determination is much

[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).

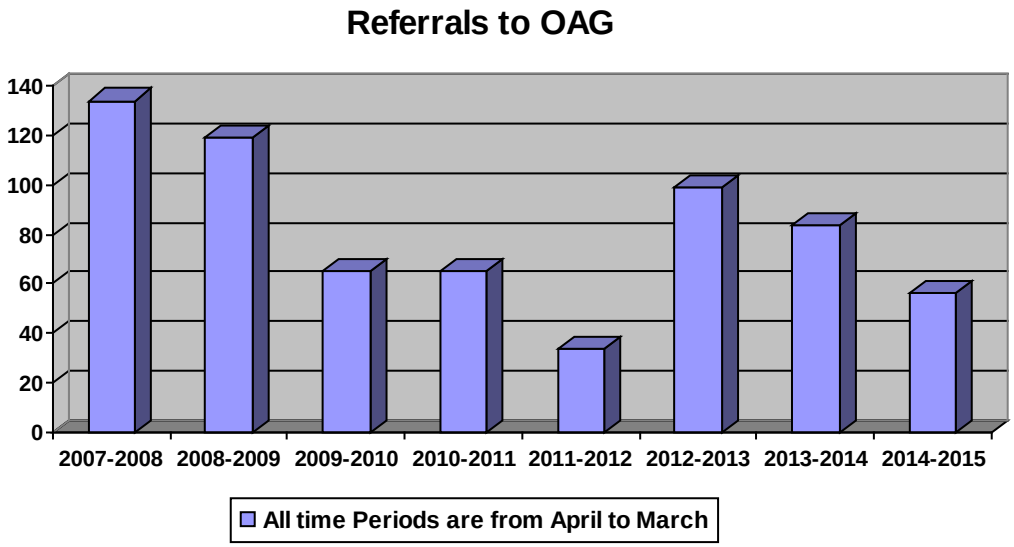
less. In 2007, the actual average time between the OAG's receipt of such notification and the offender's release date was 4 days; in 2008 it was 16 days; in 2009 it was 34 days; in 2010 it was 15 days; in 2011 it was 11 days; in 2012 it was 8 days; in 2014 through March 31, 2015, it was 12 days.



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, and although it started to increase in 2013, it has now leveled off.

In 2007-2008 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 that agency referred 65 cases; in 2011-2012 it referred 34 cases; in 2012-2013, 99 cases were referred; and in 2013 to 2014, 84 cases were referred. Between April 1st, 2014 and March 31st, 2015, OMH has referred 56 cases to the OAG. The various and complex factors driving annual case 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 in 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 "located" in a state prison responsible for his or her custody. Therefore, the petition is 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 remove the case to the county of the underlying sex offense conviction(s).[17] If an offender does not request venue to be transferred back to the

[15] MHL §10.06(a).
[16] MHL §10.06(c).
[17] MHL §10.06(b).

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 custody 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 the Department of Corrections and Community Supervision (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 law. [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 "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."

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[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*.
[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)

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. 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, determine 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 abnormality, the court must then determine what the disposition will be. The second part of the 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]

[27] MHL §10.03(i).
[28] *Id*.
[29] MHL §10.07(e).
[30] MHL §10.07(d), (f).
[31] MHL §10.03(e).

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 abides by conditions set by the court.

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 Central New York Psychiatric Center (CNYPC) in Marcy, New York, or St. Lawrence Psychiatric Center in Ogdensburg, New York.

The fact that a respondent is found to be a dangerous sex offender requiring confinement is not a life sentence and does not mean the offender will serve the rest of his or her life in a se-

[32] MHL §10.07(f).
[33] *Id*.
[34] MHL §10.01(b).

cure 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 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 sex offender 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 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 requiring confinement.[37] The Attorney General calls the OMH examiner to testify at the annual review hearing and the respondent often presents independent expert testimony on his or her behalf. These safeguards ensure the offender's legal rights are respected and that civil commitment 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] As of March 31, 2015, fifty-one offenders have been released from secure treatment facilities back into the community on a regimen of SIST.

2. Strict and Intensive Supervision and Treatment (SIST)

The legislative findings further provide that some sex offenders can receive treatment un-

[35] MHL §10.09(f).
[36] MHL §10.09(b).
[37] MHL §10.09(d).
[38] MHL §10.09(h).

der 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 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 seriously 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

[39] MHL §10.01(c).
[40] MHL §10.11(a)(1).
[41] *Id*.

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 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

[42] MHL §10.11(b)(1).
[43] MHL §10.00(b)(2).
[44] MHL §10.11(d)(1).
[45] MHL §10.11(d)(2).
[46] MHL §10.11(d)(4).
[47] MHL §10.11(f).

by clear and convincing evidence that the modifications are warranted.[48] However, when the sex offender brings a petition for termination, 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 into the community.[49] As of March 31, 2015, twenty-four offenders who had been placed on SIST have had their SIST conditions terminated and have been discharged from civil management supervision back into the community.

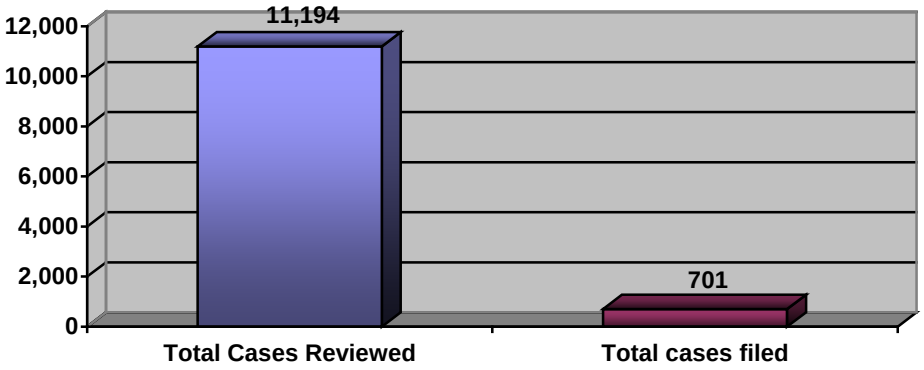
As time passes, it is expected that the number of offenders on SIST will grow considerably because of (1) the number of offenders that are released to SIST after trial, but also because (2) every time an offender is released from a secure treatment facility, the court has found he or she still suffers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

II. CIVIL MANAGEMENT AFTER EIGHT YEARS

A. REFERRALS AND CASES FILED

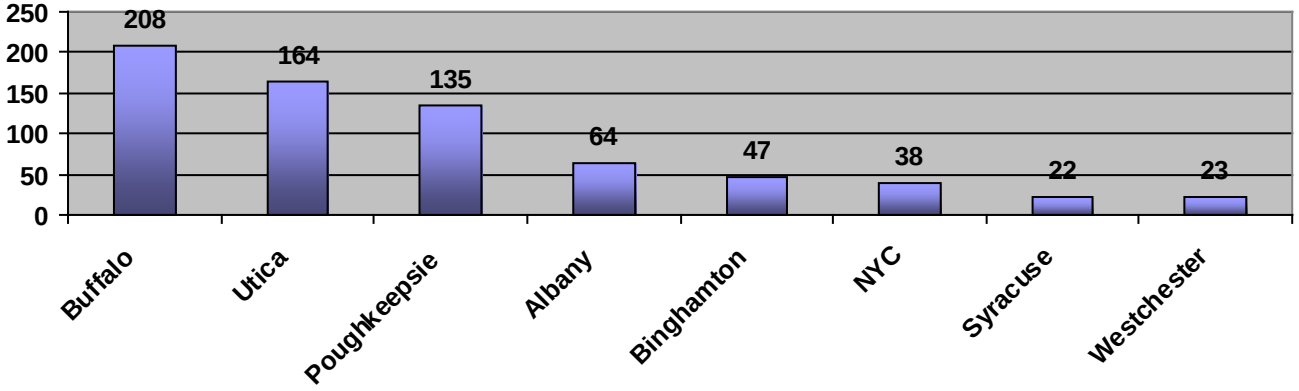
In the eight years since Mental Hygiene Law Article 10 became law, the New York State Office of Mental Health has reviewed 11,194 sex offenders to determine whether they are appropriate for referral to civil management. Of the cases reviewed, only 701 have resulted in OAG filing an Article 10 Petition. This includes what is considered the "Harkavy" cases addressed in previous reports.

[48] MHL §10.11(g).
[49] MHL §10.11(h).



B. FILINGS

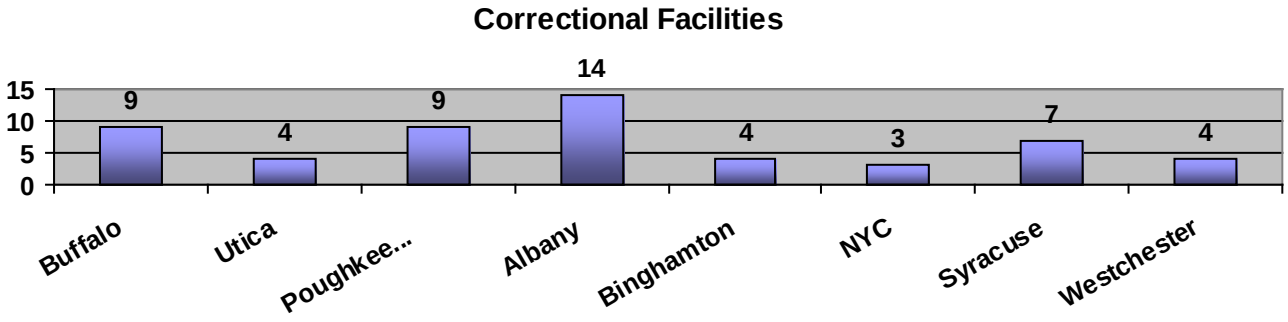
The graph below gives a breakdown of the geographical regions in which the MHL Article 10 cases have been filed. Since inception of SOMTA, the Buffalo regional office filed 208 petitions, Utica regional office filed 164, Poughkeepsie regional office filed 135, Albany office filed 64, Binghamton regional office filed 48[50], New York City office filed 38, Syracuse regional office filed 22, and the Westchester regional office filed 23 petitions.



The majority of referrals for civil management are sex offenders who are still in prison nearing

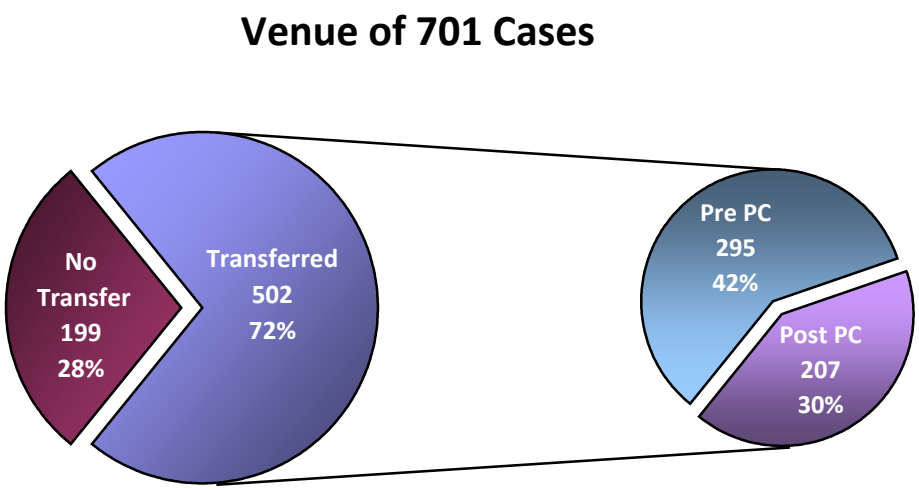
[50] The 10 counties which the Binghamton Regional Office covered for filing have been reassigned to the Syracuse (7 counties), Utica (1), Buffalo (1), and Poughkeepsie (1) Regional Offices.

their release date. Petitions are filed in the county in which the correctional facility with custody of respondent is located. The following graph is a break down of the number of maximum and medium security prisons within the jurisdiction of the particular regional office.



C. VENUE TRANSFERS

A petition is generally filed in the county where the correctional facility housing the respondent is located. After the civil management proceeding is commenced, the respondent may move to transfer venue to another county for good cause. Said transfer can occur prior to or after a probable cause hearing and/or finding, if a hearing is waived. Respondents have moved to change venue because often the county of conviction is their county of residence. In such instances, the Attorney General's Office may move to retain venue based upon good cause which can include, but is not limited to, the convenience of witnesses. As of March 31, 2015, there have been a total of 502 venue transfers, representing 72% of all cases. Of the 502 transfers, 295 (59%) were moved prior to the probable cause hearing and/or finding, while 207 (41%) moved afterward. The chart below illustrates the number of cases which have moved pre-probable cause versus post-probable cause out of all 701 cases.

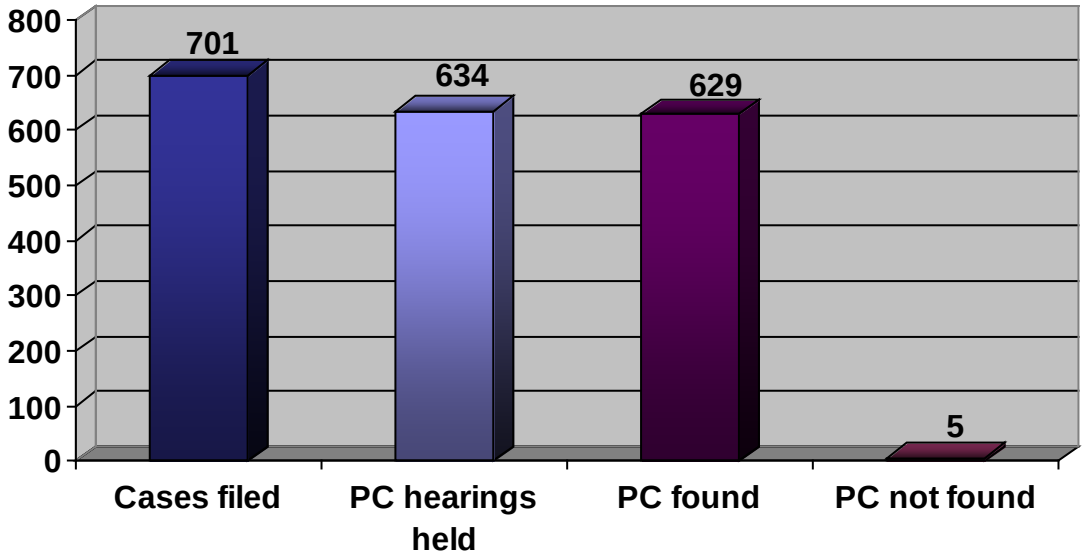


In total, 42% have moved venue prior to the probable cause hearing and/or finding while 30% moved thereafter.

D. PROBABLE CAUSE HEARINGS

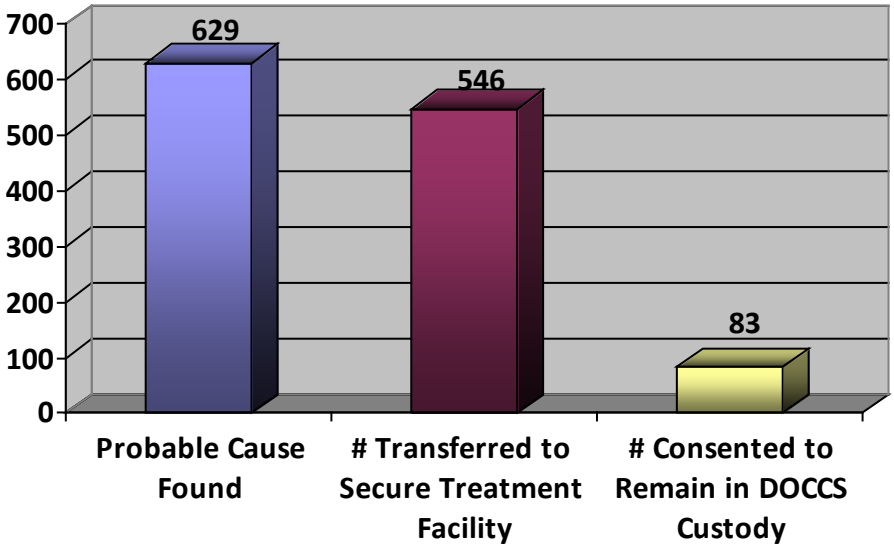
In the eight years since SOMTA's inception, OMH referred a total of 708 sex offenders for civil management.[51] The OAG has filed 701 petitions, conducted 634 probable cause hearings, and respondent has waived his right to the hearing on 67 occasions. The courts found probable cause to believe the offender suffered from a mental abnormality and was in need of civil management 629 times out of the 634 hearings held to date.

[51] These referrals include the Harkavy cases.



E. PRE-TRIAL DETENTION

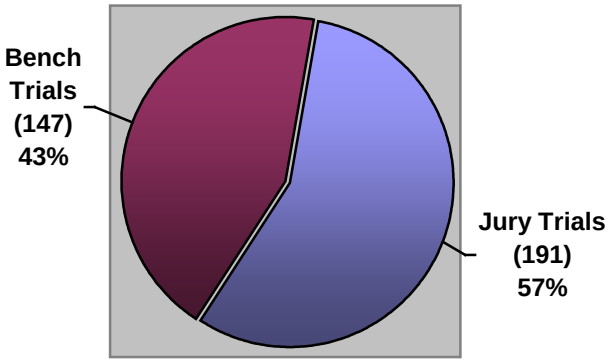
If the court determines that probable cause has been established, the respondent shall be housed in an OMH secure treatment facility pending trial, unless he or she elects to remain in DOCCS custody pending trial or final disposition of the matter. To date, 83 respondents have elected to remain in a correctional facility pending trial or final disposition.



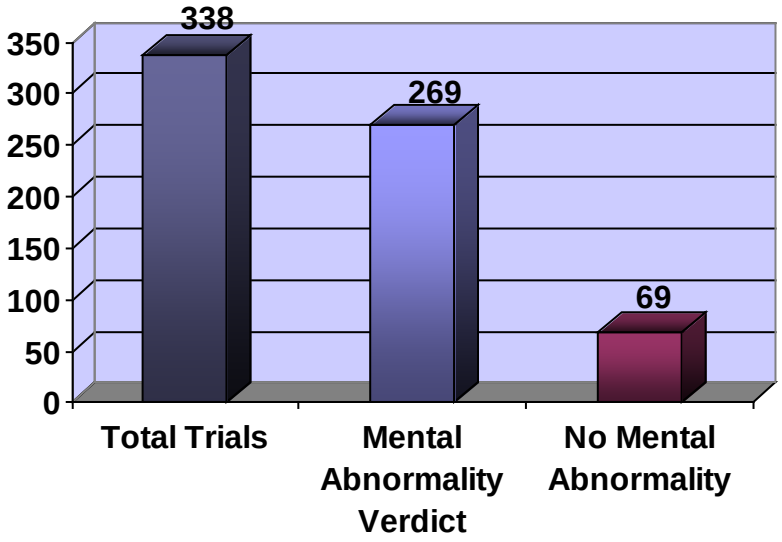
F. MENTAL ABNORMALITY

1. Trials

Since 2007, OAG has tried 338 Article 10 trials to final verdict. Of those, 191 were jury trials and 147 were bench trials after the offender waived his right to a jury.

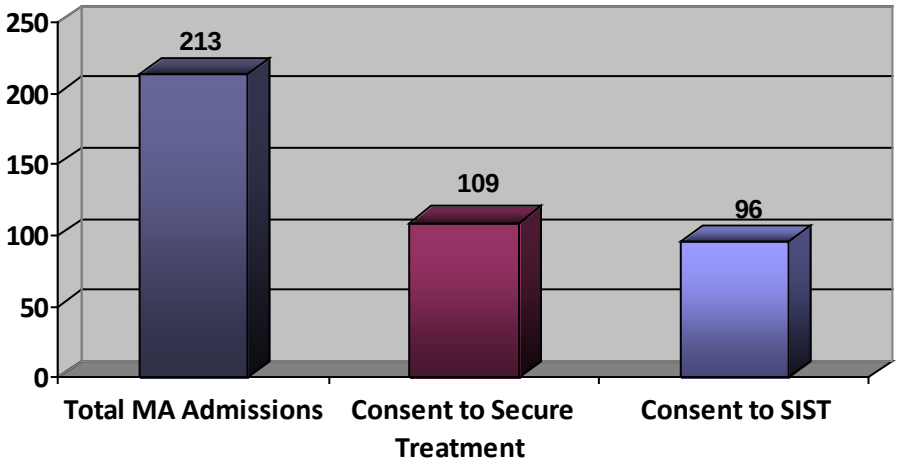


Of the 338 trials, the jury or judge rendered a verdict that 269 of those sex offenders suffered from a mental abnormality and 69 were adjudicated to have no mental abnormality.



2. Admission to Mental Abnormality and Consent to Treatment

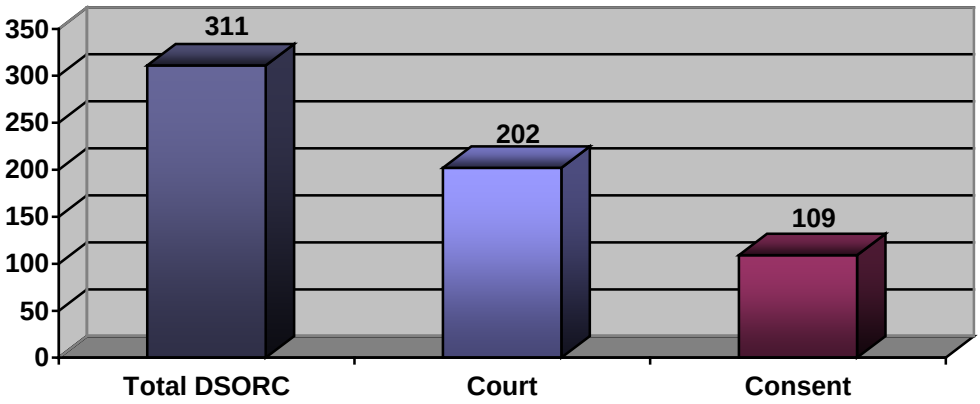
In addition to verdicts rendered after trial, 213 respondents, represented by counsel, admitted they suffered from a mental abnormality and consented to treatment. In 109 cases, the offender admitted he was a dangerous sex offender and consented to treatment in a secure OMH facility. In another 96 cases, the patient admitted he was a sex offender that required civil management and the court imposed a regimen of SIST.



G. DISPOSITIONS

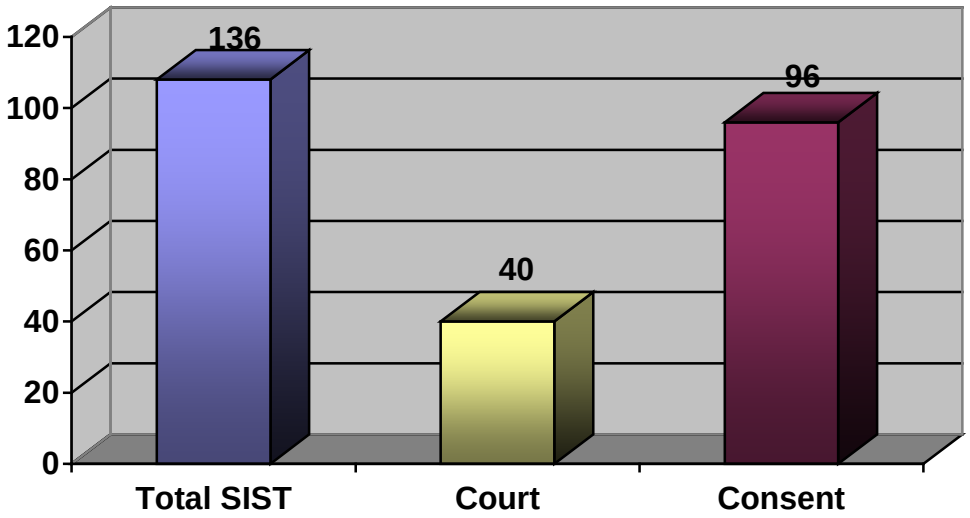
1. Dangerous Sex Offender Requiring Confinement (DSORC)

From April 13, 2007, to March 31, 2015, a total of 311 offenders have been found to be dangerous sex offenders requiring treatment in a secure OMH facility. Of that number, 109 respondents admitted they were dangerous sex offenders requiring treatment in a secure treatment facility, and 202 were adjudicated by the court to be dangerous sex offenders requiring confinement.



2. Strict and Intensive Supervision and Treatment (SIST)

From April 13, 2007, to March 31, 2015, a total of 136 offenders were initially placed on a regimen of SIST after a finding that he suffers from a mental abnormality. Of that number, 96 admitted they were sex offenders requiring SIST, and after a dispositional hearing 40 were adjudicated by the court to be sex offenders requiring SIST. The data suggests that if a dispositional hearing is conducted, more offenders are found to be dangerous sex offenders requiring confinement than are appropriate for SIST.

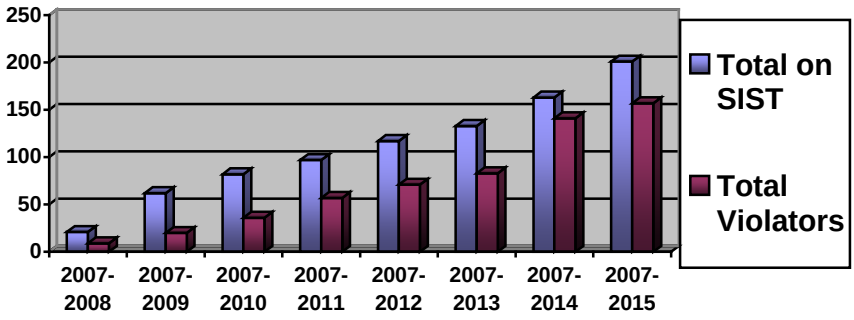


3. SIST Violations

The data 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.[52]

	2007-2008	2007-2009	2007-2010	2007-2011	2007-2012	2007-2013	2007-2014	2007-2015
Total on SIST	21	62	82	97	117	133	163	201
Total SIST Violators	9	20	36	57	71	83	141	157
% Violated	43%	32%	44%	59%	61%	62%	86.5%	78%

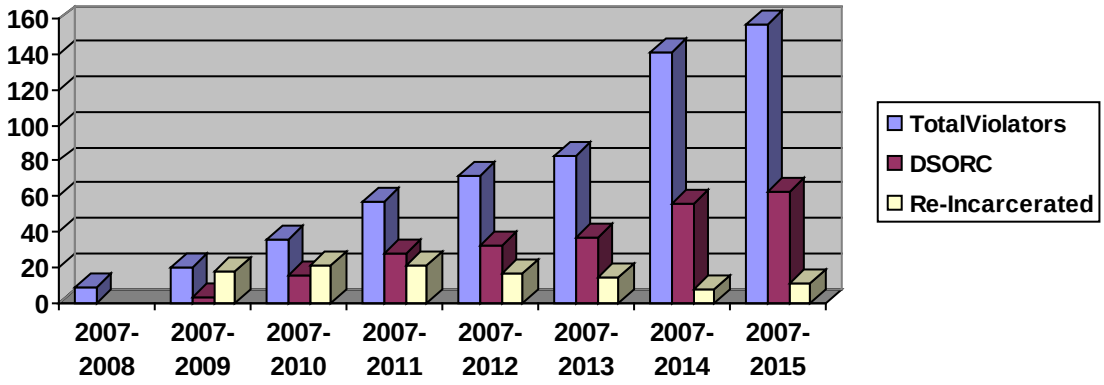
With each passing year, SIST violations increase. By the end of SOMTA's second year, the violation rate was 32%, with 40% of those violations taking place the first month on SIST. By the end of the third year the violation rate was up to 44%, and by the end of the fourth year, 59% had violated their conditions. That percentage has continued to increase; in the fifth year it leveled to 61% and 62%, respectively. In the past two years, the number of sex offenders on SIST significantly increased, and thus, the percentage of violations have also increased to 86.5% and 78%, respectively.



[52] This data is represented as cumulative for ease of comparison with Parole and DCJS data that is calculated by those agencies on a cumulative basis.

The chart and graph below reflect the disposition and outcome of the SIST violations. This data only reflects the violators who were removed from SIST because they were later determined to be dangerous sex offenders requiring confinement and were placed into a secure treatment facility, or they were re-incarcerated because the SIST violation also constituted a parole violation that was determined to warrant re-incarceration after an administrative parole hearing.[53]

	2007-2008	**2007-2009**	**2007-2010**	**2007-2011**	**2007-2012**	**2007-2013**	**2007-2014**	**2007-2015**
Total Violators	9	20	36	57	71	83	141	157
DSORC		3	15	28	32	37	56	63
Re-Incarcerated		17	31	33	53	57	61	66



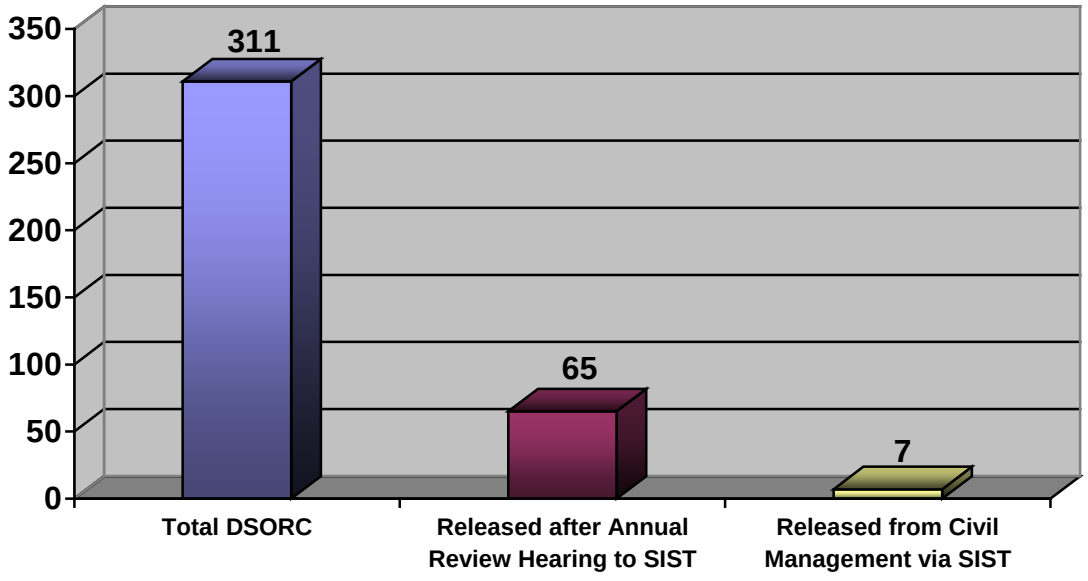
Generally, most SIST violations occur within the first year of being placed into the community. At this time, there has been no analysis to what percentage of the SIST violators were those placed into the community by the court after a dispositional hearing, as opposed to those placed into the community by the court without a dispositional hearing based upon an offender's admission that he is a sex offender requiring strict and intensive supervision and treatment.

[53] This data is also presented on a cumulative basis for ease of comparison with DOCCS and DCJS as those agencies calculate this data on a cumulative basis.

H. ANNUAL REVIEW HEARINGS

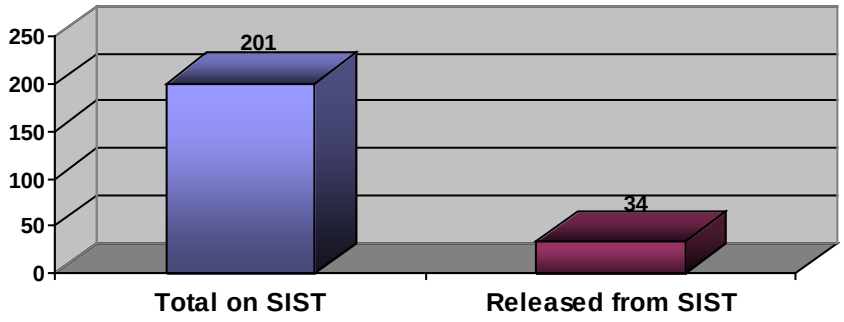
The number of annual review hearings held each year trends consistently with the increases in the number of sex offenders who are receiving treatment in a secure facility. The number of dangerous sex offenders requiring confinement who petition for annual review is expected to rise. Since SOMTA's inception, while some offenders have waived their right to a hearing and consented to continued treatment in the facility, over 300 dangerous sex offenders have had an annual review hearing held by the court. In the current report period, April 1, 2014 to March 31, 2015, there have been 72 evidentiary hearings.

Of the 311 dangerous sex offenders requiring confinement, 65 have been released from the secure treatment facilities and re-integrated into the community under a regimen of SIST. Of the 65 offenders released from a secure treatment facility to SIST, 7 have been released from SIST and no longer subject to the Sex Offender Management and Treatment Act.



I. SIST MODIFICATION OR TERMINATION HEARINGS

Of the 201 offenders placed on SIST, 34 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

Between April 2014, and April 2015, there have been a significant number of cases decided which have had a dynamic impact on Article 10 litigation.

A. FEDERAL

1. MHLS Lacks Associational and Third-Party Standing:

The U.S. Court of Appeals for the Second Circuit issued a summary order in Mental Hygiene Legal Services v. Cuomo, et. al. – No. 14-1421-cv, on April 22, 2015.[54] This order affirms the District Court's previous decision on remand issued March 31, 2014.[55] In that decision, the Southern District of New York granted the defendant's motion for summary judgment and dismissed MHLS's complaint because it lacked both associational standing and third-party standing to sue. In affirming, the U.S. Court of Appeals wrote:

> Although MHLS argues that its constituents' privacy concerns, fear of retaliation, and mental disabilities hinder their ability to bring lawsuits to vindicate their rights, there is scant evidence in the record of such hindrance. Quite the contrary, MHLS concedes that it already has represented constituents in numerous lawsuits in New York State court raising the same constitutional claims at issue here. On this record, we see no reason why, pursuant to its statutory mandate, MHLS will not continue to represent its constituents and assert these claims in such individual suits, which will predictably arise in the course of state court proceedings under SOMTA.

Id. (internal citation omitted).

[54] This Summary Order is unpublished, but can be found at: 2015 U.S. App. LEXIS 6647.
[55] MHLS v. Cuomo, 13 F. Supp. 3d 289 (2014).

B. NEW YORK STATE COURT OF APPEALS

The New York Court of Appeals decided six MHL Article 10 cases between April 1, 2014, and March 31st, 2015.

2. Expert Testimony and Hearsay Evidence:

On May 8, 2014, the Court issued two Article 10 decisions, In the Matter of State of New York v. John S., 23 N.Y.3d 326, 991 N.Y.S.2d 532 (2014) and In the Matter of State of New York v. Charada T., 23 N.Y.3d 355, 991 N.Y.S.2d 9 (2014). Combined, these decisions reinforce and add clarification to the Court's "ground rules" for admitting basis hearsay[56] testimony, which it recently established in Floyd Y., 22 NY3d 95 (2013). Floyd Y. held that due process requires the application of a two-pronged test for reliability and substantial relevance (probative value substantially outweighs prejudicial effect) before admitting basis hearsay in a jury trial. In that decision, the Court acknowledged that the admissibility of criminal charges that resulted in neither acquittal nor conviction presents a close question to be resolved by the trial court, which must closely scrutinize the evidence.[57] John S. presented the Court of Appeals with that precise question, whether a trial court's close scrutiny in resolving a close question comported with Floyd Y. and the due process framework it established.[58]

In 1968, John S. pleaded guilty to one count each of rape and robbery in full satisfaction of a multiple count indictment alleging a series of rapes and robberies. His conviction was later

[56] Basis hearsay is generally out of court statements and/or documents which in part form the basis of a testifying expert's opinion.

[57] John S., 23 NY3d at 343

[58] In addition to the basis hearsay issues, John S. also appealed other aspects of his case. He challenged the trial court's decision to unseal records under CPL § 160.50, which the Court of Appeals upheld pursuant to MHL § 10.08(c). He also challenged the jury's verdict by asserting that his admitted Antisocial Personality Disorder was insufficient to support a mental abnormality finding. The Court of Appeals concluded however, that the trial evidence was sufficient to support the jury's verdict. *But see* Donald DD., *infra*. notes 63 and 64.

vacated on mental incompetency grounds, and thus, he was neither acquitted nor convicted of the 1968 allegations. The trial court admitted these allegations given the substantial amount of reliable documentary evidence (i.e. indictments, witness statements, arrest records, and presentence reports) which all indicated a strikingly similar pattern of behavior. Further, the decision noted that in addition to vigorous cross examination, the prejudicial effect was checked by the court's limiting instructions to the jury and the exclusion of certain inflammatory portions of the evidence. Ultimately, the Court of Appeals held that the trial court did not abuse its discretion by admitting the 1968 evidence and that such evidence comported with due process.

In 1978, John S. was arrested but never charged for a second rape he allegedly committed a week after committing the September 16, 1978 rape that led to his Article 10 qualifying conviction. "Information about the [second] uncharged rape was culled from a single official record: the 1979 presentence report" on his qualifying conviction.[59] The trial court admitted evidence of the uncharged accusation contained solely in the presentence report.

The Court of Appeals held that evidence of the 1978 uncharged accusation should have been excluded as it was not sufficiently reliable, given there were no other sources which corroborated the allegation and John S. steadfastly denied them. Declining to deem presentence reports "automatically reliable" in Article 10 proceedings,[60] the Court held that while a presentence report may bear "certain indicia of reliability," it is "not so inherently reliable that it, alone, can sustain the admission" of uncharged crimes into evidence.[61] Nevertheless, the Court held that the trial court's error was harmless here, and no reversal was required since there was

[59] 23 NY3d at 346.
[60] See People v. Mingo, 12 NY3d 563 (2009), which held that hearsay information found in presentence reports is inherently reliable for purposes of determining the appropriate risk level of a sex offender under the Sex Offender Registration Act (SORA).
[61] Id. at 347.

ample proof based on admissible evidence.

Likewise, in Charda T. the Court was asked to determine whether a trial court abused its discretion by admitting expert testimony based on evidence of an uncharged rape contained solely within the pages of a presentence report. Quoting language from its same day decision in John S., the Court held that a presentence report "is not so inherently reliable that it, alone, can sustain the admission" of expert testimony on an uncharged crime.[62] However, though such evidence should have been excluded, it was harmless error, as "there is no reasonable possibility that, had this testimony been excluded, the jury would have reached a different verdict."[63]

3. Antisocial Personality Disorder Diagnosis Alone is Insufficient:

On October 28, 2014, a divided Court of Appeals issued a consolidated opinion which decided two cases: In the Matter of State of New York v. Donald DD. and In the Matter of State of New York v. Kenneth T., 24 N.Y.3d 174; 996 N.Y.S.2d 610 (2014).[64] In Donald DD., the court held that "in a Mental Hygiene article 10 trial, evidence that a respondent [sex offender] suffers from an antisocial personality disorder cannot be used to support a finding that he has a mental abnormality as defined by Mental Hygiene Law § 10.03(i), when it is not accompanied by any other diagnosis of mental abnormality."[65] Citing various social science sources which collectively indicate that between 40% to 80% of the U.S. male prison population could be diagnosed with ASPD, the Court indicated that it believes "that an ASPD diagnosis has so little relevance to the controlling legal criteria of Mental Hygiene Law § 10.03(i) that it cannot be relied upon to show mental abnormality for article 10 purposes."

The Court did not declare ASPD unreliable, but stated that the problem it sees with the

[62] Charada T., 23 NY3d at 361 (citing John S., at 347).
[63] Id. (internal quotations and citations omitted).
[64] While two separate cases, collectively, the decision is commonly and hereinafter referred to as Donald DD.
[65] 24 NY3d at 177.

diagnosis is that it "establishes only a general tendency toward criminality, and has no necessary relationship to a difficulty controlling one's sexual behavior." The Court held it was error for the trial court to admit proof of the ASPD diagnosis, combined with the sex offender's crimes, "but without evidence of some independent mental abnormality diagnosis, to ground a finding of mental abnormality within the meaning of Mental Hygiene Law article 10."[66] The Court declined to specify precisely what it meant by "independent mental abnormality," thus it remains an open question. However, by specifically upholding its prior Shannon S. decision,[67] the Court made clear that an "independent mental abnormality" need not be a particular diagnosis from the Diagnostic and Statistical Manual of Mental Disorders (DSM). Furthermore, in a footnote, the Court noted that Psychopathy[68] is "an extreme form of ASPD" which, the Court implied, could be admissible if the experts were to conclude that a sex offender's Psychopathy materially affected their conclusions regarding mental abnormality.[69]

4. Sufficiency of Evidence - Proving Serious Difficulty:

In the *Kenneth T.* portion of its consolidated Donald DD. decision,[70] the Court was asked to rule on the sufficiency of evidence of the Respondent's mental abnormality, particularly as it related to the diagnosis of Paraphilia NOS. However, without deciding any issue regarding Paraphilia NOS,[71] the Court dismissed the MHL Article 10 petition. On the factual record before it,

[66] *Id*. at 191.
[67] In the Matter of the State of New York v. Shannon S., 20 N.Y.3d 99 (2012), held that a mental abnormality need not necessarily be one identified within the Diagnostic and Statistical Manual of Mental Disorders (DSM) in order to meet the statutory requirement for mental abnormality under MHL 10.03(i).
[68] Psychopathy is widely studied and well known condition in psychology, though it is not listed in the DSM as a formal diagnosis. It is indicated by a high number of psychopathic traits identified on a continuum and measured on a psychometric instrument currently known as the Psychopathy Checklist-Revised (PCL-R). The original PCL was developed in the 1970's by Dr. Robert D. Hare.
[69] See Donald DD., at 183 (footnote 3).
[70] 24 N.Y.3d at 187.
[71] *Id*. The Court acknowledged that it previously held Paraphilia NOS sufficient to support a mental abnormality finding in Shannon S. (supra. note 66) and found "no compelling justification for overruling" that decision. Fur-

the Court found the evidence insufficient to prove "serious difficulty" as required by the definition of mental abnormality. The Court held that proof that Kenneth T. committed two rapes in a manner which would allow his victims to identify him and committed the second rape after serving a lengthy prison sentence for the first, is not clear and convincing evidence of "serious difficulty in controlling" his sexual misconduct under MHL § 10.03(i).[72]

The Court declined to decide "from what sources sufficient evidence of a serious difficulty controlling sex-offending conduct may arise," but stated they "cannot consist of such meager material as that a sex offender did not make efforts to avoid arrest and reincarceration."[73] The Court further held that expert testimony that a sex offender lacks "internal controls such as a conscience that might curb his impulses is not a basis from which serious difficulty controlling sexual conduct may be rationally inferred."[74] The Court reasoned that such evidence is "as consistent with a rapist who could control himself but, having strong urges and an impaired conscience, decides to force sex upon someone, as it is with a rapist who cannot control his urges."[75] Thus, what may suffice as clear and convincing evidence of a predisposed sex offender's serious difficulty in controlling sexually offensive conduct remains an open question.[76]

5. Least Restrictive Alternative and Sufficiency of Proof For Confinement:

On December 17, 2014, the Court decided In the Matter of State of New York v. Michael M., 24 N.Y.3d 649; 2 N.Y.S.3d 830 (2014). The Court made clear that least restrictive alterna-

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ther, the Court noted that "Paraphilia NOS is a controversial diagnosis," and implicitly questioned whether it "has received general acceptance in the psychiatric community," as would be the issue if the Respondent had requested and the trial court held a hearing pursuant to Frye, 293 F. 1013 (1923).

[72] *Id.*

[73] *Id*. at 188.

[74] *Id*.

[75] *Id*. (internal quotation marks omitted).

[76] The written dissent by Judge Graffeo (joined by Judges Abdus-Salaam and Read), concurred in the result only of *Kenneth T.* but on different analytical grounds than the majority. Judge Graffeo noted that the majority's rationale creates an "impossible standard" for legal sufficiency of serious difficulty. *See also* discussion *infra*. pp. 43-45 regarding unpublished New York County trial court decision in Floyd Y., March 10, 2015.

tive principles are not automatically transferred from one article of the MHL to another, and that Article 10 has its own implicit least restrictive alternative in SIST. Additionally, the Court addressed the sufficiency of proof needed to show that a Respondent is a "dangerous sex offender requiring confinement" versus a sex offender appropriate for SIST. Acknowledging the definitional differences between the terms "mental abnormality" and "dangerous sex offender requiring confinement,"[77] the Court wrote that Article 10 "clearly envisages a distinction between sex offenders who have difficulty controlling their sexual conduct and those who are unable to control it. The former are to be supervised and treated as 'outpatients' and only the latter may be confined." Michael M., at 659.

6. Annual Review Hearings - Venue Can Be Moved For Good Cause:

On February 12, 2015, the Court decided In the Matter of Tyrone D. v. State of New York, 23 N.Y.3d 661; 3 N.Y.S.3d 291 (2015). The Court's holding makes clear that venue can be moved in MHL § 10.09 annual review hearings for good cause shown, pursuant to MHL § 10.08(e). Good cause can include convenience of the witnesses and condition of the respondent. However, the Court explained that in order to show good cause, more is needed than general assertions of inconvenience. In his affidavit supporting the venue change, Tyrone D. merely made general assertions of inconvenience to unnamed family and other potential witnesses without providing the identity of a single person he intended to call on his behalf or the subject matter of any proposed testimony. Under these facts, the Court of Appeals held that there was insufficient cause shown for a change in venue, and the trial court properly denied the motion.

[77] See MHL §§ 10.03 (e), (i), and (r).

C. THE NEW YORK STATE APPELLATE DIVISIONS

Statewide, between April 1, 2014 and April 1, 2015, the Appellate Division decided a total of 32 cases addressing MHL Article 10 matters. The breakdown is as follows:

The First Department rendered three decisions; the Second Department delivered 16 decisions; the Third Department decided one case; and the Fourth Department issued 12 decisions. The following sections summarize the notable decisions.

FIRST DEPARTMENT:

7. Serious Difficulty - Distinct from Predisposition, Cannot be Inferred from a Diagnosis, Must be Proven with Non-Conclusory Evidence:

Decided February 19, 2015, Matter of the State of New York v. Frank P., 126 A.D.3d 150 (1st Dep't 2015), the Court stated, "the concept of predisposition and volition are separate and distinct." The Court noted that in Frank P.'s case, neither of the State's experts conducted a quantified analysis of factors leading to their conclusions. Instead, said the Court, the experts "opined in a conclusory fashion" that Frank P.'s diagnosis of Paraphilia NOS "predisposes him to commit sexual offenses and causes him to have serious difficulty controlling his sexual impulses." The Court cautioned that "drawing a conclusion that a respondent has a volitional impairment from only a diagnosis of sexual abnormality violates the Court of Appeals' recent mandate in Donald DD. that the State must prove, separate from the abnormality, that a sex offender has serious difficulty controlling his behavior."

8. Expert Testimony & Hearsay - Social Worker's Emailed Statements Regarding Respondent's Treatment Are Admissible Through Expert, No HIPPA or Constitutional Due Process Violation:

Decided March 17, 2015, In re State of New York Office of Mental Health v. Dennis J., 126

A.D.3d 537 (1st Dep't 2015), upheld the admissibility of the State expert's trial testimony concerning an email message he received from a social worker who had recently provided Dennis J. treatment in an OMH secure facility pending trial. The Respondent appealed based on several challenges, including hearsay per Floyd Y., Federal HIPPA standards, and a claimed constitutional due process violation. In the interests of justice, the Appellate Division declined to review the HIPPA challenge, deeming it unpreserved, but also noting that the Respondent's argument lacked merit. Similarly, the Court declined to reach the unpreserved constitutional due process challenge, but as an alternative holding, rejected the Respondent's claim on the merits. Moreover, on the basis hearsay challenge, the Court held that the trial court "providently exercised its discretion in admitting the expert's testimony." The State met the two-pronged test under Floyd Y. by establishing the reliability of the email at issue and that its probative value substantially outweighed any prejudice. Citing John S.,[78] the decision acknowledged that the trial court successfully "minimized any prejudice by instructing the jury to consider the social worker's statements solely as the basis of the expert's opinion, rather than for their truth."

SECOND DEPARTMENT:

9. Sex Offender's Waiver of Statutory Right to Counsel, Desire to Proceed *Pro Se*, Must Be Unequivocal, Voluntary, and Intelligent – Court Must Conduct Searching Inquiry:

Decided June 4, 2014, In the Matter of State of New York v. Raul L., 120 A.D.3d 52 (2d Dep't 2014), held "that a respondent in a SOMTA proceeding can effectively waive his or her statutory right to counsel only after the court conducts a searching inquiry to ensure that the waiver is unequivocal, voluntary, and intelligent." The Court explained that the "searching in-

[78] *Supra*. note 56.

quiry" need not "adhere to any rigid formula, litany, or catechism;" it could be similar to what is required in criminal matters. Citing Floyd Y.,[79] the Court reiterated that while MHL Article 10 proceedings are civil, rather than criminal, and that the "constitutional protections of the Sixth Amendment, which guarantees the right to counsel, do not apply," respondents nevertheless have a statutory right to counsel.[80] As long as the trial court's searching inquiry accomplishes "the goals of adequately warning" a respondent "of the risks inherent in proceeding *pro se*, and apprising [a respondent] of the singular importance of the lawyer in the adversarial system," as equally as it ensures that the respondent's decision is made unequivocally, voluntarily, and intelligently, the waiver can be granted.

10. Expert Testimony and Hearsay Evidence – "Unproven Acts" Inadmissible Absent Showing of Reliability:

Decided June 4, 2014, less than a month after the Court of Appeals decisions in John S. and Charada T.,[81] in Matter of State of New York v. Walter R., 118 A.D.3d 714 (2d Dep't 2014), the Second Department reversed and set aside a verdict of mental abnormality based on expert trial testimony that included evidence of "unproven acts." The Court noted that "both the State's experts testified to the appellant's convictions, as well as unproven acts, which formed the basis of their opinion that appellant suffered from a mental abnormality." The Court remarked that the "experts provided considerable hearsay testimony concerning these unproven acts, relying, *inter alia*, upon hearsay evidence within probation reports and other documents, and not personal knowledge." Citing Floyd Y., the Court found that the State failed to demonstrate through other evidence that the hearsay in question was reliable.

[79] *Supra*. page 28.
[80] See MHL § 10.06(c),(d).
[81] *Supra*. notes 56 – 62.

11. Detained Sex Offender - No Distinction Between Lawfully or Unlawfully Held, Probable Cause Finding Is Independent Basis For Confinement

Decided July 16, 2014, in People ex rel. Bourlaye T. v. Connolly, 119 A.D.3d 825 (2d Dep't 2014, the Court upheld the MHL § 10.06(k) probable cause finding as an independent basis for Respondent's confinement, thereby defeating the *habeas corpus* challenge. The Court stated, "[n]ot only was the petitioner under parole supervision at the time the article 10 proceeding was commenced . . . he was actually imprisoned" by DOCCS after being released from Federal Immigration and Customs Enforcement custody while pending formal deportation. Relying upon Court of Appeals precedents,[82] the decision reiterated "that the statutory language of article 10 does not distinguish between lawfully and unlawfully detained sex offenders."

12. Jurisdiction – "Detained Sex Offender" and "Related Offense" Under MHL § 10.03 Satisfied Where Paroled Sex Offender Still Subject to PRS is Incarcerated for Non-Sex Offense Felony:

Decided August 20, 2014, in Matter of State of New York v. Claude McC., 122 A.D.3d 65 (2d Dep't 2014), the Court was asked to decided "whether the respondent's conviction of a non-sex offense, which he committed while on postrelease supervision for an underlying offense, was a 'related offense,' as that term is defined in [MHL] § 10.03(l)." The Court held that a paroled sex offender still subject to postrelease supervision who is subsequently convicted for a non-sex felony (criminal possession of stolen property) and nearing his release date from prison on the subsequent (non-sex) conviction, is a "detained sex offender" under MHL § 10.03(g). The Court reasoned that a non-sex felony can be a "related offense" under MHL § 10.03(l) when said crime is committed while the sex offender is on postrelease supervision for his previous sex crime and

[82] People ex rel. Joesph II. v. Superintendent of Southport Correctional Facility, 15 N.Y.3d 126 (2010); Matter of State of New York v. Matter, 78 A.D.3d 1694 (2010); People ex rel. David NN. v. Hogan, 53 A.D.3d at 841, 844 (2008).

where, as here, the new commitment to DOCCS requires a recalculation of the previous sentence and term of postrelease supervision.

Citing MHL § 10.03(l), the Court focused on a category of offenses "which are the bases of the orders of commitment received by [DOCCS] in connection with an inmate's current term of incarceration." Quoting the Court of Appeals decision in Matter of State of New York v. Rashid, 16 N.Y.3d 1, 14 (2010), the Court held that this third "category covers 'inmates' serving their 'current term of incarceration'… and is 'broadly worded, reflecting the legislature's apparent decision to give the State more leeway to pursue civil commitment against soon-to-be-released [DOCCS] inmates than parolees.'" The Court stressed that "[r]eading the statute as prohibiting evaluation of the respondent's need for civil management upon his release from prison – while he is still subject to the sex offense sentence – is inconsistent with the objectives of [MHL] article 10. . . ."

Furthermore, the Court noted that "[h]ad the respondent violated the terms of his postrelease supervision by virtue of conduct that did not constitute a felony," and he was subsequently "re-incarcerated as a result of such a violation, he could still be subject to proceedings pursuant to [MHL] article 10." However, reading the statute such that "a sex offender is not subject to proceedings under [MHL] article 10 when the period of postrelease supervision is held in abeyance pending [his] imprisonment for a more egregious violation . . . i.e., a violation constituting a felony that is not a sex offense," the Court said, "is not a reasonable result."[83]

[83] See also the October 1, 2014 decision of the Second Department in Matter of State of New York v. Anthony J., 121 A.D.3d 697 (2014).

13. Paraphilia Not Otherwise Specified, Non-Consent, Upheld As Reliable Evidence of Mental Abnormality:

Decided September 24, 2014,[84] in Matter of State of New York v. David M., 120 A.D.3d 1423 (2d Dep't 2014), the Court upheld the jury verdict finding mental abnormality based in part upon evidence of the respondent's diagnosis of Paraphilia Not Otherwise Specified, Non-Consent. Citing Shannon S., the Court stated, "the question of whether the diagnosis of 'Paraphilia Disorder-Not Otherwise Specified[,] Nonconsent' constituted a reliable predicate for a finding of mental abnormality presented a factual issue to be resolved by the jury, and there is no basis to disturb its findings."

14. Conditions Not Found in the DSM (Sexual Preoccupation and Sexually Deviant Interest in Underage Girls) Legally Sufficient Evidence of Mental Abnormality – However, Cumulative Effect of other Errors, Including Denying Motion for *Frye* Hearing on the PCL-R Instrument, Reversible:

Decided April 1, 2015, In the Matter of State of New York v. Ian I. (Anonymous), 127 A.D.3d 766 (2d Dep't 2015), upheld as legally sufficient evidence the expert opinion testimony that Respondent suffered not only from the DSM diagnoses of Bipolar Disorder, Antisocial Personality Disorder, and Polysubstance Abuse Disorder, but also from conditions which are not listed in the DSM. Citing Shannon S.,[85] the Court stated, "[w]hile the diagnoses of sexual preoccupation and sexual interest in underage girls are not recognized diagnoses in the [DSM] it does not necessarily follow that those conditions were not relevant to the determination of mental abnormality." The Court held that "the evidence upon which the jury made its determination was legally sufficient to support the verdict," and that the verdict "was supported by a fair interpreta-

[84] This decision was issued just one month prior to the October 28, 2014 Donald DD (Kenneth T.) decision; see *supra.* Note 64,
[85] *Supra*. note 67.

tion of the evidence."

However, the Court noted several errors, the cumulative effect of which required reversal. The Court found error in denying the Respondent's pretrial motion for a *Frye* hearing on the use of the PCL-R[86] at trial, as well as concluding that the probative value outweighed the prejudicial effect of using the terms "psychopath" and "psychopathy" during trial. The decision found error in denying Respondent's motion for mistrial when a State expert witness testified "that a previous court made a finding of probable cause to believe that [the Respondent] suffers from a mental abnormality." The Court noted this error was "compounded" when, in reply to the Respondent's objection, the trial judge asked the parties to stipulate to that fact. Lastly, the Court found error in admitting testimony regarding the Respondent's youthful offender adjudication for grand larceny. Quoting MHL § 10.08 (c), the Court stated that evidence of such offense "does not constitute 'information relevant to a determination of whether the appellant is a sex offender requiring civil management.'"

15. Dispositional Hearing Not Mandated by MHL § 10.07(f):

Decided April 29, 2015, In the Matter of State of New York v. Wayne J. (Anonymous), 127 A.D.3d 1211 (2d Dep't 2015), held that MHL § 10.07(f) does not require that a dispositional hearing be held for purposes of determining whether a sex offender requiring civil management is appropriate for confinement or SIST. The decision emphasized the word "may" found in MHL § 10.07(f) which states, in relevant part, that after a finding of mental abnormality, "then the court shall consider whether the respondent is a dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision. The parties may offer additional evidence, and the court shall hear argument, as to that issue." The Court stated, "[c]ontrary to

[86] *Supra*. note 68.

the appellant's contention, the statute does not mandate a dispositional hearing."

16. Report of Expert Testifying in Dispositional Hearing Is Admissible:

Decided February 4, 2015, Matter of State of New York v. Eric P., 125 A.D.3d 669 (2d Dep't 2015), held that MHL § 10.08(g) "does not prohibit the admission into evidence of a psychiatric examiner's report when the author testifies at a dispositional hearing." The Court stated, "in all proceedings or hearings held pursuant to [MHL] article 10, except for probable cause hearings and certain SIST-related proceedings, when a psychiatric examiner who authors a report does not testify, his or her report is inadmissible in the absence of a showing that the author is unavailable to testify, or other good cause."

THIRD DEPARTMENT DECISIONS:

17. Jurisdiction and Immigration - Article 10 Proceeding Upheld Against Dual Citizen Sex Offender Wishing to Expatriate and Denounce US Citizenship:

Decided July 3, 2014, in Matter of State of New York v. Horowitz, 119 A.D.3d 1029 (3d Dep't 2014), the Court upheld the jurisdiction of the State to pursue civil management of a dual citizen sex offender wishing to leave the country for Israel and denounce his U.S. citizenship. Respondent's appeal urged dismissal of the MHL Article 10 proceeding by arguing violations of claimed due process and equal protection rights to expatriate and renounce U.S. citizenship. The Court summarized the Respondent's theory of the appeal as that the "petition must be dismissed so that he may be released from DOCC's custody in order to leave the United States and return to Israel, where he will effectuate his expatriation." In reply, the Court stated, "[w]e flatly reject this argument, which presupposes, among other things, that respondent would actually exit this country if he were released from custody. Even if he did leave, the state is not required to bear

the risk that petitioner – an experienced international fugitive – would not return to New York thereafter."

The Court noted that so far, the Respondent remains a U.S. citizen confined as a sex offender who is alleged to have a mental abnormality and is in need of civil management and thus, the state has a "legitimate interest in protecting society from the risks he poses." Rejecting the notion that the Respondent has a fundamental right to expatriate, the Court noted that the Respondent provided no persuasive legal authority for that assertion and regardless, "assuming that such fundamental right exists, [the State's] infringement thereof through this SOMTA proceeding is narrowly tailored to achieve a compelling state interest." (internal quotation marks and citations omitted).

Lastly, the Court reasoned, "[g]iven that respondent has not yet effectively renounced his citizenship in accord with the procedures proscribed by Congress, any claim that such renunciation impacts petitioner's interest in his civil confinement is, at best, premature."

FOURTH DEPARTMENT DECISIONS:

18. Sufficient Evidence - Diagnosis Forming Basis of Mental Abnormality Not Required to Have a Sexual Component:

Decided August 8, 2014, in Matter of State of New York v. Nervina, 120 A.D.3d 941 (4th Dep't 2014), the Court held, *inter alia*, that respondent's Personality Disorder[87] diagnosis was sufficient to form the basis of a mental abnormality finding. The Court stated that MHL "does not require that the underlying condition, disease, or disorder serving as the basis for a finding of

[87] The DSM-5 definition of Personality Disorder is "an enduring pattern of inner experience and behavior that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early adulthood, is stable over time, and leads to distress or impairment." The DSM-5 lists 10 types of Personality Disorders, each with distinct and separate criteria. Nervina was diagnosed with three of those types: Borderline Personality Disorder, Narcissistic Personality Disorder, as well as Antisocial Personality Disorder.

mental abnormality have a sexual component to its diagnosis." The Court stressed that "rather, the law requires only that the underlying condition, disease or disorder affect respondent in a manner that predisposes him … to the commission of conduct constituting a sex offense and that results in respondent having serious difficulty in controlling such conduct." (internal quotation marks and citations omitted).

19. Evidence - Reliability of Actuarial Assessment Instruments Go to Weight, Not Admissibility:

Decided September 26, 2014, in Matter of State of New York v. Castleberry, 120 A.D.3d 1535 (4th Dep't 2014), the Fourth Department upheld an Order determining the respondent to be a dangerous sex offender requiring confinement in a secure treatment facility after a dispositional hearing in which the state experts offered testimony based upon actuarial risk assessment instruments. The Court held that "Respondent's challenge to the reliability of the actuarial assessment instruments used by petitioner's expert is actually a challenge to the weight of that evidence rather than its admissibility." (internal quotation marks and citations omitted).

20. Sufficiency of Evidence – Prior Jury Verdict Does Not Preclude Subsequent Review of Mental Abnormality at Annual Review Hearing, Donald DD. Applies:

Decided January 2, 2015, Matter of Groves v. State of New York, 124 A.D.3d 1213 (4th Dep't 2015), involved a challenge to an order releasing the respondent from confinement and discharging him from civil management after an annual review hearing, wherein experts for both the State and the respondent opined that he suffered from Antisocial Personality Disorder. Citing Donald DD.,[88] the Court explained "that diagnosis is insufficient, as a matter of law, to support a 'mental abnormality' finding." Further, the Court said, "[w]e reject the [State's]

[88] *Supra*. pages 29 -31, note 64.

contention that the jury determination that petitioner[89] suffered from a 'mental abnormality' in 2008 precludes any subsequent review of that issue." The Court emphasized the term "currently" found in MHL § 10.08(b), and reminded that "as part of each annual review, a psychiatric examiner is required to report to the Commissioner of Mental Health whether such person 'is *currently* a dangerous sex offender requiring confinement.'" 124 A.D.3d at 1214.

D. TRIAL COURT DECISIONS

21. Sufficiency of Evidence – *Kenneth T.* Sets "New Bar" and "Significantly Increased Quantum of Evidence" Required to Prove Serious Difficulty:

In a written decision and order dated March 10, 2015, the New York County Supreme Court (D. Conviser, A.J.S.C.) vacated under CPLR § 4404(a) the unanimous jury verdict finding mental abnormality, dismissed the MHL Article 10 petition, and stayed the ruling to allow for immediate appeal. In the Matter of the Application of The State of New York v. Floyd Y. (New York County Index No. 30061-2008).[90] The fifty-one page decision stated that prior to *Donald DD.*, and more particularly the *Kenneth T.* portion thereof, [91] "there would have been no question that the evidence in this case was legally sufficient." However, the Court asserted that the language in *Kenneth T.* "significantly increased the quantum of evidence" required to prove the serious difficulty element of mental abnormality. The Court also pointed to "an extraordinary gulf between the previous rulings of trial and mid-level appellate courts and [recent decisions] of the Court of Appeals" in Article 10 cases. The Court wrote, "[t]he *Kenneth T.* decision did not an-

[89] In annual review hearing captions and nomenclature, the confined sex offender is the petitioner.
[90] This decision and order is the result of the retrial on remand from the Court of Appeals previous Floyd Y., 22 N.Y.3d 95 (2013) decision. See *supra.* page 27.
[91] *Supra*. note 64.

nounce any bright-line legal sufficiency rules for Article 10 cases and on its face is a decision limited to its facts . . . . however, its implications are far greater."

In a thorough exploration of those implications, the decision engaged in an extensive factual comparison of respondents Floyd Y. and Kenneth T. and pointed out evidentiary distinctions between their respective trials. Moreover, the Court also discussed language in the *Kenneth T.* decision and the subsequent First Department decision in *Frank P.*[92] to analyze the general psychological methods of experts which produce "detailed psychological portraits" of sex offenders in Article 10 proceedings. The trial Court focused its analysis on the expert methodology of assessing the "serious difficulty" element of the mental abnormality definition, which the decision refers to as the standard that provides "the justification for the Article 10 system." The decision notes that "what the Court of Appeals in *Kenneth T.* found lacking was not the extent of evidence which was presented…" but, "…the validity of the [expert's] inference itself, the validity of allowing an offender's knowledge that he might get caught to permit [an expert's] conclusion that he lacked volitional control." Yet, "drawing inferences from behavior, primarily sexually offending behavior, is what experts do in these cases to arrive at their conclusions," the decision stated. "If that is an illegitimate method of determining serious difficulty, as the *Kenneth T.* court asserted, however, then it is unclear how the State will be able to prove most of these cases," said the Court. Moreover, the Court asked, "[i]f an expert cannot infer serious difficulty from either the circumstances surrounding an offender's crimes (*Kenneth T.*) nor an expert's psychiatric diagnoses (*Donald DD.* & *Frank P.*), how can Mental Abnormality be proven?"[93] The decision went on to state, "in this Court's view, the 'detailed psychological portraits' the Court sought in *Kenneth T.* may be unattainable given our current understanding of human be-

[92] *Supra*. page 33.
[93] This notion is echoed by the "impossible standard" language found in Judge Graffeo's dissent in Donald DD. (Kenneth T.), 24 N.Y.3d at 200; see also supra. notes 69 – 76.

havior, at least in the vast majority of Article 10 cases."

The trial Court indicated that the "*Kenneth T.* decision primarily concerned the quantum of proof which is necessary to distinguish an offender who has serious difficulty controlling his sexually offending behavior from an offender who has greater volitional control but chooses not to exercise it."[94] Based on the U.S. Supreme Court's language in Kansas v. Crane,[95] the trial court referred to this concept more succinctly as the "irresistible impulse\impulse not resisted distinction." The Court stated, "prior to *Kenneth T.*, this court is not aware of any cases in which evidence was held legally insufficient because the 'irresistible impulse\impulse not resisted' distinction was not adequately proven." Overall, regarding the evidence of serious difficulty in this matter, the Court wrote, "it is clear to this Court that the new bar set by *Kenneth T.* was not met here." The Court stayed its own decision to allow for appeal, which is pending.

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. C.B. – C.B.'s known sex crimes began at age 15, when he kidnapped a 10-year-old neighbor girl off the street by carrying her into the back of a building and dragging her up three flights of a stairwell where he digitally and vaginally raped her. Between ages 23 to 25, C.B. went on to anally and orally sodomize two of his younger half-brothers, ages 4 and 6, on multiple occasions, as well as orally sodomize the 5-year-old niece of his girlfriend. He ultimately pleaded to one count of Sex Abuse 1st in full satisfaction and was sentenced to a 6½-year term of incarceration, followed by a three-year term of post-release supervision. C.B. was diagnosed with Pedophilic Disorder, Sexually Attracted to Both Males and Females, Non-Exclusive Type

[94] See *supra*. note 76.
[95] Kansas v. Crane, 534 U.S. 407 (2002).

(with Sexually Sadistic Traits), Antisocial Personality Disorder, and a high level of Psychopathic traits. A jury unanimously found C.B. to suffer from a mental abnormality and, after his dispositional hearing, the court found him to be a dangerous sex offender requiring confinement.

State v. V.S. – In 1984, at age 17, V.S. was arrested and charged with misdemeanor sexual misconduct. He was arrested in 1986 for felony sex abuse 1st on allegations of forcible sexual contact including hitting and choking his female victim, which he pleaded down to misdemeanor sexual misconduct. In 1988 (age 21), V.S. was arrested on two distinct occasions and charged with Rape 3rd, then Rape 1st for two separate incidents involving two different victims. In the Rape 3rd case, V.S. sodomized a female, choked her, forced her to drink her own urine, and threatened to kill her if she reported him to police. In the Rape 1st case, he held a knife to a 16-year-old girl's throat and threatened to kill her while he raped her. He was ultimately convicted for Rape 3rd, and sentenced to four months jail and a five-year term of probation starting in October 1988. He violated probation in August 1989 when he and an accomplice broke down the door of a young couple's residence while claiming to be FBI agents searching for drugs. V.S. physically assaulted the male resident, forced him to strip naked for a "drug search" and then locked him in a closet. V.S. then strip searched the 20-year-old girlfriend who, it should be noted, was the same female victim from his 1984 offense described above. He then released the boyfriend from the closet and forced the two victims to perform oral sex upon each other, ordering them to bite each other's genitals as hard as each could. He then confined the boyfriend back in the closet, and forced the female to perform oral sex upon him while yelling sexual expletives at her. V.S. then vaginally raped the girl while choking her neck with his hands. V.S. beat the male victim nearly unconscious, stole items from the residence, and kidnapped the female, forcing her into the car with him. Convicted by plea to Rape 1st, Sodomy, Burglary, and Criminal Impersonation, he was sentenced to 8-16 years concurrent and was paroled in 2001 after serving 11 years. In 2004, while on parole, V.S. raped and sodomized a 27-year-old female. He convinced the victim, whom he had just met at a party, to take a ride with him and, upon parking the car, V.S. forced the female in the back seat, stripped her naked, and forced her to masturbate while he watched. He then forced her back to the front seat, where he vaginally raped and anally sodomized her. While raping her, he slapped her repeatedly, choked her, and threatened to kill her with a gun. Before releasing her, he threatened to kill her and her children if she reported the rape. He was convicted by plea to Rape 1st and sentenced to an 8½-year to 10-year indeterminate term of incarceration, with a five-year term of post-release supervision. V.S. was diagnosed with Sexual Sadism, Antisocial Personality Disorder (ASPD), Alcohol Dependence, and Psychopathy, among others. V.S. elected to proceed with a bench trial and the court found him to suffer from a mental abnormality. Following a dispositional hearing, the court found that V.S. is a dangerous sex offender requiring confinement.

State v. C.R. – In 1998, C.R. (age 47) was convicted after trial of sex abuse 2nd and received a three year term of probation resulting from the abuse of an 11-year-old boy who was staying in his home as a foster child. In the summer of 2005, C.R. (age 53) engaged in repeated molestation of two young brothers, ages six and eight, on multiple occasions and home visits. C.R. became acquainted with the boys through their grandmother. On the home visits and overnight stays, C.R. would lie in bed with both boys, and would rub the eight-year-old's genitals, through his clothing, while the boy's younger brother was lying between them. On one of those occasions, R's fondling lasted approximately 50 minutes. C.R. touched the boys sexually on most of the nights that they stayed over. Although the 6-year-old victim denied that R had ever touched him sexually, R admitted to the State Police that he had sexually abused the 6-year-old as well. In 2006, he was convicted of Sex Abuse 1st and sentenced to a five-year term of incarceration, plus a three-year term of post-release supervision. While in DOCCS sex-offender treatment, C.R. also admitted to orally sodomizing the six-year-old brother. Additionally, C.R disclosed that he molested three of his young nephews on multiple occasions over a several year period. Within five months of his parole, he was arrested for inappropriate hugging and kissing incidents involving an eight-year-old neighbor boy and a different nine-year-old neighbor boy. This led to C.R.'s arrest and separate charges of Endangering the Welfare of a Child which he pleaded down to Harassment violations. As a result, C.R.'s parole was revoked and he was returned to DOCCS custody. C. R. was diagnosed with Pedophilic Disorder, Non-Exclusive Type, Sexually Attracted to Males. C.R. waived his trial and admitted to suffering from a mental abnormality. After also waiving his right to a dispositional hearing, the court ordered him to an OMH secure treatment facility as a dangerous sex offender requiring confinement.

State v. G.T. – G.T. has an extensive and diverse criminal history (over 35 arrests, 18 convictions) stemming back to his early youth. His known sex crimes began at age 23 when he raped a 13-year-old girl resulting in her hospitalization and pregnancy. At 25, G.T. raped a 14-year-old learning-disabled runaway girl at knife-point and under threat of death, which resulted in her contracting gonorrhea. While on parole for the previous offense, G.T. (age 28) stalked his former girlfriend and mother of his child, following her home and forcing his way inside, wherein he brutally raped and anally sodomized the victim until she bled. He was sentenced to three to six years indeterminate and was paroled twice, violating the same day and within five days of release, respectively. At age 38, G.T. befriended and coaxed a 15-year-old girl into leaving her home and running away with him. Over several days, he engaged in repeated acts of oral and vaginal rape of the girl, who was usually too intoxicated to resist and under threat when sober, which resulted in her contracting herpes. Upon guilty pleas to two Rape 3rd counts, G.T. was sentenced on each to two-to-four-year consecutive terms. G.T. was diagnosed with Antisocial Personality Disorder, Borderline Personality Disorder, Cannabis Use Disorder, and Alcohol Use Disorder. He was also found to exhibit a very high level of psychopathic traits and a high level of sexual preoccupation. After waiving his right to a jury, a bench trial and dispositional hearing was held. The court found G.T. to suffer from a mental abnormality and to be a dangerous sex

offender requiring confinement. G.T. subsequently filed a motion to vacate the mental abnormality verdict relying upon Donald DD. (infra.), which the trial court ultimately denied.

State v. J.S. – J.S pleaded guilty to one count of Attempted Rape 1st, in satisfaction of four counts of Rape 1st and four counts of Sodomy 1st. His conviction is the result of four separate occasions where he engaged in sexual intercourse by forcible compulsion and oral sodomy of a seven-year-old girl, who was the younger sister of his then girlfriend. He received a five-year term of incarceration followed by a five-year term of post-release supervision. J.S. was paroled but violated after failing a polygraph and admitting to having unapproved contact with his daughter and an unapproved sexual relationship with an undisclosed female. He was again paroled and violated for being discharged from sex offender treatment for failure to complete assignments, ongoing deception, and engaging in a sexual relationship with an unauthorized female. During Parole's investigation, J.S. admitted to sexually molesting his five-year-old daughter while on his first parole release. In addition to his daughter, J.S. also self-reported multiple instances of molesting two other, unrelated, eight-year-old girls when he was 13 and 15. Prior to his conviction, J.S. was accused by his sister of molesting her daughter, his then five-year-old niece. While no formal charges resulted, a Child Protective Services investigation was "indicated" having found "credible evidence of abuse." J.S. was diagnosed with Pedophilic Disorder and Alcohol Use Disorder. A jury unanimously found J.S. to suffer from a mental abnormality. He is currently confined pending a dispositional hearing scheduled in early summer of 2015.

State v. S.P. – S.P.'s sex crimes began in another state in 1994 when, at age 15, he was adjudicated delinquent for molesting and forcing a six-year-old boy to perform oral sex upon him. While on probation for that offense, S.P. was terminated from probation after incurring over $1,100 worth of charges for sexually explicit "1-900" phone calls. At age 24, while on probation for non-sex crimes, S.P. was convicted by plea to Corruption of a Minor and Unlawful Communication with a Minor. This conviction resulted from S.P. sending sexually explicit content to a 14-year-old girl whom he had met in an online sex chat room and whom he indicated that he briefly "dated" even though he was engaged to another age-appropriate woman. The material included letters with explicit descriptions of sexual acts he intended to perform with her in filming a pornographic movie. S.P.'s probation was transferred to New York in 2004. In 2008, at age 29, he was convicted by plea to Sex Abuse 1st in full satisfaction, resulting from S.P. using adult lubricant on two of his fingers to digitally penetrate the rectum of his three-year-old daughter, resulting in significant physical injury to the child. He was sentenced to 42-months incarceration and a three-year term of post-release supervision. While in prison, he was disciplined on multiple occasions for mailing sexually explicit letters, possessing pornographic contraband and inappropriate photos. S.P. was diagnosed with Pedophilic Disorder, Attracted to Both Males and Females, Non-Exclusive Type, Antisocial Personality Disorder, Alcohol Use Disorder, Dysthy-

mic Disorder (mild but chronic depression), Borderline Personality Disorder, and was additionally found to have a clinically significant level of sexual preoccupation, as well as a high number of Psychopathic traits. A jury unanimously found that he suffered from a mental abnormality and after a dispositional hearing, the court ordered S.P. confined to a secure treatment facility as a dangerous sex offender requiring confinement.

State v. W.B. – At age 14, W.B. was convicted upon a plea to Sex Abuse 1st and adjudicated delinquent. This conviction resulted from W.B performing and receiving oral sodomy on his four-year-old nephew. At 17, W.B. was arrested for Endangering the Welfare of a Child (EWOC) after persuading a 13-year-old girl to perform oral sex on him, and while that charge was pending and with an order of protection prohibiting contact with her in place, he again coaxed her into performing oral sex on him. He pleaded to a misdemeanor and received a three-year term of probation. Within the first three months of probation, W.B. was arrested for Sodomy 2nd and EWOC after cajoling a 15-year-old female into performing oral sex upon him. He was convicted of Attempted Sodomy 2nd and sentenced to a one and one-third to three-year indeterminate term of incarceration, of which he served the full three years. Within two years of his release, W.B. was arrested for Promoting a Sexual Performance by a Child. The police investigation revealed that W.B. possessed and viewed over 3,000 photos and 400 video clips of child pornography. It was also determined that W.B. regularly visited sexually explicit websites depicting bestiality with dogs and horses, and sadistic and masochistic fetishes. W.B. was convicted by plea to Promoting a Sexual Performance of a Child and sentenced to a three-to-six-year indeterminate term of incarceration. W.B. was diagnosed with Pedophilic Disorder, Attracted to Both Males and Females, Non-Exclusive Type, Otherwise Specified Personality Disorder, with Mixed Personality Features, Borderline features, and Antisocial Features, as well as a clinically significant level of sexual preoccupation. A jury unanimously found W.B. to suffer from a mental abnormality and after a dispositional hearing, the court found him to be a dangerous sex offender requiring confinement and ordered him to a secure treatment facility.

State v. M.T. – M.T.'s sex crimes date back to the summer of 1990, when at age 17, he engaged in multiple, repeated acts of sodomy and rape of three sisters, ages six, ten, and twelve. The twelve year old victim revealed that M.T. referred to and treated her like his girlfriend. By plea bargain, M.T. pleaded guilty to two counts of Attempted Rape 1st, in full satisfaction. He was adjudicated a youthful offender and sentenced to a five-year term of ("shock") probation, the shock portion being six months incarceration. M.T. quickly violated probation and was re-incarcerated to a term of one-and-a-third to four years. This violation primarily stemmed from his arrest and ultimate conviction by plea of guilty to Sexual Abuse 1st for molesting his girlfriend's ten-year-old daughter. M.T. was sentenced to a two to six-year term of incarceration to run consecutive to his violation of probation. He was paroled in November of 2000, only to be

revoked (conditional release violator) in December 2001. The Article 10 qualifying offense occurred in May 2004, when Respondent was 31 years old. He was arrested for and convicted of Sexual Abuse 1st: Victim Less Than 11 Years, for molesting the penis of an eight-year-old boy. He was sentenced in September 2004 to a five-year determinate term of incarceration, with five years post-release supervision. M.T. was paroled in 2009, but was re-incarcerated after only two months due to a parole violation involving him being on school grounds as a registered sex offender. He was again paroled in 2011, but violated a mere 10 days later after being arrested for Petit Larceny and failing to notify his parole officer. Thus, he was returned to prison to serve a maximum bid. Thereafter, he was released to parole supervision in March 2013. M.T. was diagnosed with Pedophilic Disorder, Nonexclusive type, Sexually Attracted to Males and Females. The Respondent stipulated to a mental abnormality finding and OMH recommended that he be civilly managed under a regimen of SIST.

State v. L.B. – Prior to his first known sex offense, L.B. had several misdemeanor petit larceny and criminal mischief youthful offender adjudications. He was also adjudicated a youthful offender at age 17 for Aggravated Cruelty to Animals. At 18, he pleaded guilty to Falsely Reporting an Incident and was placed on probation, which he violated and as a result, received five months local jail. His first known sex offense occurred in 2012, at age 19. Two days after meeting the 14- year-old victim through mutual friends, L.B. lured the girl from her home to a deserted alley where he digitally penetrated her vagina and anus. Ignoring her demands to stop and multiple requests to leave, he then inserted his penis into her mouth and forced the girl to perform oral sex on him, causing injury and swelling to her throat. L.B. was arrested for Criminal Sex Act 2nd and released on bail. While out on bail, he was arrested for Burglary 2nd and Reckless Endangerment 2nd. L.B. was convicted by plea of guilty to one count of Attempted Criminal Sex Act 2nd and Burglary 3rd. He was sentenced to 180 days incarceration and a 10-year term of probation. Shortly after his release from jail, he pleaded guilty to a technical violation of probation (curfew) and returned to prison. Among other probation violations, L.B. also failed to participate in sex offender therapy, admitted to engaging in sex acts with one male and one female partner without informing his probation officer, and he admitted to forcing an 18-year-old male victim to perform oral sex upon him under threat of death. L.B. had an extensive mental health history and had been previously diagnosed with Posttraumatic Stress Disorder, Attention Deficit Hyperactivity Disorder, Bipolar Disorder, Obsessive Compulsive Disorder, Manic Depressive Psychosis-Unspecified, Mood Disorder and Personality Disorder. While these previous diagnoses were considered they were ultimately not assigned during the Article 10 review. Thus, L.B. was diagnosed with Antisocial Personality Disorder along with a high number of Psychopathic traits. Prior to a probable cause hearing, L.B. moved to dismiss the petition under Donald DD. (*supra*.) which the Court denied. However, after an evidentiary hearing, the Court found no probable cause under MHL 10.06(k) and dismissed the petition.

CONCLUSION

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 April 1st, 2015, 454 dangerous sex offenders with mental abnormalities are being civilly managed. Of that, 351 are being treated in a secure treatment facility, while 103 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 of 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 readily apparent 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*.