ERIC T. SCHNEIDERMAN

ATTORNEY GENERAL

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL

SEX OFFENDER MANAGEMENT BUREAU

A Report On The Sex Offender Management Treatment Act

April 1st, 2015 to March 31, 2016

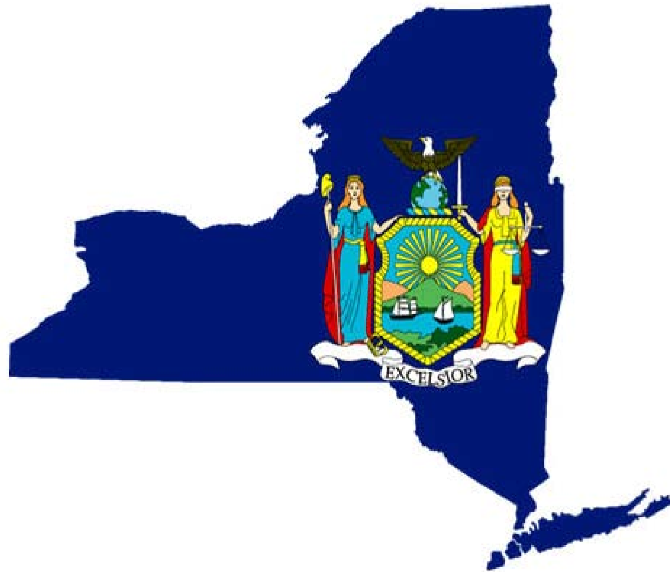


TABLE OF CONTENTS

INTRODUCTION 1

PART I. THE CIVIL MANAGEMENT PROCESS 2

A. OVERVIEW 2

FLOW CHART: THE MHL ARTICLE 10 CIVIL MANAGEMENT PROCESS........ 4

B. THE EVALUATION PROCESS........ 5

C. LEGAL PROCEEDINGS........ 7

D. TREATMENT AFTER MENTAL ABNORMALITY IS ESTABLISHED 10

1. Dangerous Sex Offender Requiring Confinement (DSORC)........ 10

2. Strict and Intensive Supervision and Treatment (SIST) 11

PART II. CIVIL MANAGEMENT AFTER NINE YEARS........ 14

A. REFERRALS AND CASES FILED 14

B. FILINGS 15

C. VENUE TRANSFERS........ 16

D. PROBABLE CAUSE HEARINGS 17

E. PRE-TRIAL DETENTION........ 18

F. MENTAL ABNORMALITY 18

1. Trials........ 18

2. Admission to Mental Abnormality and Consent to Treatment........ 19

G. DISPOSITIONS........ 20

1. Dangerous Sex Offender Requiring Confinement (DSORC)........ 20

2. Strict and Intensive Supervision and Treatment (SIST) 21

3. SIST Violations........ 21

H. ANNUAL REVIEW HEARINGS 23

I. SIST MODIFICATION OR TERMINATION HEARINGS........ 24

PART III. SIGNIFICANT LEGAL DEVELOPMENTS 25

A. FEDERAL........ 25

B. NEW YORK STATE COURT OF APPEALS 25

C. THE NEW YORK STATE APPELLATE DIVISIONS 28

FIRST DEPARTMENT DECISIONS 28
SECOND DEPARTMENT DECISIONS 32
THIRD DEPARTMENT DECISIONS 38
FOURTH DEPARTMENT DECISIONS 44
D. TRIAL COURT DECISIONS 48
PART IV. PROFILES OF OFFENDERS UNDER CIVIL MANAGEMENT 60
CONCLUSION 65
PART V. SOMTA'S Impact on Public Safety 65
APPENDIX : Victim Resources 66

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.

[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 nine 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 Nine Years," provides updated statistics and case data that are current as of March 31, 2016. 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-

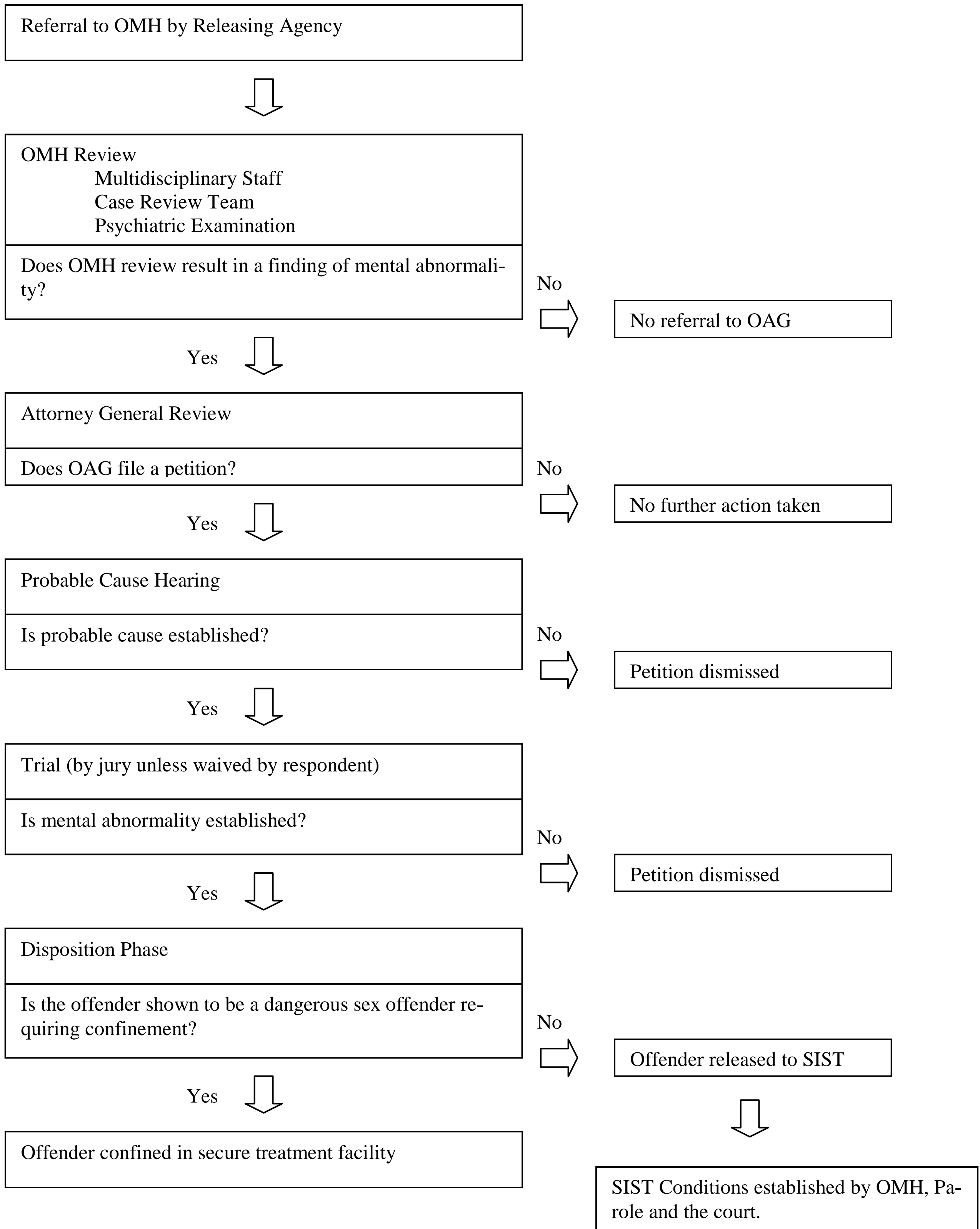
[6] MHL §§10.05, 10.03(a),(q),(g) and (i).

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.

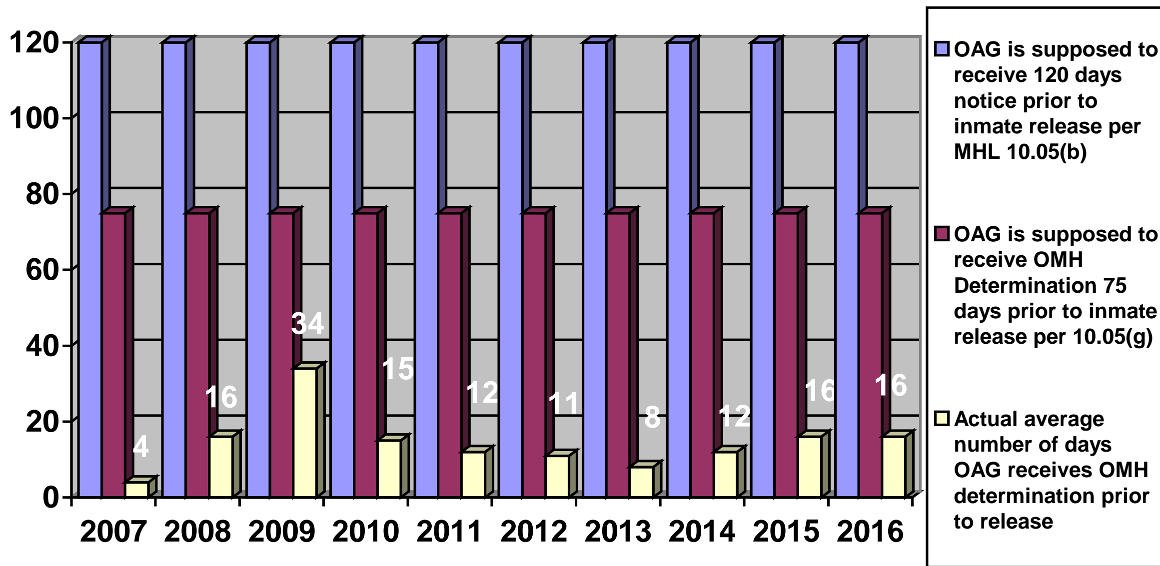
When a "detained sex offender" nears anticipated release, the statute requires the agency with jurisdiction to provide OMH and the OAG 120 days notice of the upcoming release. Within 45 days of its receipt of such notice, OMH is required to provide the offender and the OAG with written notice of its 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

---

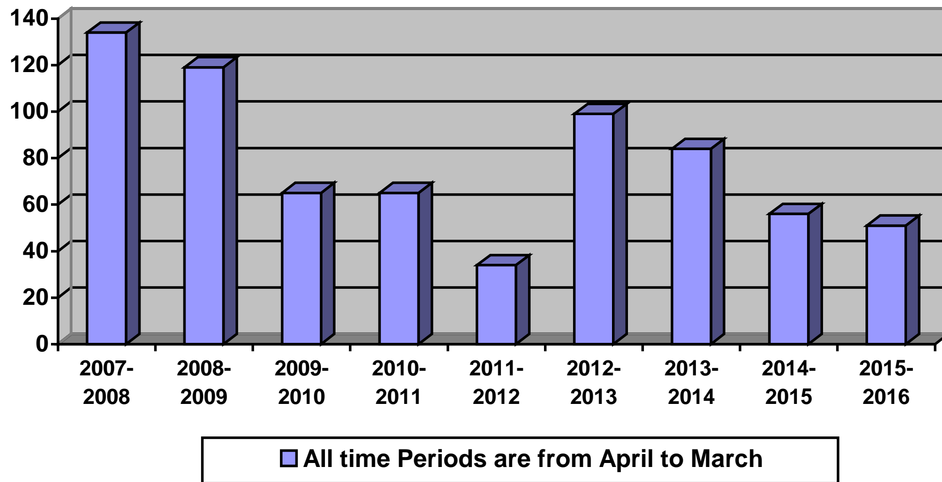
[10] The agency with jurisdiction can include the Department of Corrections and Community Supervision (DOCCS), the Office of Mental Health (OMH), and the Office for People with Developmental Disabilities (OPWDD). See MHL §10.03(a).
[11] MHL §10.05(b).
[12] MHL §10.05(d)
[13] MHL §10.05(e).
[14] MHL §10.05(g).

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 12 days; in 2012 it was 11 days; in 2013 it was 8 days, in 2014 it was 12 days, in 2015 it was 16 days, and through March 31, 2016, it was 16 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 though it slightly increased 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; in 2013 to 2014, 84 cases were referred; and in 2014 to 2015, 56 cases were referred. Between April 1st, 2015 and March 31st, 2016, OMH has referred 51 cases to the OAG. The various and complex factors driving annual referrals exceed the scope of this report.



C. Legal Proceedings

If upon referral by OMH, the OAG determines that civil management is appropriate, a petition is filed 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."

---

[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 re-lease 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, 2016, ninety-three 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, 2016, forty-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.

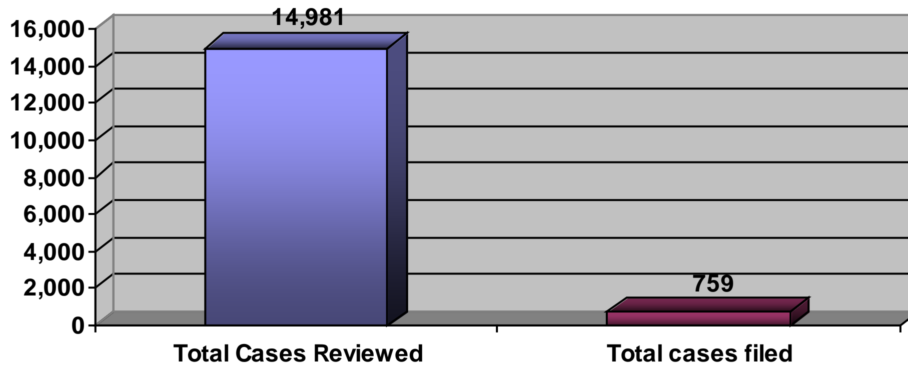
As time passes, it is expected that the number of offenders on SIST will grow considerably because of (1) the number of offenders that are released to SIST after trial, but also because (2) every time an offender is released from a secure treatment facility, the court has found he or she still suffers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

II. CIVIL MANAGEMENT AFTER NINE YEARS

A. REFERRALS AND CASES FILED

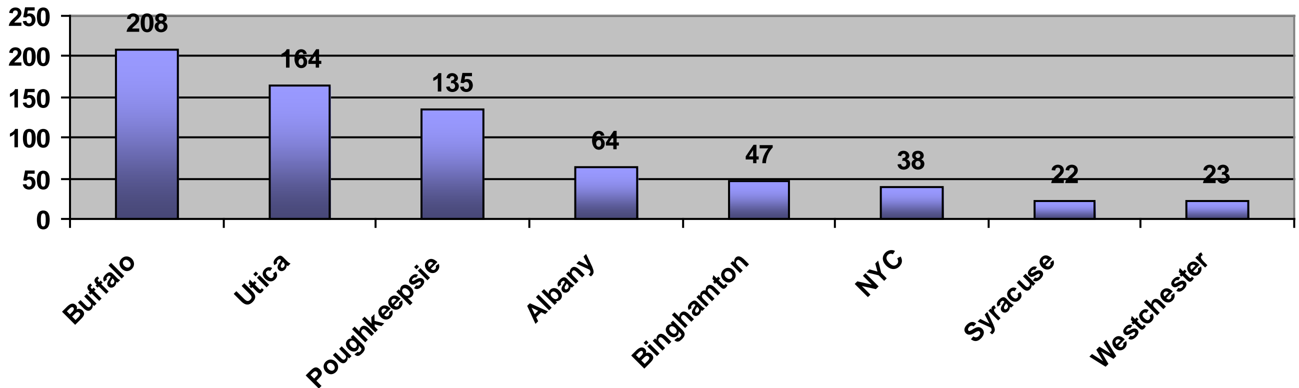
In the eight years since Mental Hygiene Law Article 10 became law, the New York State Office of Mental Health has reviewed 14,981 sex offenders to determine whether they are appropriate for referral to civil management. Of the cases reviewed, only 759 have resulted in OAG filing an Article 10 Petition. This includes what is considered the "Harkavy" cases addressed in previous reports.

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



B. FILINGS

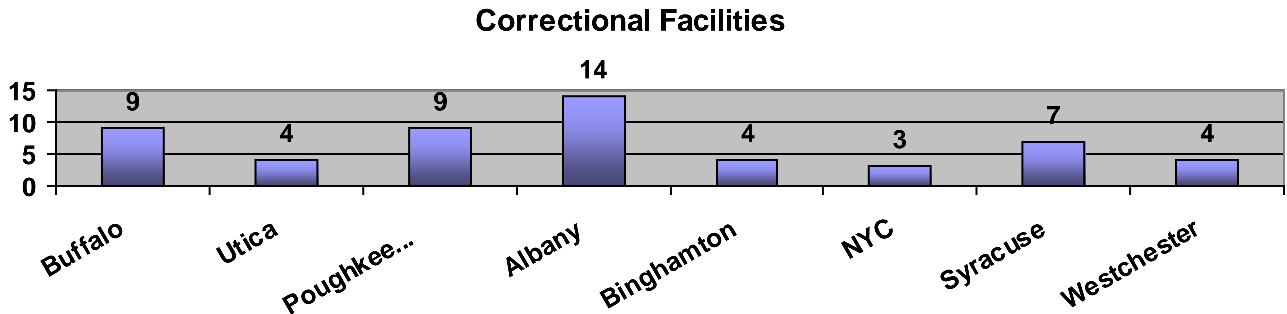
The graph below gives a breakdown of the geographical regions in which the MHL Article 10 cases have been filed. Since inception of SOMTA, the Buffalo regional office filed 208 petitions, Utica regional office filed 164, Poughkeepsie regional office filed 135, Albany office filed 64, Binghamton regional 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.



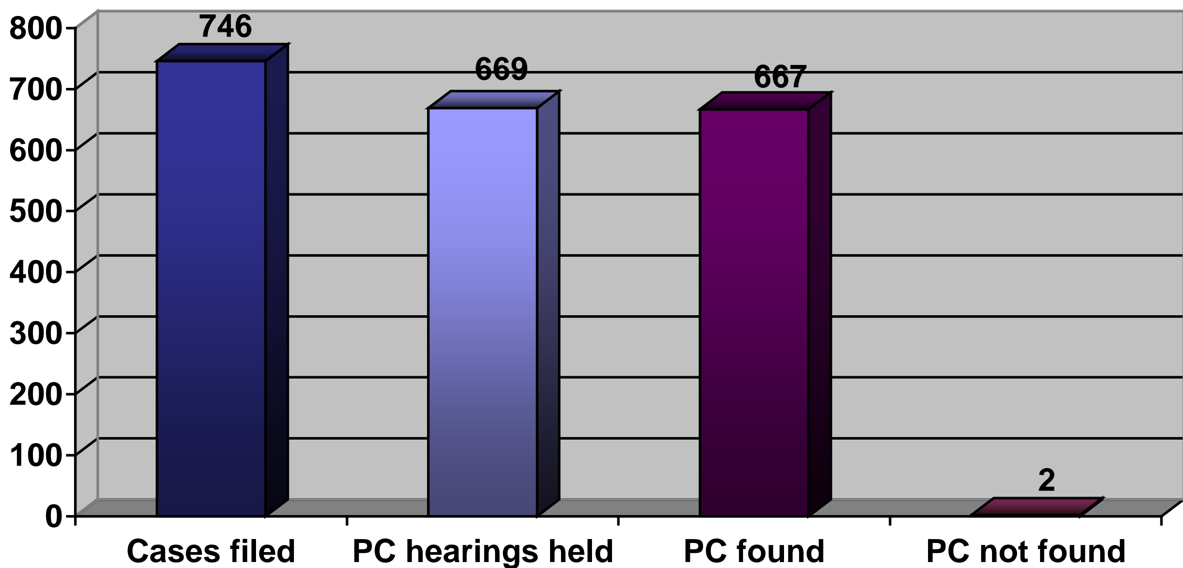
C. Venue Transfers

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, 2016, there have been a total of 540 venue transfers, representing 72% of all cases. Of the 540 transfers, 315 (59%) were moved prior to the probable cause hearing and/or finding, while 225 (41%) moved afterward.

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

D. PROBABLE CAUSE HEARINGS

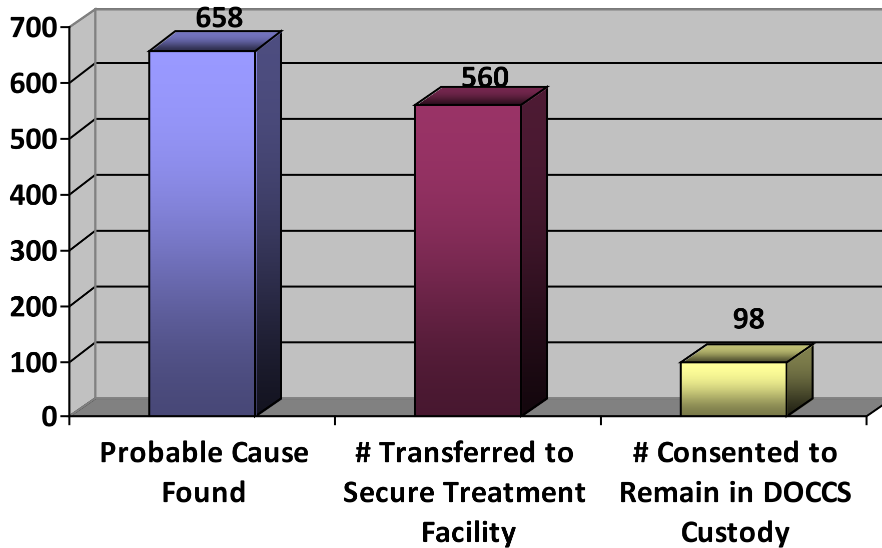
In the nine years since SOMTA's inception, OMH referred a total of 759 sex offenders for civil management.[51] The OAG has filed 759 petitions, conducted 669 probable cause hearings, and respondent has waived his right to the hearing on 90 occasions. The courts found probable cause to believe the offender suffered from a mental abnormality and was in need of civil management 667 times out of the 669 hearings held to date.



[51] These referrals include the Harkavy cases.

E. PRE-TRIAL DETENTION

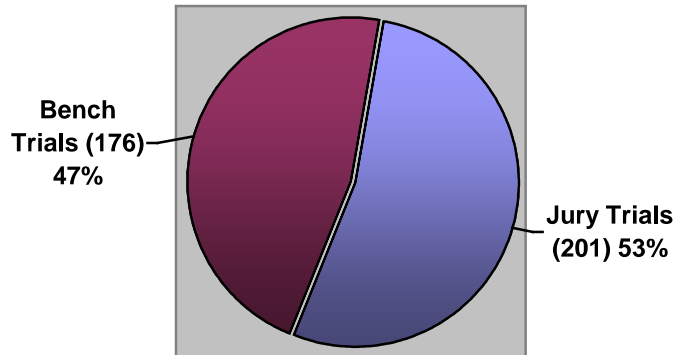
If the court determines that probable cause has been established, the respondent shall be housed in an OMH secure treatment facility pending trial, unless he or she elects to remain in DOCCS custody pending trial or final disposition of the matter. To date, 98 respondents have elected to remain in a correctional facility pending trial or final disposition.



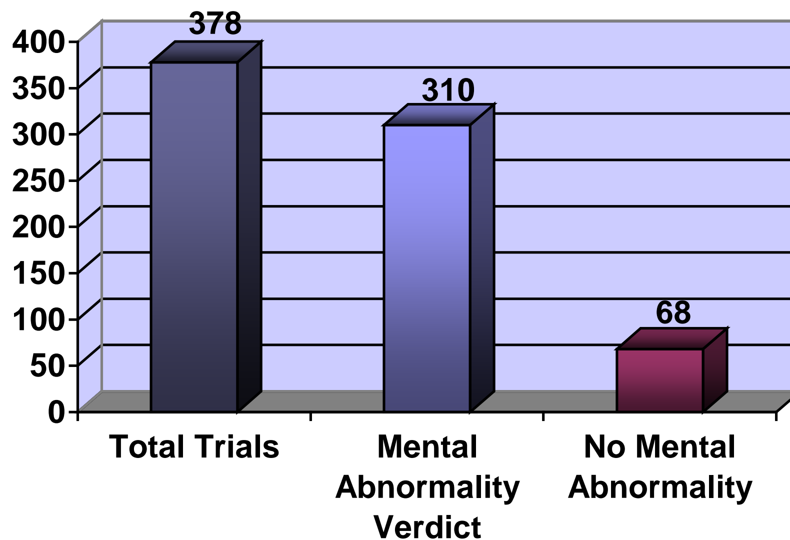
F. MENTAL ABNORMALITY

1. Trials

Since 2007, OAG has tried 377 Article 10 trials to final verdict. Of those, 201 were jury trials and 176 were bench trials after the offender waived his right to a jury.



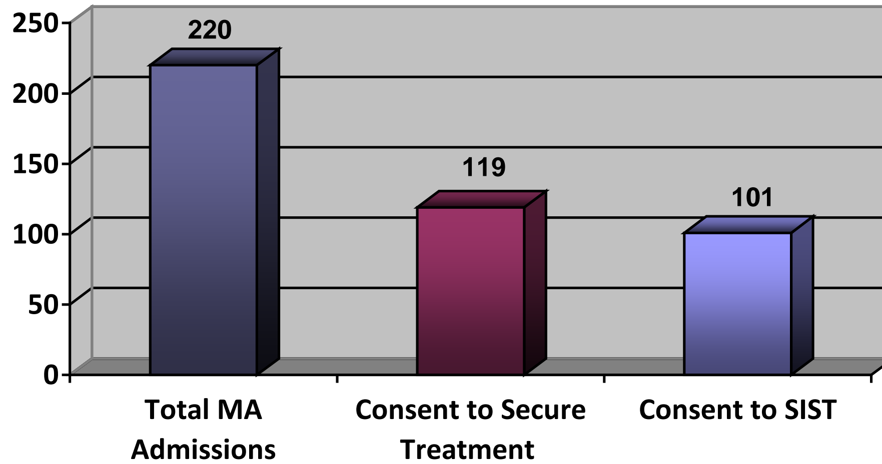
Of the 378 trials, the jury or judge rendered a verdict that 310 of those sex offenders suffered from a mental abnormality and 68 were adjudicated to have no mental abnormality.



2. Admission to Mental Abnormality and Consent to Treatment

In addition to verdicts rendered after trial, 220 respondents, represented by counsel, admitted they suffered from a mental abnormality and consented to treatment. In 119 cases, the offender admitted he was a dangerous sex offender and consented to treatment in a secure OMH facility. In another 101 cases, the patient admitted he was a sex offender that required civil man-

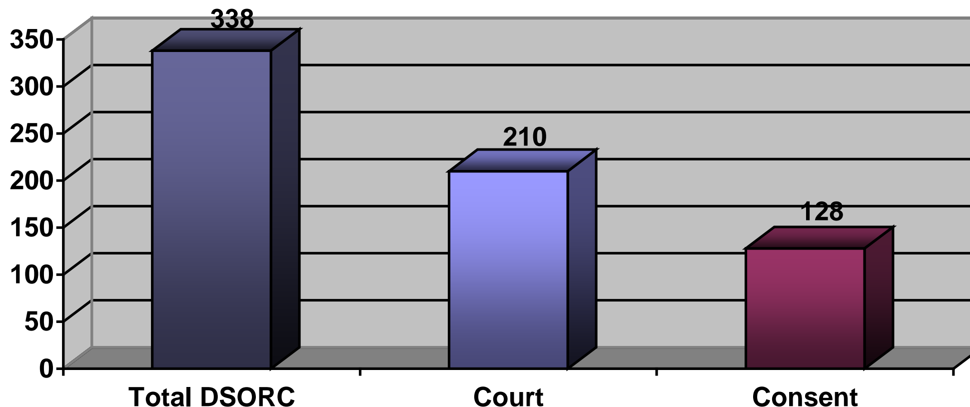
agement and the court imposed a regimen of SIST.



G. DISPOSITIONS

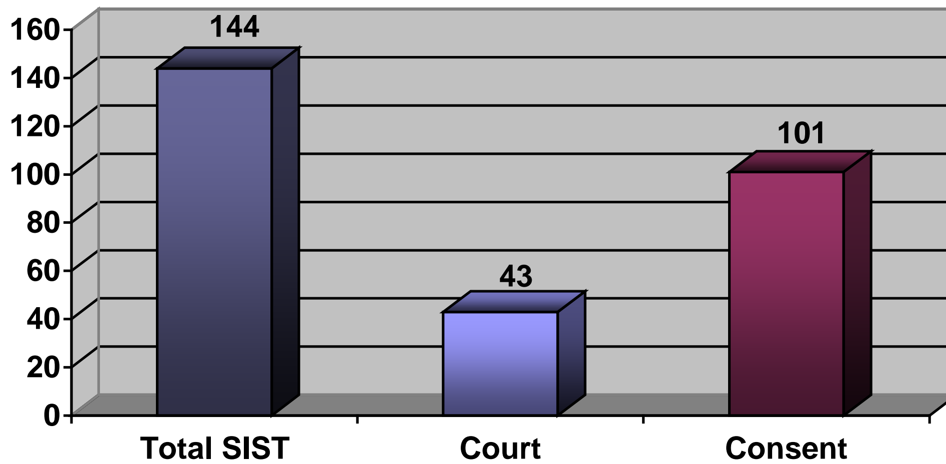
1. Dangerous Sex Offender Requiring Confinement (DSORC)

From April 13, 2007, to March 31, 2016, a total of 338 offenders have been found to be dangerous sex offenders requiring treatment in a secure OMH facility. Of that number, 128 respondents admitted they were dangerous sex offenders requiring treatment in a secure treatment facility, and 210 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, 2016, a total of 144 offenders were initially placed on a regimen of SIST after a finding that he suffers from a mental abnormality. Of that number, 101 admitted they were sex offenders requiring SIST, and after a dispositional hearing 43 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

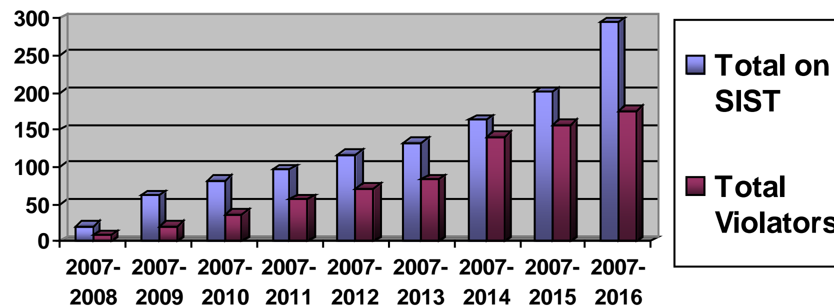
The data below reflects the total number of offenders placed on SIST initially after trial, as well as those placed on SIST from confinement, and the number of those offenders who violated.[52]

	2007-2008	2007-2009	2007-2010	2007-2011	2007-2012	2007-2013	2007-2014	2007-2015	2007-2016

[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.

Total on SIST	21	62	82	97	117	133	163	201	294
Total SIST Violators	9	20	36	57	71	83	141	157	176
% Violated	43%	32%	44%	59%	61%	62%	86.5%	78%	59%

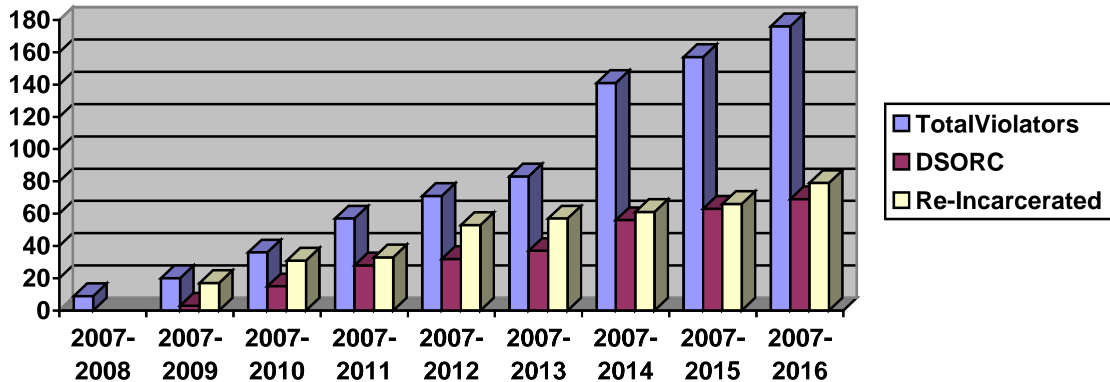
By the end of SOMTA's second year, the violation rate was 32%, with 40% of those violations taking place the first month on SIST. By the end of the third year, the violation rate was up to 44%, increasing to 59% in the fourth year. In the fifth and sixth years it leveled to 61% and 62%, respectively. Since then however, the number of sex offenders on SIST more than doubled, from 133 in 2013 to 294 in 2016, and thus, the total number of violations also increased.



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	2007-2016
Total Violators	9	20	36	57	71	83	141	157	176
DSORC		3	15	28	32	37	56	63	69
Re-Incarcerated		17	31	33	53	57	61	66	79



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.

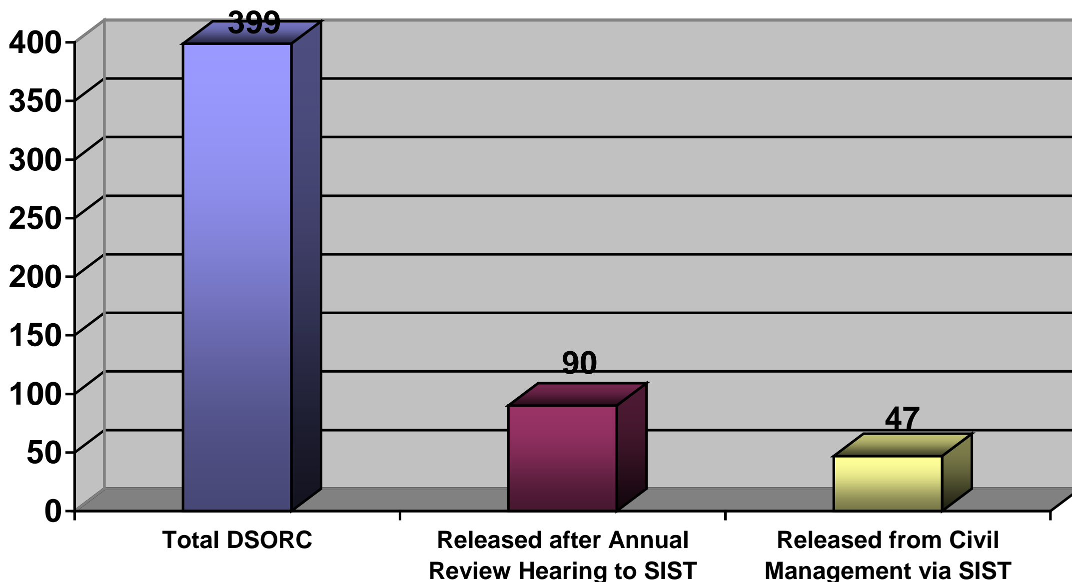
H. Annual Review Hearings

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

[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.

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, 2015 to March 31, 2016, there have been 96 evidentiary hearings.

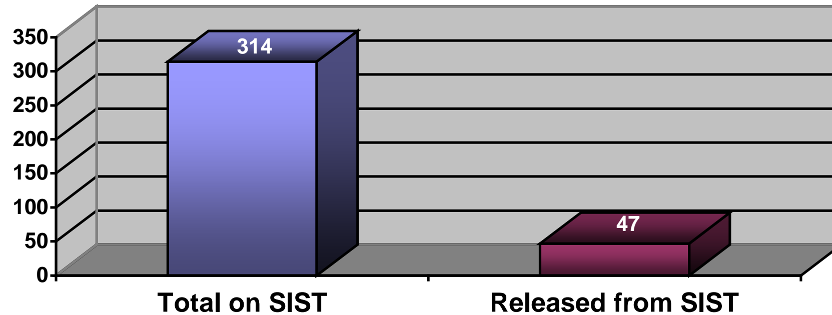
Of the 399 dangerous sex offenders requiring confinement, 90 have been released from the secure treatment facilities and re-integrated into the community under a regimen of SIST. Of the 90 offenders released from a secure treatment facility to SIST, 47 have been released from SIST and no longer subject to the Sex Offender Management and Treatment Act.



I. SIST MODIFICATION OR TERMINATION HEARINGS

Of the 314 offenders placed on SIST, 47 have been released from SIST supervision alto-

gether, 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 2015, and March 31, 2016, there have been a significant number of cases decided which have had a dynamic impact on Article 10 litigation.

A. FEDERAL

There were no Federal cases which have a direct impact on Article 10 practice during this review period.

B. NEW YORK STATE COURT OF APPEALS

The New York Court of Appeals decided two MHL Article 10 cases between April 1, 2015, and March 31st, 2016.

1. **Evidence and Procedure: Live, Two-Way Video Testimony Permitted In Exceptional Circumstances or Upon Consent.**

Decided May 14, 2015, the Court of Appeals held in Matter of the State of New York v. Robert F., 25 N.Y.3d 448 (2015), that the use of live, two-way video testimony at an article 10 proceeding is a permissible "only where exceptional circumstances so require, or when all parties consent."

After a jury found that respondent suffered from a mental abnormality, the Supreme Court held a dispositional hearing under MHL § 10.07(f) and subsequently found that he was a dangerous sex offender requiring confinement at a treatment facility. At the hearing, the respondent testified and disclosed for the first time that one of his prior victims was an unknown stranger. Because this new revelation affected respondent's score on actuarial risk assessments, over objection, the Supreme Court permitted the State to call its expert as a rebuttal witness via live, two-way video conferencing. The respondent appealed, but the Appellate Division affirmed the Supreme Court's decision.

The Court noted that MHL §10.08(i)(1) provides for electronic appearance in probable cause hearings upon "good cause shown," however, the statute "does not automatically permit, nor does it necessarily preclude, the use of the same in other contexts." Referring to its prior jurisprudence on the analogous issue in criminal cases, the Court stated, ". . . express authorization of live video testimony in certain circumstances 'leaves [unaffected] courts' preexisting authority' to exercise discretion in permitting such testimony (Wrotten, 14 NY3d at 37-38). We see no compelling reason why a trial court should have this discretion . . . in criminal trials, but not in Mental Hygiene Law proceedings."

The Court cautioned that electronic appearance is "not the equivalent of in-person testimony" and that the "decision to excuse a witness's presence in the courtroom should be weighed carefully." Further quoting Wrotten, the Court stated that "[t]elevised testimony requires a case-

specific finding of necessity; it is an exceptional procedure to be used only in exceptional circumstances."

In Robert F.'s case, the Court found that the State merely indicated that the witness could not appear on short notice and was limited by her other employment. The Court concluded that this was an insufficient showing of exceptional circumstances and thus, error. However, based on the State's "overwhelming evidence"[54] at the hearing, as well as the trial court's written decision, which relied upon the State's case in chief, not the rebuttal testimony, the Court concluded such error was harmless and affirmed the decision.

2. Detained Sex Offender: Finding of Probable Cause Under Article 10 Renders *Habeas Corpus* Challenge "Academic" Even If Detention Was Unlawful.

Decided June 4, 2015, in People ex rel. Bourlaye T. v. Connolly, 25 N.Y.3d 1054 (2015), the Court of Appeals denied Bourlaye T.'s *habeas corpus* challenge which alleged that his arrest and detention while on Federal parole supervision and which preceded the MHL article 10 procedeing, was unlawful. After serving a 25 year sentence, the respondent - a foreign national - was released from DOCCS custody to Federal confinement, pending deportation proceedings. The deportation process stalled, resulting in his physical release to the community under Federal parole supervision and simultaneous State parole supervision. The respondent was subsequently arrested and taken into DOCCS custody without allegation that he had violated parole. Thereafter, respondent commenced a *habeas corpus* proceeding. On the same day, the State filed an MHL Article 10 petition seeking his civil management and obtained temporary authorization to retain respondent in custody pending a probable cause hearing. After a hearing, the trial court

[54] The Court noted that in addition to diagnosing pedophilia, ASPD, and alcohol dependence, the State expert had based her opinion on Robert F.'s high Static-99 scores, which placed him at high risk to reoffend, as well as his lack of progress in sex offender treatment, lack of a viable relapse prevention plan, and because he exhibited behaviors which indicated that he would not be able to comply the rules of SIST if released to the community.

found probable cause that he was a detained sex offender requiring civil management and ordered that he remain in custody at a secure treatment facility pending his trial.

The State sought and obtained trial court dismissal of the *habeas* proceeding which was upheld by the Appellate Division, Second Department. 119 A.D.3d 825 (2014). Before the Court of Appeals, respondent argued that his arrest and detention was unlawful. The State argued that the *habeas* proceeding was moot because the probable cause finding is an independent and superseding basis for his confinement. The Court of Appeals agreed with the State and held that the *habeas* challenge was rendered "academic" by the probable cause finding under Article 10 and it found no grounds for an exception to the mootness doctrine. The Court further noted that the Article 10 proceeding, not a *habeas* proceeding, was the proper forum to challenge the validity of the probable cause order.[55]

C. THE NEW YORK STATE APPELLATE DIVISIONS

Statewide, between April 1, 2015 and April 1, 2016, the Appellate Division decided a total of 18 cases addressing MHL Article 10 matters. The breakdown is as follows:
The First Department rendered four decisions; the Second Department delivered seven decisions; the Third Department decided three cases; and the Fourth Department issued four decisions. The following sections summarize the notable decisions.

FIRST DEPARTMENT:

[55] This decision is consistent with the Court's prior ruling in People ex rel. Joseph II v. Superintendent of Southport Correctional Facility, 15 N.Y.3d 126 (2010) (holding respondents subject to Article 10 because they were "detained sex offenders" even though they were illegally detained as a result of DOCCS administratively-imposed terms of post-release supervision); see also State v. Matter, 103 A.D.3d 1113 (4th Dept. 2013) (pivotal issue in determining if respondent is detained sex offender is whether he was in custody when Article 10 petition was filed, not whether that custody was "lawful").

3. Mental Abnormality: Proof of Hypersexuality/Sexual Preoccupation Insufficient Without Evidence it Predisposes One to Commit Sex Offenses and Results in Serious Difficulty Controlling Such Conduct.

Decided May 12, 2015, in Matter of State of New York v. Gen C., 128 A.D.3d 467 (1st Dep't 2015), the Appellate Division reversed and dismissed the article 10 petition ruling that based on the trial evidence, Gen. C.'s diagnosis of antisocial personality disorder and hypersexuality/sexual preoccupation was legally insufficient to prove mental abnormality . The First Department decision did not contain a discussion of the facts or analysis of the testimony. The Court simply stated that "no rational factfinder could conclude based on the trial evidence that hypersexuality/sexual preoccupation is an independent mental abnormality within the meaning of article 10." Though the Court acknowledged that "the evidence shows, at most, that hypersexuality/sexual preoccupation is a recognized mental condition," at this trial, the State did not present evidence that hypersexuality/sexual preoccupation is a condition that predisposes one to commit a sex offense and results in serious difficulty in controlling the sexually offending conduct. Citing Donald DD., 24 NY3d 174 (2014), the First Department reiterated that "a diagnosis of ASPD, together with testimony concerning a respondent's sex crimes but without evidence of an independent mental abnormality diagnosis, is insufficient to establish a mental abnormality within the meaning of article 10."

4. Mental Abnormality: Proof of Sexual Preoccupation Insufficient Without Evidence It Predisposes One to Commit Sex Offenses and Results in Serious Difficulty Controlling Such Conduct.

Decided September 29, 2015, in Matter of State of New York v. Kenneth W., 131 A.D.3d 872 (1st Dep't 2015), the First Department reversed the jury verdict finding that Kenneth W. suffered a mental abnormality and dismissed the article 10 petition. Using nearly identical language

and citing to its recent decision in Gen C., the Court's brief opinion did not discuss the facts or trial testimony at issue. Instead, the Court stated "here, we find that based on the trial evidence, a rational factfinder could not conclude that sexual preoccupation is an independent mental abnormality. The State failed to present evidence that sexual preoccupation is a condition that predisposes one to commit a sex offense and results in serious difficulty in controlling the sexually offending conduct."

5. Mental Abnormality: Serious Difficulty Satisfied by Totality of Evidence, Including Diagnoses, Sexual Offenses, Respondent's Admitted Inability to Control his Urges, Minimal Progress in Treatment, and an Inadequate Relapse Prevention Plan.

Decided November 10, 2015, in Matter of State of New York v. Floyd Y., 135 A.D.3d 70 (1st Dep't, 2015), the Court reversed on the law the trial court's grant of respondent's post-trial motion to set aside the jury verdict finding mental abnormality and dismissing the petition. In granting the motion to set aside and dismiss, the trial court relied upon Matter of State of New York v. Frank P., 126 A.D.3d 150 (1st Dept. 2015) and the Court of Appeals' decision in Matter of State of New York v. Donald DD (Kenneth T.), 24 N.Y3d 714 (2014). In Kenneth T., the Court stated that the second prong of the test (evidence that the offender's mental condition resulted in his having *serious difficulty* controlling his sexual conduct), could rarely, if ever, be satisfied from the facts of a sex offense alone.

In this decision, the First Department discussed and analyzed the factual and evidentiary differences to distinguish Frank P. and Kenneth T., ultimately finding that the totality of the evidence was legally sufficient to prove serious difficulty. At trial, the State's expert testified to Floyd Y.'s three diagnoses of pedophilia (DSM-5 Pedophilic Disorder), ASPD, and substance abuse disorders, in addition to "his pattern of sexual misconduct, and his abject failure to satis-

factorily progress in treatment." The Court found that pedophilia, "by definition, involves an element of difficulty in control"[56] and noted trial testimony regarding respondent's own admissions to being unable to resist sexual urges toward his child victims. It stated, "[f]urther, the DSM-5 exliplicitly recognizes that the dangerous combination of respondent's ASPD and pedophilia increases the likelihood that he will act out sexually with children." The Court pointed out that the "diagnosis of respondent's substance abuse disorders, not present in *Kenneth T.*, provides a further basis for the jury's finding of serious difficulty." Citing to Robert F., *supra*, the Court noted that "[f]urther distinguishing this case from *Kenneth T.* is the fact that respondent here failed to satisfactorily progress in sex offender treatment, did not have an adequate relapse prevention plan, and exhibited a cavalier attitude toward participation in therapy." In sum, the factors upon which the expert relied in concluding that Floyd Y. has serious difficulty were not limited solely to the facts of his sex offenses, and was thus, legally sufficient evidence to support the jury's verdict of mental abnormality.

6. Probable Cause: Diagnosis of Antisocial Personality Disorder with Psychopathy Sufficient to Meet Probable Cause Burden.

Decided March 15, 2016, in Matter of State of New York v. Jerome A., 135 A.D.3d 557 (1st Dep't 2016), the State's MHL article 10 petition which was dismissed by the trial court after conducting the requisite evidentiary hearing under MHL § 10.06(g), was reinstated and remanded for trial. The Appellate Division held that the Supreme Court erred in finding that the State failed to meet its probable cause burden.

[56] Though the decision uses "pedophilia," the more precise terminology based on the DSM-5 is "pedophilic disorder," which, as the Court notes, by definition implies difficulty in control. On this point, the Court stated, "we do not hold that all offenders who suffer from pedophilia are automatically, by virtue of that diagnosis alone, subject to mandatory civil management."

Citing its most recent Floyd Y. decision, *supra*., (see also Matter of State of New York v. Robert V., 111 A.D.3d 541, 542 (1st Dep't 2013), the Court reminded that in article 10 proceedings, "issues concerning the viability and reliability of the respondent's diagnosis are properly reserved for resolution by the jury. . . ." In this proceeding, the State presented expert opinion that respondent suffered from a mental abnormality based in part upon a diagnosis of ASPD along with psychopathy. The Court noted that [a]lthough the factinder at trial may or may not accept the expert's opinion, the expert's testimony at the hearing was not so deficient as to warrant dismissal of the petition at this early juncture, especially since the expert offered extensive testimony regarding the distinctions between ASPD and psychopathy, and since the Court of Appeals in Donald DD. did not state that a diagnosis of ASPD with psychopathy is insufficient to support a finding of mental abnormality (see 24 N.Y.3d at 189-191)."

SECOND DEPARTMENT:

7. Due Process: On-Record Colloquy Required to Knowingly, Intelligently, and Voluntarily Waive Right to Jury Trial After Consult With Counsel.

Decided July 29, 2015, in Matter of State of New York v. Ted B., 132 A.D.3d 28 (2d Dep't 2015), the Court held that a respondent must knowingly and voluntarily waive his right to a jury trial by an on the record colloquy after sufficient inquiry from the Court. Prior to his trial, respondent wrote a lengthy letter to the Supreme Court stating that he did not want a jury trial and explaining his preference for a bench trial. The decision states that there was "no indication in the record that Ted B. discussed his letter with his attorney or the court" and further, "during the course of the proceedings, neither Ted B. nor his counsel confirmed in court or made a public record of his purported waiver of his right to a jury trial."

The Court rejected the State's argument that the respondent's failure to demand a jury trial pursuant to CPLR § 4102(a) was an implied waiver of his right under MHL § 10.07(b). Thus, as the Court noted, the "pivotal question" is "what is required to validly waive the right to a jury trial in an article 10 proceeding."

The Court noted that MHL § 10.07(b) "evinces that a respondent. . . may waive a jury trial, but does not explicitly state the requirements for a valid waiver." Citing Floyd Y., 22 N.Y.3d 95 (2013), the Court noted that article 10 proceedings are civil matters, not criminal, but nevertheless, a respondent's waiver of the right to a jury trial must comport with due process and fundamental fairness.

The Second Department turned to the Third Department article 10 decision in Robert C. 113 A.D.3d 937 (3d Dep't 2014) which dealt with the validity of a jury trial waiver. In that case, the Third Department stated, "[a] waiver of the right to a jury trial . . . will be upheld if the court made an inquiry to establish that the waiving party understood the implications of such waiver and the waiver was knowingly, intelligently, and voluntarily made." The decision emphasized the on-the-record discussion of the Court, Counsel, and respondent in that case, which demonstrated that the waiver was made knowingly, intelligently, and voluntarily.

In light of Robert C., and after discussing general principles of jury trial waivers from other jurisdictions, the Second Department held "that in order to accomplish a valid waiver of the right to a jury trial in an article 10 proceeding . . . there must be an on-the-record colloquy, in order to ensure that the respondent understands the nature of the right, and that respondent's decision is knowing and voluntary after having had sufficient opportunity to consult with counsel." The Court expressed that a written waiver of trial, as required in criminal proceedings, is not needed. Instead, [a]ll that a trial court must do [on the record] is explain to respondent the nature

of the right to a jury trial and confirm that he or she has decided to waive that right after consulting with his or her attorney."

8. Mental Abnormality: Jury Verdict Predicated Solely on Diagnosis of ASPD Insufficient Under Donald DD.

Decided October 28, 2015, in Matter of State of New York v. Odell A., 132 A.D.3d 1004 (2d Dep't 2015), the Court reversed a decision that the respondent had a mental abnormality as defined in the Mental Hygiene Law. Citing Donald DD., 24 N.Y.3d 174, the Court held that a diagnosis of ASPD "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 . . . ." Though the decision did not discuss the trial testimony, it stated, "[s]ince ASPD was the sole diagnosis underlying the jury's finding," the verdict "was not supported by legally sufficient evidence, and the petition must be dismissed."

9. Evidence: Jury Verdict Upheld Under "Valid Line of Reasoning" Standard; No 6th or 14th Amendment Constitutional Violations; Denying Application to Reopen Dispositional Hearing, Valid Exercise of Discretion.

Decided November 12, 2015, in Matter of State of New York v. Robert M., 133 A.D.3d 670 (2d Dep't 2015), the Second Department affirmed an order by the Supreme Court, Kings County which, upon a jury verdict finding mental abnormality and a dispositional hearing finding respondent to be a dangerous sex offender requiring civil confinement, ordered him confined to a secure treatment facility. The respondent appealed, claiming that the evidence at the jury trial was insufficient, that his Fourteenth and Sixth Amendment rights were violated, and that the Court erred in denying his request to reopen the dispositional hearing to present further evidence.

The Second Department summarily rejected these claims and stated that there was a "valid line of reasoning" that the jury could conclude that the respondent suffered from a mental abnormality, and that the verdict "was not against the weight of the evidence."

Also, the respondent's constitutional rights were not violated because the right of confrontation (hearsay testimony from the State's expert) and his right to present a defense (i.e. preclusion of his expert from testifying to evidence derived from "certain post-evaluation meetings") were "partially unpreserved for appellate review," and citing Floyd Y., respondent's contentions are "in any event, without merit."[57]

Additionally, the Court held that the trial court "providently exercised its discretion in denying [respondent's] application . . . to reopen the dispositional hearing to present additional evidence." Finally, the Court upheld the Supreme Court's finding, by clear and convincing evidence, that respondent's level of dangerousness requires confinement rather than SIST.

10. Evidence: Jury Verdict Upheld Based On Fair Interpretation of the Evidence; Whether Diagnosis Constituted Reliable Predicate For Mental Abnormality Is A Factual Issue Resolved By Jury; No Basis To Preclude OMH Psychologist or Statements Respondent Gave During Evaluation.

Decided January 27, 2016, in Matter of State of New York v. Luis S., 134 A.D.3d 945 (2d Dep't 2016), the Court upheld the jury verdict finding mental abnormality and the trial court order for confinement after a dispositional hearing. "Contrary to the appellant's contention, the evidence at trial was legally sufficient to support the jury's verdict that he suffered from a 'mental abnormality,'" the Court wrote. "Moreover, since the jury's finding was supported by a fair interpretation of the evidence, it was not contrary to the weight of the evidence."

[57] Floyd Y., 22 N.Y.3d 95, 103 (2013) reiterated that there is no 6th Amendment Right to Confrontation in MHL article 10 proceedings.

On whether the respondent's diagnosis was a sufficiently reliable predicate for the mental abnormality finding, the Court stated such question "presented a factual issue to be resolved by the jury, and there is no basis to disturb its findings."

The Second Department also upheld the trial court's decision to deny respondent's motion seeking preclusion of the OMH Psychologist who evaluated him prior to commencement of the article 10 proceeding and denying preclusion of respondent's statements given to that expert, though he was without counsel, during the psychological interview. Citing the Court of Appeals in John P., 20 N.Y.3d 941 (2012) and its own decision in Robert F., 101 A.D.3d 1133 (2d Dep't 2012), the Court held that the "statements the [respondent] made to the psychologist were relevant, no statute prohibits their use, and since the evaluation was conducted prior to the commencement of the . . . proceeding, the [respondent] was not entitled to have counsel present."

11. Evidence: *Frye* Hearing Required to Resolve Admissibility of Diagnosis of Paraphilia NOS.

Decided November 12, 2015, in Matter of State of New York v. Richard S., 133 A.D.3d 672 (2nd Dep't 2015), the Second Department held the totality of the appeal in abeyance and remitted the case back to the Supreme Court with instruction to conduct a Frye hearing. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).

Richard S., who was diagnosed with paraphilia, not otherwise specified (NOS), moved for a Frye hearing and supported his request with scientific literature drawing into question whether the diagnosis achieved general acceptance in the relevant psychological and psychiatric community. The Supreme Court denied the request for a Frye hearing and a jury trial resulted in a finding of mental abnormality.

The Second Department cited Donald DD., 24 N.Y.3d 174 (2014) wherein the Court of

Appeals stated that paraphilia NOS is controversial, but ultimately did not decide whether it was an accepted diagnosis under Frye because no hearing was conducted or requested in that case. Here, the Appellate Division held that because respondent did request a Frye hearing and that request was supported by scientific literature, the hearing should be conducted. All other issues on the appeal were held in abeyance pending the outcome of the Frye hearing.

12. Evidence: Jury Verdict Upheld Based On Valid Line of Reasoning and Fair Interpretation of the Evidence; Testimony Regarding "Rule-Out" Diagnosis of Pedophilia Proper; No Error Admitting Evidence of Rape Charge Satisfied By Plea Bargain and Admitting Crime Scene Photos.

Decided March 16, 2016, in Matter of the State of New York v. Ruben M., 137 A.D.3d 1047 (2d Dep't 2016), the Court upheld a jury verdict finding mental abnormality and upon a dispositional hearing, the trial court's order finding him to be a dangerous sex offender requiring confinement. The respondent appealed challenging various evidentiary rulings of the Supreme Court, all of which the Second Department upheld. Notably, and consistent with the decisions in Robert M. and Luis S., *supra*., the Court wrote, "contrary to [respondent's] contention, legally sufficient evidence supported the jury verdict since there was a valid line of reasoning by which the jury could conclude" respondent suffers from a mental abnormality. Similarly, the Court stated, "the verdict was not against the weight of the evidence, as it was supported by a fair interpretation of the evidence."

In discussing the various evidentiary rulings, the Second Department stated that "Supreme Court's denial of [respondent's] requests to preclude petitioner's expert . . . from testifying about a rule out diagnosis of pedophilia was not error. . . ." The Court also held that it was not error to deny respondent's motion to preclude hearsay evidence of a rape charge that resulted in his plea of guilty to the lesser related charge of endangering the welfare of a child. Addition-

ally, citing the Court of Appeals decision in People v. Wood, 79 N.Y.2d 958 (1992) and its own decision in Justin C., 93 A.D.3d 852 (2d Dep't 2012), the Court stated it was not error to admit into evidence three crime scene photos from the underlying article 10 offense.

THIRD DEPARTMENT DECISIONS:

13. Annual Review: Continued Confinement Upheld Where Credible Evidence Indicated Respondent Has Such An Inability To Control His Behavior Based, In Part, Upon His Failure To Advance in Treatment, Refusal To Admit To Crimes, And Continued Aggressive, Violent, and Sexualized Behaviors Towards Peers and Facility Staff.

Decided June 11, 2015, in Matter of Sincere KK. v. State of New York, 129 A.D.3d 1254 (3d Dep't 2015), the Appellate Division, Third Department upheld the Supreme Court's order for continued confinement after an annual review evidentiary hearing held pursuant to MHL § 10.09(d). At the hearing, the Supreme Court heard from one witness, the State's psychiatric examiner, who opined that the patient, Sincere KK, continued to demonstrate "such a strong predisposition to commit sex offenses, and such an inability to control [his] behavior, that [he] is likely to be a danger to others and commit sex offenses if not confined to a secure treatment facility." MHL §10.03(e).

The patient appealed, arguing that the State failed to submit credible evidence proving that he has "such an inability to control his behavior." In rejecting that contention, the Third Department found that the expert based her opinion on, "among other things, [Sincere KK's] failure to advance beyond the first phase of treatment, his refusal to admit his crimes or to be tested regarding his attraction to children." The Court placed emphasis on the evidence which showed the patient's "continued aggressive, violent behavior towards peers and staff members in the facility, including inappropriate sexual comments and threats toward female staff members." Not-

ing also that the patient was scored as a high risk to reoffend on actuarial instruments, presented no evidence contradicting the State's expert, and failed to offer any insight into his behavior, the Court denied the appeal and affirmed the Supreme Court's Order for Continued Confinement.

In so doing, the Court also rejected the contention on appeal that Supreme Court improperly relied upon hearsay statements contained in the expert's report which was received into evidence with the understanding that the Court would not consider such hearsay evidence and nothing in the record suggested that it had in making its findings.

14. Mental Abnormality: Motion To Vacate Under CPLR § 5015 Proper For Donald DD. Challenge, But Abuse of Discretion Found Here.

Decided August 13, 2015, in Matter of the State of New York v. Richard TT., 132 A.D.3d 72 (3d Dep't 2015), the Appellate Division reversed and denied respondent's motion to vacate prior orders of the Supreme Court finding that he suffered from a mental abnormality and is a dangerous sex offender requiring confinement.

Prior to the instant appeal, respondent previously appealed the orders of the Supreme Court in question here, however during the pendency, the Court of Appeals announced its decision in Donald DD., 24 N.Y.3d 174.[58] Pending decision on the initial appeal, respondent moved to vacate the trial court's prior orders under CPLR §§ 4404(b) and 5015(a). Supreme Court granted the motion to vacate under CPLR § 5015 and stated that while it still believed the respondent suffered from a mental abnormality, the Court of Appeal's ruling in Donald DD. mandated a different conclusion. As a result, the Third Department dismissed respondent's appeal as moot. The State brought this subsequent appeal seeking reversal of the Supreme Court's vacatur

[58] The Court of Appeals held that ASPD with evidence of sex crimes does not sufficiently distinguish an article 10 respondent from the typical recidivist, and therefore cannot serve as the sole predicate for a finding of mental abnormality.

order.

The State argued that the motion to vacate was procedurally improper under MHL article 10 because respondent could obtain relief via other means, i.e. an appeal. However, the Court dispensed with that argument and held that the trial court's reliance on CPLR § 5015(a) was properly considered.

On the merits, the Third Department acknowledged that under CPLR § 5015, "a motion to vacate is addressed to the trial court's sound discretion, subject to reversal only where there has been a clear abuse of that discretion." (citations omitted). The State argued that such abuse existed here, as Donald DD. "did not compel the conclusion that respondent did not suffer from a mental abnormality." Ultimately, the Third Department agreed and held that the orders of the Supreme Court were supported by the evidence.

In reaching that conclusion, the decision analyzes the trial evidence and discusses the respondent's diagnoses, which included ASPD and Borderline Personality Disorder (BPD), as well as his high levels of psychopathic traits and his hypersexuality/sexual preoccupation. The decision notes that both experts, the State's and respondent's, diagnosed him with ASPD and BPD. respondent's expert was noted to have testified that persons with BPD "not only exhibit generalized impulsivity, but may specifically exhibit impulsive sexual behavior." With regard to his psychopathic traits, the Court acknowledged the expert testimony explaining how such traits impact the conclusion for mental abnormality, specifically "noting that a psychopath such as respondent exhibits poor behavioral control and impulsivity that would further impair his decision making." The Court also noted that respondent's expert, though he questioned the validity of links between psychopathy and sexual recidivism, nevertheless acknowledged the existence of studies that drew such link. The Court wrote, "[t]he trial evidence therefore reflected that re-

spondent has a variety of disorders that can lead not only to a generalized willingness to commit crimes, but impulsive sexual behavior in particular." As the Court pointed out, the "record is replete with proof that the disorders do, in fact, cause respondent to exhibit impulsive and inappropriate sexual behavior."

The Court also addressed an evidentiary concern pronounced in Donald DD. regarding what the Court of Appeals described as a purported distinction between a respondent who has great difficulty in controlling his urges and one who simply decides to gratify them. The Third Department stated that question could also be answered easily here by citing to respondent's "lack of compunction and incapability to comprehend the inappropriateness of his conduct" as testified to by the State's expert and demonstrated by numerous factual examples. Heeding language in Donald DD., the Court honed in on the "detailed psychological portrait" of the respondent, stating "that [his] portrait shows an individual whose various disorders create a toxic mix that have not only caused him to objectify women and feel 'entitled to sex regardless of impact,' but have also impelled him to satisfy those desires." The Court pointed to the State's expert who "saw no reason to believe that [respondent's] situation would change in the future and [who] had no difficulty opining that respondent had a mental abnormality that seriously impaired his behavioral control . . . ." In the Court's view, "nothing in [Donald DD.] would bar [that expert] from doing so now." In reversing the Supreme Court's order to vacate, the Third Department stated, "as the evidence otherwise supports the finding that respondent is a dangerous sex offender requiring civil confinement, and the interests of justice plainly do not support granting the motion to vacate, Supreme Court abused its discretion in doing so." (citations omitted).

In dissent, two justices argued that Donald DD. required a different outcome and that the orders to vacate should stand. The dissent focused on the fact that "neither expert witness diag-

nosed respondent with an 'independent mental abnormality diagnosis,' because none of the conditions, diseases or disorders that were attributed to respondent bear a 'necessary relationship to a difficulty in controlling one's sexual behavior.'"

15. Expert Testimony: OMH Examiner Permitted To Testify At All Stages Of Proceedings; Statute Does Not Require An Equal Number of Testifying Experts.

Decided October 29, 2015, in Matter of State of New York v. James K., 135 A.D.3d 35 (3d Dep't 2015), the Third Department affirmed the Supreme Court's decision and order finding respondent a dangerous sex offender requiring confinement. The respondent waived his right to trial and stipulated to a finding that he suffered from a mental abnormality. Prior to his dispositional hearing, respondent moved to preclude the OMH psychiatric examiner from testifying, and in the alternative, requested that the Court appoint him a second independent expert. The Supreme Court denied both requests. At the dispositional hearing the State called the OMH examiner and an independent examiner, while the respondent called his own independent examiner.

On appeal, respondent argued that the trial court erred in allowing both the OMH psychologist, who initially evaluated him prior to the commencement of the proceedings, as well as the Attorney General's independent psychologist to testify. The Court rejected this, finding nothing in the statute which precludes an expert witness who initially examined respondent under the MHL § 10.05(e) review process (prior to commencement of the article 10 proceeding) to continue to participate in later proceedings.

Further, the Court rejected the contention that the psychiatric examiner was prohibited from supplementing his (pre-petition) evaluation report based on a review of (post-petition) updated treatment records for purposes of testifying on the question of confinement at the dispositional hearing. The Court stated, "[t]o limit the psychiatric examiner's subsequent access to

relevant information would be inconsistent with the statutory provisions that permit the parties to offer additional evidence on the question of respondent's dangerousness" and would contradict the mandates of MHL § 10.07(f) which requires that the Court consider "all available information" about the respondent's prospects for release to the community.

The respondent's appeal also included the notion that the petitioner needed to demonstrate the "necessity" of the psychiatric examiner's testimony. However, the Court stated that the test for admissibility is not necessity, but "whether the testimony is material and relevant to the issues posed." Here, the psychologist "possessed knowledge on the respondent's pathology that was clearly material and relevant on the issue of whether [respondent] required confinement." Moreover, the Court pointed out that while both experts "relied upon many of the same records and testing instruments, and each concluded that respondent required confinement," the two experts called by the State offered non-cumulative evidence. "Among other significant differences in the experts' procedures and conclusions," the Court said, the OMH examiner's "were based, in part, on an interview with respondent, while [the independent examiner] was unable to conduct such an interview due to the respondent's refusal to cooperate."

The respondent also claimed that the Court abused its discretion in denying his alternative motion for the appointment of a second expert. The Third Department found no abuse of discretion and stated that because the respondent did not identify any new evidence, any deficiency in his own expert's "investigations or conclusions or other need for a second expert opinion, except to balance the number of experts called by petitioner" such application was properly denied. The Court noted that there is no statutory language requiring both parties to have the same number of expert witnesses.

Lastly, in rejecting the respondent's claims that because of his "ostensibly superior quali-

fications," his expert's testimony must be afforded greater weight than the State's, the Third Department wrote, "[d]eterminations as to the weight and credibility of conflicting expert medical or psychiatric testimony are reserved for the trier of fact, who is in the best position to make such assessments."

FOURTH DEPARTMENT DECISIONS:

16. Evidence: Great Deference Given To Trier Of Fact In Evaluating Weight and Credibility of Conflicting Expert Testimony; Jury Verdict Upheld Based On Fair Interpretation of the Evidence.

Decided December 31, 2015, in Matter of State of New York v. Connor, 134 A.D.3d 1577 (4th Dep't 2015), the Appellate Division upheld the Supreme Court's order for confinement based upon a jury verdict finding mental abnormality and dispositional hearing wherein respondent was determined to be a dangerous sex offender requiring confinement.

On appeal, respondent argued that the jury verdict and finding of Supreme Court was against the weight of the evidence; contentions the Court rejected. It wrote, "petitioner's two expert psychologists testified that respondent suffered from a mental abnormality, and although respondent's expert testified to the contrary, the jury verdict is entitled to great deference based on the jury's opportunity to evaluate the weight and credibility of conflicting expert testimony." (citations omitted). Upon reviewing the record, the Court concluded that "the evidence does not preponderate so greatly in respondent's favor that the jury could not have reached its conclusion on any fair interpretation of the evidence." (internal quotations and citations omitted).

Further, the Court held that "Supreme Court, as trier of fact, was in the best position to evaluate the weight and credibility of the conflicting psychological testimony presented [at the dispositional hearing] and we see no basis to disturb its decision to credit the testimony of peti-

tioner's expert over that of respondent's expert." (citations omitted).

17. Annual Review: Motion For Directed Verdict Should Have Been Denied, Evidence Of Serious Difficulty Sufficiently Supported By Expert's Detailed Psychological Portrait of Sex Offender.

Decided December 31, 2015, in Matter of Wright v. State of New York, 134 A.D.3d 1483 (4th Dep't 2015), the Appellate Division was asked to reverse a trial court decision granting respondent's motion for a directed verdict made at the conclusion of the State's case in chief in Petitioner (Wright's) annual review hearing.

At the hearing, the State called one expert, an OMH examiner, who testified that the petitioner remained a dangerous sex offender. The expert reached that conclusion based in part upon respondent's diagnoses of ASPD, cannabis dependence in sustained remission in a secure environment, and paraphilia, otherwise specified. The latter diagnosis was determined based on what the Court described as "his arousal by and predisposition to engage in nonconsensual sex, in a highly formulaic and compulsive manner, following a well-defined cycle of offending." The State's expert also testified to results of psychological testing given to Wright, and provided a comprehensive psychological profile of his sexual compulsions. At the close of the State's proof, Wright's attorney moved for a directed verdict under CPLR § 4401, arguing that the State had failed to establish the "serious difficulty in controlling" prong of the mental abnormality definition, which the Supreme Court granted.

In reversing, the Court notes the standard for directed verdicts, i.e. resolving issues of credibility, drawing all inferences, and viewing the evidence in the light most favorable to the non-movant. Under that standard, the Court notes that the trial court erred in granting Wright's motion. Acknowledging Donald DD., the Court stated that here, the diagnoses alone are not suf-

ficient in meeting the burden of proof needed to establish "serious difficulty," but that the State "elicited significant additional information concerning petitioner's predispositions from [the expert] throughout the [hearing], and she testified that such information factored into her diagnosis and her opinion that petitioner had the requisite serious difficulty in controlling his sexual conduct."

The decision analyzes the hearing record and cites to numerous factors elicited from the State's expert which the Court uses to distinguish Wright's case from Donald DD., *supra*. and Frank P., 126 A.D.3d 150 (1st Dep't 2015). Among others, those factors include Wright's offenses against 21 separate female victims, his own stated arousal to nonconsensual sex, his stagnation in and failure to complete a sex offender treatment program, his lack of a viable plan to prevent relapse, and his scores on actuarial instruments placing him in categories of high risk to reoffend. "Consequently," the Court stated, "we conclude [the State's expert] created a detailed psychological portrait of a sex offender that allowed her to determine the level of control the offender has over his conduct." (internal quotations and citations omitted). Citing to recently decided Robert F., *supra*., in support of its decision to reverse, the Court further noted that [i]ndeed, when the Court of Appeals was confronted with a trial of an offender with a similar diagnosis and supporting facts, the Court concluded there was overwhelming evidence on the issue of the offender's inability to control his conduct." (See also *supra*. note 54).

18. Pre-Trial Procedure: Reversible Error In Granting Offender's Motion For Written Deposition Of Victim; Use of Victim's Hearsay Statements Not "Good Cause" To Issue Subpoena.

Decided March 25, 2016, in Matter of State of New York v. Vanderpool, 137 A.D.3d 1689 (4th Dep't 2016), the Appellate Division found error with and reversed the Supreme Court's order granting respondent's motion to conduct a written deposition of the rape victim in

respondent's qualifying offense. The Court noted that it was evident from his motion papers that respondent's intent in deposing the victim was "to relitigate the issue of his use of force in the commission of the qualifying offense." In so doing, the Court notes that the respondent specifically violates MHL § 10.07(c), which deems the underlying offense established and prohibits its relitigation in article 10 proceedings. The Court emphasizes that the respondent's conviction resulted in his voluntary plea of guilty to Rape in the First Degree, "by forcible compulsion."

Furthermore, the Court held that respondent "failed to demonstrate good cause for the issuance of a judicial subpoena upon the victim," as required by MHL § 10.08(g). Rejecting the respondent's contention that "good cause" is derived from the expectation that the State expert would rely upon the victim's hearsay statements at trial, the Court cited Floyd Y. and concluded "that the experts' reliance on such hearsay is not improper inasmuch as the evidence of reliability of that hearsay was the criminal justice adjudication unfavorable to respondent." (internal quotations omitted).

19. Annual Review: Evidence Of Mental Abnormality Supported By Offender's Diagnoses, Lack of Relapse Prevention Plan, High Risk To Reoffend, and Relative Progress in Treatment.

Decided March 25, 2016, in Matter of Billinger v. State of New York, 137 A.D.3d 1757 (4th Dep't 2016), the Fourth Department unanimously affirmed the Supreme Court order for respondent's continued confinement at a secure treatment facility, after an annual review hearing.

On appeal, the petitioner argued that the evidence submitted by the State at the hearing was not legally sufficient to establish the he requires continued confinement. The Court noted that the State's proof consisted of the report and testimony of an expert psychologist who diagnosed the Petitioner with pedophilic disorder, nonexclusive type, ASPD, and borderline intellectual functioning. Also, the expert "opined that petitioner remains at the 'relatively early' 'Phase

II' of his treatment . . . that petitioner does not have an adequate relapse prevention plan, and that petitioner's risk of sexual recidivism was high as indicated on by a Static-99R score of 8."

Based on its review of the record, the Court found that the State "established by the requisite clear and convincing evidence the petitioner suffers from a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, the [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.'" Further, the Appellate Division rejected the claim that the determination of the trial court was against the weight of the evidence, finding no reason to disturb the Supreme Court's decision to credit the testimony of the State's expert, as it was in the best position to evaluate the weight and credibility of the conflicting expert testimony.

D. TRIAL COURT DECISIONS

20. *Frye*: Unspecified Paraphilic Disorder Admissible.

In a written decision and order dated April 27, 2015, Bronx County Supreme Court (Michael A. Gross, J.S.C.) denied respondent's motion to preclude testimony regarding unspecified paraphilic disorder. In State v. Howard Harris, (Bronx Co. Index No. 251370/13), the Court granted respondent's motion and held hearing pursuant to Frye, 293 F. 1013 (D.C. Cir. 1923). During the four-day proceeding, the Supreme Court heard from four expert witnesses regarding whether the unspecified paraphilic disorder is a generally accepted diagnosis.

In its decision, the Court acknowledged that while unspecified paraphilic disorder has been criticized by experts in the field, "the mere fact that the diagnosis has been [the] subject of debate does not warrant the conclusion that it is no longer generally accepted." The Court noted that under a Frye analysis, "the test of reliability does not require that the diagnosis be unani-

mously endorsed by the scientific community but, rather, need only be generally accepted as reliable." (internal quotations and citations omitted). The Court noted that the diagnoses contained in the Diagnostic and Statistical Manual-5th Edition (DSM-5) "represent the collective agreement of the mental health community." Because the DSM-5 "represents the consensus of the psychiatric community, the decision to include unspecified paraphilia as a mental health diagnosis is clear indication of its general acceptance."

The Supreme Court also acknowledged the Court of Appeals concerns that paraphilia, not otherwise specified[59] is merely a "catch-all" category which amounted to "junk science devised for the purpose of locking up dangerous criminals," as well as that Court's "grave doubts" whether said diagnosis would survive a Frye challenge. However, Justice Gross stated that "the opinion in *Donald DD.* does not compel a finding that unspecified paraphilia is an unreliable diagnosis pursuant to *Frye*." Citing Wesley, 83 N.Y.2d at 439, the Supreme Court wrote that the "Frye test is not for our Court to determine whether the method was or was not reliable . . . but whether there was consensus in the scientific community as to its reliability. The *Frye* test emphasizes counting scientists votes, rather than verifying the soundness of a scientific conlcusion." (internal quotations omitted).

The decision states that, "issues regarding the application of this disorder – whether as clinical or forensic diagnosis – do not affect admissibility under *Frye*." Further, the opinion notes that "[s]ince unspecified paraphilic disorder is generally accepted as reliable, any objections to the application of the disorder in a particular forensic context are for the consideration by the factfinder in weighing evidence." In denying respondent's motion to preclude, the Supreme Court stated, "despite the existence of debate regarding its validity, the evidence establishes that

[59] Paraphilia, NOS is the DSM-IV-TR precursor to what is now listed in the DSM-5 as two separate disorders; Other Specified Paraphilic Disorder (302.89) and Unspecified Paraphilic Disorder (302.9). See DSM-5, page 705.

unspecified paraphilic disorder is generally accepted as a valid diagnosis in the psychiatric and psychological community."

21. *Floyd Y.* Basis Hearsay Admissible In Probable Cause Hearings, Court Presumed To Give Proper and Limited Legal Significance.

Decided May 5, 2015, in Matter of State of New York v. Marcello A., 2015 N.Y. Slip Op. 25148, the Suffolk County Supreme Court held that basis hearsay which may be subject to preclusion at trial based on Floyd Y., *supra*., is nevertheless admissible in a probable cause hearing held under MHL § 10.06(g). The Court's opinion provided a thorough discussion of the Floyd Y. decision and its implication on the various types of proceedings, aside from jury trials, wherein the Court serves as trier of fact. The Court noted various other rulings, trial and appellate, which concluded that when the judge sits as trier of fact, "the court is presumed to have properly given any hearsay statements their limited legal significance." The Court denied respondent's motion to preclude basis hearsay at the probable cause hearing.

22. No *Frye* Hearing Granted For Other Specified Paraphilic Disorder; "Provisional Diagnosis" Precluded, But Underlying Behaviors Admissible.

Decided September 28, 2015, in Matter of State of New York v. Balcerak, the Supreme Court, Nassau County (Teresa K. Corrigan, A.J.S.C.) denied respondent's motion seeking a Frye hearing to challenge the diagnosis of Other Specified Paraphilic Disorder (sexual interest in non-consenting minors). The Court notes that it has previously denied similar requests for Frye hearings but that courts in other jurisdictions have recently granted them. The Court reiterated that the issue is not the diagnosis, but the respondent's interest in children younger than 14 years old. The Court notes that a reading of the DSM-5 "reveals that interest in pre-pubscent children can be both abnormal and pathological." The Court stated that "this case is different in that the non-

consent is directly related to minors which brings the diagnosis into a realm that is well established within the DSM-5." Thus, the Court stated its belief that this type of diagnosis is generally accepted in the scientific community and that no Frye hearing is necessary related to this specific qualifier.

With regard to respondent's challenge of a "provisional diagnosis," the Court states that the DSM-5 does allow for these type of diagnoses when there is insufficient information to make a certain diagnosis. As such, the Court states that such "provisional diagnoses" have not reached the reasonable degree professional certainty required to be admissible. Nevertheless, the Court states, "those facts that assist the trier of fact in developing a full psychological profile of the respondent are admissible whether or not, when taken in totality, they equate with a DSM diagnosis. State v. Shannon S., 20 N.Y.3d 99 (2012)."

23. Motion to Preclude "Rule Out" and "Considered But Not Assigned" Diagnoses Denied As Matters of Weight, Not Admissibility; No Diagnosis Needed To Find Mental Abnormality.

Decided December 18, 2015, in Matter of State of New York v. Kevin J., the Supreme Court, Kings County (Dineen A. Riviezzo) denied a motion brought by the respondent which sought to preclude the State's expert witnesses from testifying to "rule out" diagnoses or diagnoses that were "considered but not assigned." The respondent argued that said diagnoses lack scientific certainty and required the psychologist to assume facts that are not supported by the evidence.

The Court held that the examiners did not assume facts unsupported by the evidence. The Court noted that the DSM-5 allows for "provisional" diagnoses to be made "when there is a strong presumption that the full criteria will ultimately be met for a disorder but not enough in-

formation is available to make a firm diagnosis or when a differential diagnosis depends exclusively on the duration of illness."

Citing Shannon S., *supra*., the Court argued that

> [s]ince an opinion that a respondent suffers from an mental abnormality may include a diagnosis that is not specifically identified in the DSM, or theoretically may not include any diagnosis at all, there is no legal reason to preclude a diagnosis or condition that was considered by an expert but not assigned or 'ruled out' just because it does not meet all of the criteria of the diagnosis as stated in the DSM.

Also, the Court pointed to the Second Department's decision in Derrick B., 68 A.D.3d 1124 (2d Dep't 2009), which held that a provisional diagnosis can be used in concluding that a respondent has a mental abnormality. The Court wrote

> [w]hile the examiners did not label these opinions as provisional diagnoses, the court does not believe that the label, whether it be provisional or a rule out diagnosis, has any import on the admissibility of the opinion. It is clear from the expert reports that the behaviors and the conduct of the respondent considered by the experts were still instrumental in the ultimate conclusion that he has a mental abnormality, and therefore, admissible.

Lastly, it should be noted that the Court indicated that respondent's objections to testimony regarding the "rule out" and "considered but not assigned" diagnoses are "more properly a 'weight of the evidence argument' rather than an admissibility argument."

24. *Frye*: "Non-Consent" Specifier Attached to "Other Specified Paraphilic Disorder" Diagnosis Is Not Generally Accepted in the Relevant Scientific Community.

Decided on January 12, 2016 by the Supreme Court, Kings County (Dineen A. Riviezzo, J.S.C.), in Matter of State of New York v. Jason C., the Court held that a diagnosis of "Other

Specified Paraphilic Disorder, Non-Consent" (OSPD-NC) has not been generally accepted in the relevant scientific field, and thus granted Repspondent's motion to preclude.

The Court held an extensive Frye hearing wherein each party called three expert witnesses. While noting that the "Other Specified Paraphilic Disorder" has been generally accepted within the relevant psychological community, the Court was persuaded that the specifier "non-consent" is not generally accepted. The Court noted that testimony from six experts within the psychological community provided conflicting accounts with regard to the specific diagnostic criteria and, in the Court's view, made it evident that no explicit criteria for this diagnosis currently exists and that "non-consent" cannot be reliably differentiated from what the DSM-5 describes as sexual sadism.

While the Court acknowledged that some form of paraphilia, non-consent has been proposed for inclusion in the DSM but rejected since the 1980's, the Court refuted that this was convincing evidence that the diagnosis is not generally accepted by the scientific community because, as the Court stated, "the DSM is a political document that rarely changes and the reasons for inclusion or exclusion of any particular diagnosis are complex."

Ultimately, the Court focuses on the lack of uniform criteria for establishing the non-consent specifier and notes that "there are persons on a sexual sadism scale who are sexually excited by the use of force and violence but to a degree that is less than what would be currently diagnosed as sexual sadism." The Court commended the efforts of two testifying experts engaged in establishing uniform criteria for "non-consent" so as to avoid its overuse in sex offender civil management proceedings, but emphasized *at this point in time*, the State has only proven the diagnosis to be a "working hypothesis."

25. Summary Judgment Denied; Regardless of Diagnostic Label, Mental Abnormality Supported by Evidence of Underlying Behaviors.

Subsequent to its decision above to preclude the OSPD-NC diagnosis, the Supreme Court Kings County, (Dineeen A. Riviezzo, J.S.C.) was presented with respondent, Jason C.'s motion for summary judgment under CPLR § 3211(a)(7), which alleged a failure to state a cause of action. Citing Donald DD., respondent sought dismissal of the petition with prejudice, arguing that since OSPD-NC was precluded, the only viable diagnosis assigned to him was ASPD and alcohol use disorder, severe, in a controlled environment, which cannot form the basis of a finding of mental abnormality, as they are "non-sexual diagnoses" that do not predispose him to commission of sex offenses.

The State countered that Donald DD. was not implicated here. In addition to ASPD and the alcohol use disorder diagnoses assigned to respondent, the State argued that it's expert concluded the respondent suffers from a mental abnormality based in part upon evidence of behaviors consistent with a sexual sadism disorder, which the psychologist considered, but ultimately did not assign.

In denying the motion, the Court applied the standard for summary judgment, noting that the movant must make a *prima facie* showing that they are entitled to judgment as a matter of law. Applying that standard here, the Court reasoned that notwithstanding the Donald DD. decision, a material issue of fact existed, particularly as it relates to the State's evidence that respondent presented with "arousal to the physical or psychological suffering of others as evidenced by the level of violence respondent exhibited during his four convicted sex offenses." The Court noted further evidence that respondent "meant to humiliate [his] victims . . . [by] in-

serting his finger in a victim's rectum, making victims insert their own fingers into their own rectums, slapping the victims and ejaculating on victims' body parts including the face on one victim." The Court continued: "[c]ontrary to respondent's position, these opinions are not synonymous with the testimony that this court has rendered inadmissible after the *Frye* hearing."

The fact that the State expert "did not actually diagnose respondent with sexual sadism disorder is not dispositive," the Court reasoned. Using language similar to its decision in Kevin J., *supra*., the Court pointed out that though the State's expert "did not label his opinion as a provisional diagnosis, [it] does not believe that the label, whether it is 'provisional' or a rule out diagnosis, or 'considered but not assigned' has any import to the admissibility of the opinion." Moreover, the Court states that it is "clear from the expert report that the behaviors and the conduct of respondent considered by the expert were still instrumental in the ultimate conclusion that he has a mental abnormality, and therefore, admissible."

26. *Frye*: OSPD, "Gerontophilia" Is A Generally Accepted Diagnosis.

On March 17, 2016, the Supreme Court, Nassau County (Teresa K. Corrigan, A.J.S.C.) held in Matter of State of New York v. Patrick Reilly, that Other Specified Paraphilic Disorder (OSPD), "gerontophilia" is a generally accepted diagnosis. After conducting a Frye hearing, the Court denied the respondent's motion to preclude the diagnosis, finding "that a younger person's sexual attraction to a much older person is a paraphilia named gerontophilia and gerontophilia has been generally accepted within the relevant psychological and psychiatric community." The Court stated, "[a]dditionally, Petitioner has established that gerontophilia can transition into a paraphilic disorder and lastly that the mental disorder diagnosis of OSPD (gerontophilia) is a generally accepted diagnosis within the relevant psychological and psychiatric community."

At the hearing, the State called two expert witnesses to testify; one a licensed psychiatrist and the other a licensed psychologist. The Court alludes to the psychiatrist's testimony which explained that "paraphilia" as a clinical term first came into existence in the DSM-3, but has been known in scientific literature for thirty years prior. The Court points out that the DSM-5 acknowledges that there are many paraphilias, not all of which are named, and that these are referred to as either "action" or "target" based. The Court acknowledges that "gerontophilia" would be target based as the targeted sexual preference is an elderly person.

The decision discusses the evidence presented at the hearing, and notes that as early as 1886, psychiatrists initially described the concept of sexual interest in the elderly within scientific literature and it was first given then name "gerontophilia" in 1938. The State's expert testified that he had seen several cases of gerontophilia first-hand, and opined that gerontophilia is accepted in the psychological and psychiatric community. The Court points to "extensive testimony related to the validity and reliability of the other paraphilia named in the DSM-5." Further, the Court notes that "[a]ll experts agreed that there are many dozen unnamed paraphilias." Based on that testimony, the Court gave "very little weight to the argument that gerontophilia can't exist as a paraphilia or a disorder based on the believed degree of validity, reliability, and research. This phenomenon has been the topic of discussion for decades, long before SVP [sexually violent predator] legislation came into existence."

The Court found that "the current level of belief in the validity and reliability of gerontophilia does not negate OSPD (gerontophilia) from being generally accepted in the relevant psychological and psychiatric community as a parparaphilic disorder, and indeed, is sufficient to warrant such a finding." In drawing a distinction, the Court stated, "[w]hether it is sufficient for an Article 10 finding of mental abnormality is a question that must be decided at trial and the

trier of fact must evaluate a full psychological profile of the accused when determining if the person has a mental abnormality as defined by statute."

Additionally, the Court wrote:

> although extremely rare, there is a well accepted and reasonable concern amongst clinicians and law enforcement to properly identify those individuals who sexually assault the elderly based on sexual deviance. Only about 2% to 7% of the victims of sexual assault are elderly. Those who offend against them are an equally small number of people. It is logical to expect that those that offend against elderly based on a mental abnormality must be equally small.

In concluding, the Court stated, "[t]hat which is rare should not be ignored. That which is rare must still be identified and properly treated. Sexual deviance that forms the basis of an Article 10 proceeding should likewise be rare. . . ."

27. *Frye*: "Non-Consent" Specifier to OSPD Has Not Gained General Acceptance.

On March 29, 2016, the Supreme Court, New York County (Daniel P. Conviser, J.S.C.) issued a decision in Matter of State of New York v. Kareem M., 2016 Slip Op. 50427(U) granting preclusion of Otherwise Specified Paraphilic Disorder, non-consent. The decision was written after the Court held a Frye hearing in which six expert witnesses testified, three called by each party.

The Court's written opinion thoroughly recounts the proof as testified to by each witness. It also considered and discussed the extensive research and literature in the field and discussed the evolution of the OSPD diagnosis up to its current form in the DSM-5. It also discusses the use of OSPD, non-consent and various other similar diagnoses, which the Court labels "paraphilic coercive disorder" (PCD), as they are used in other jurisdictions which have analogous

civil management statutes, which the Court refers to as sexually violent predator (SVP) statutes.

The Court considered the conceptual distinction between "non-consent" and sexual sadism, and acknowledged that some experts consider forms of non-consent to be contained on a continuum or spectrum of behaviors, the more extreme forms of which rise to the level of sexual sadism. The Court also discussed the exclusion of PCD from the DSM and the process by which diagnoses are considered for publication in the manual.

The Court emphasized that OSPD itself, is a valid diagnosis, when it has a valid specifier. The Court stated, "[i]t is clear to this Court that the OSPD designation itself is generally accepted in the psychiatric community assuming a valid specifier is attached."

Here, however, based on the Court's review of the Frye hearing testimony, the literature in the field, and drawing upon the Court's own experience in article 10 civil management cases, the Court held that PCD, or the "non-consent" specifier, has not yet gained general acceptance in the relevant field. The decision cited several reasons for reaching this conclusion, namely, that while some experts in the field are working to define a precise diagnostic framework, no agreed upon diagnostic criteria yet exists for PCD. Additionally, the Court notes the difficulty in distinguishing arousal from lack of inhibition and PCD from sexual sadism.

Noting also the political and bureaucratic nature of the DSM approval process for diagnostic inclusion, the Court nevertheless reasons that PCD's continued exclusion from the DSM is further evidence that the disorder lacks general acceptance in the field. The Court articulates a difference between acceptance among psychologists and psychiatrists generally, and acceptance among that narrower class of practitioners whose work is focused in what the Court refers to broadly as Sexually Violent Predator or SVP statutes. While the Court finds that PCD has not been generally accepted in either, it cautions that "[c]onsidering the narrow class of SVP practi-

tioners would fail to undertake the broader inquiry inherent in the view that PCD might not be legitimate if it were only used in SVP cases."

In discussing the implications of this and other recent Frye decisions (i.e. Jason C., *supra*.) the Court notes that "[w]hat the confluence of these decisions might mean if they were eventually affirmed is that offenders who rape post-pubescent victims (or, as in this case, force such victims to engage in oral sex) would rarely be subject to Article 10."

In concluding, the Court notes that the "shifting legal currents reflect the extraordinary lack of clarity in the rules governing these [article 10] proceedings." Pointing to appellate division cases decided in the wake of the Court of Appeals decision in Donald DD., the Court states that they have "raised a host of new questions." The Court writes, "[i]t has now been almost nine years since Article 10 was enacted. The rules governing the statute, in this Court's view, are more confused than they ever have been. Today's decision will do little to change that."

28. MHL § 10.06(e) Mandates Respondent's Independent Expert To Produce A Report and Requires That It Be Provided To The Attorney General and the Court.

Decided March 31, 2016, in Matter of State of New York v. Younis, the Supreme Court, Cayuga County (Thomas G. Leone, A.J.S.C.) ordered the respondent to produce the written findings of his independent psychiatric examiner. MHL states that the respondent may request an evaluation by a psychiatric examiner, and further, that said "psychiatric examiner shall report his or her findings in writing to the respondent or counsel for the respondent, to the attorney general, and to the court." MHL § 10.06(e). Counsel for the respondent argued that his independent examiner had not completed an evaluation nor written a report and therefore, respondent need not

be compelled to produce one. The State argued that the plain language of MHL § 10.06(e) makes it clear that production of a report is mandatory.

The Court held, in the event respondent elects to have an independent evaluation performed under MHL § 10.06(e), "[f]ollowing the evaluation, a report must be produced and provided to the Attorney General and Court. It is mandatory. The statutory provision is clear and unambiguous. There is no option found within the statute's text to permit respondent to decide whether an evaluation is completed or not, either express or implied."

Accordingly, Supreme Court ordered that respondent's expert produce and disclose a report, noting, "[i]ndeed, a psychiatric examiner's failure to complete an evaluation would be in contravention of a court order."

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. D.J. – Spanning over 4 decades, D.J. demonstrated a consistent pattern of sexual offenses against vulnerable women, many who were drug addicted and/or prostitutes. He would stalk and then either forcibly abduct or deceptively lure the victims to secluded locations where he would often choke to submission and then vaginally and anally raped them. His lengthy criminal history includes more than fifteen arrests for sex crimes and he has at least nine convictions for sexual or sexually motivated offenses. The most recent conviction resulted from his abduction of a female who he dragged into the woods surrounding a secluded cemetery. There, over a period of four hours, he vaginally and anally raped her until police responded to the scene after neighbors complained of hearing repeated screams for help. Upon a plea bargain, he was convicted of Attempted Rape First Degree and was sentenced to a 10-year term of incarceration, followed by seven years of post-release supervision. Additionally, D.J. has an extensive criminal record for a wide variety of non-sexual offenses. He repeatedly demonstrated non-compliance with community supervision as evidenced by two parole revocations and two probation violations. D.J. is diagnosed with an Unspecified Paraphilic Disorder, Antisocial Personality Disorder, Severe Alcohol Use Disorder, and Severe Stimulant Use Disorder. D.J. waived his probable cause hearing and his case is currently pending.

State v. C.A. – At age 33, C.A. used force and the threat of violence to rape a 14-year-old girl he had befriended over the internet in a chat room. He had groomed her by escalating the commu-

nication to texts and phone calls and deceived the girl about his age, stating that he was 18. On a day that he knew his wife would be away and at work, he was successful in persuading the victim to skip school and meet him in person. After making several advances, the girl persisted that she would not have sex with him. C.A. then put both hands around her neck and smiled at her. He scratched her face during a struggle to remove her pants and her tampon, and despite her cries to stop, he kept raping her for over thirty minutes. He threatened to kill her if she notified police. Upon pleading guilty to Rape Second Degree, he was sentenced to a three year term of state prison, followed by a five year term of post-release supervision. He violated parole twice, each time resulting in a revocation and return to incarceration. The first violation involved possessing an unapproved phone which he used to send threatening messages to an ex-girlfriend with whom he had a history of domestic violence. The second resulted from several alleged technical violations and, in a supplementary violation of release report, included his arrest for Rape First Degree. That arrest involved allegations that he raped his 40-year-old girlfriend, who was pregnant with his child, during the course of an argument over their mutual suspicion of the other's infidelities. During the investigation, C.A. described this encounter as rough sex, but his pregnant victim insisted it was against her will and resulted in significant vaginal bleeding. He plead bargained that charge down to a misdemeanor Sexual Misconduct and was sentenced to one year incarceration which merged with his parole revocation. Aside from these two sex offenses, C.A. has several other criminal convictions for sale and possession of drugs and resisting arrest. Notably, he also has two convictions stemming from incidents of domestic violence against women. The first, at age 20, resulted in a Battery-Domestic Violence conviction in Florida. The second, at age 32, for Attempted Unlawful Imprisonment Second Degree (in full satisfaction of Unlawful Imprisonment First Degree, Menacing Second Degree, Criminal Possession of a Weapon, Fourth Degree, and Harassment Second Degree), involving allegations that he forced a pistol in the mouth of his girlfriend and threatened to kill her if she ever left him. C.A. is diagnosed with Antisocial Personality Disorder along with a clinically significant condition of sexual preoccupation, sexual deviance, and psychopathy. Notably, he scored extremely high (31) on the Psychopathy Checklist Revised (PCL-R), a psychological instrument designed to measure levels of psychopathic traits. C.A. waived his right to trial and stipulated that he suffers from a mental abnormality. Thereafter, the Court determined that he is a sex offender requiring civil management in the community under SIST.

State v. J.C. – J.C.'s sexual offensive behaviors began when he was 10 years old after he admittedly touched other children and was placed on juvenile probation. At age 17, J.C. was arrested for Sex Abuse Second Degree after admitting to police that he had fondled the penises of at least four young boys between the ages of eight and ten. At 19, J.C. was arrested for Sexual Misconduct and admitted to forcing oral sex upon a 15-year-old boy whom he also threatened to kill if the victim complained to authorities. J.C. was again arrested at age 23 for Sodomy Second Degree after he forcibly performed on and received oral sex from his 12-year-old male cousin. After pleading down to a misdemeanor Sodomy Third, J.C received a six-month term of incarceration and 5 years of probation. While in the community under probation, he was violated for failing to complete sex offender treatment and absconding. Approximately five years after his re-incarceration and release, J.C. was again convicted of Sodomy First. This conviction involved the repeated oral sexual abuse of his own son, when the boy was between the ages four and five years old. He was sentenced to a 13 year term of incarceration, followed by five years post-release supervision. While in prison, J.C. has several disciplinary violations for Forcible

Touching, Lewd Contact, and Physical Contact, resulting from his performance of several acts of oral sodomy, groping, and exposure to at least three other inmates, all of whom were described as young and boyish in appearance. He has an extensive criminal history of non-sexual misdemeanor crimes as well. J.C. is diagnosed with Pedophilic Disorder, Antisocial Personality Disorder, Substance Abuse Disorder (Alcohol and Cannabis), and is noted to have a moderate level of psychopathic characteristics and to be sexually preoccupied. J.C. waived his probable cause hearing and moved venue to the county of his underlying conviction, where his case is currently pending trial.

State v. J.D. – Starting at age 16, J.D. was adjudicated a youthful offender for grand larceny and stolen property charges and would spend the next decade of his life accumulating arrests and convictions for a variety of behaviors involving theft, burglary, weapons, drug sales, resisting arrest, and disorderly conduct. At age 26, he was arrested for multiple counts of Sexual Abuse First Degree, Rape Second Degree, and Assault First Degree. The charges resulted after J.D. violently choked his 12-year-old cousin, punched her in the face, vaginally raped her, and threatened to kill her. After fleeing the scene, he returned only an hour later, around 4:30 a.m., to vaginally rape her a second time. The girl was hospitalized for two weeks and closely monitored as doctors feared that she had permanent damage and loss of vision resulting from the prolonged deprivation of oxygen during the assault. J.D. was convicted upon a plea of guilty to reduced charges of Rape First Degree (two counts), Assault Second Degree, Assault Third Degree, and Endangering the Welfare of a Child. He was sentenced to a maximum nine year indeterminate term of incarceration. Within two months of his parole release on that offense, he committed two other sex offenses against his four-year old and eight-year old nieces. J.D. attempted to force anal rape upon his four-year old niece and he orally sodomized his eight year old niece (and he beat their mother, his sister, that same night when she confronted him). He was charged in a nine count indictment for Sodomy First Degree (2), Sexual Abuse First Degree (2), Incest (2), Endangering the Welfare of a Child (2), and Assault Third Degree. Upon his plea of guilty to Sodomy First, in full satisfaction of all charges, he was sentenced to a maximum 15-year indeterminate term of incarceration. J.D. served the maximum and has no applicable post-release supervision. While serving both terms in prison, he obtained a total of 36 tier ticket violations, many for violence against staff and fighting inmates. J.D. is diagnosed with Pedophilic Disorder, Antisocial Personality Disorder, Alcohol Use, Cannabis Use, and Psychopathy (high psychopathic traits). After moving venue to the County of his underlying conviction, his case is pending trial.

State v. A.J. – As early as age 15, up to age 24, A.J.'s criminal behaviors ran the gamut from robbery and weapons charges to drug sales and gang assault. He was alleged to suffer a possible traumatic brain injury (TBI) at age 17 resulting from gang violence. At 25, A.J. was arrested for two counts of Rape 1st and Unlawful Imprisonment involving allegations that he held the 16-year-old daughter of his girlfriend in a car for two days, during which time he raped her twice, ultimately impregnating her. The victim's mother, A.J.'s girlfriend at the time, was also pregnant by him. He was ultimately arraigned on misdemeanor charges and pled guilty to a non-sexual offense. Upon his release, at age 26, A.J. was arrested and charged with two counts of Rape Third Degree, and Endangering the Welfare of a Child, stemming from his rape of a 15-year-old female. He admitted to multiple instances of intercourse with this victim, but claimed she told him that she was 18. Similar to his first victim, the second was also the daughter of an

adult female with whom he was sexually involved. He pled guilty to the misdemeanor Endangering the Welfare of a Child in satisfaction of the Rape charges. Shortly after, he picked up an Attempted Assault Third Degree conviction stemming from a domestic violence incident. At age 27, A.J. committed the Article 10 qualifying sex offense, after he forcibly raped a 14-year-old female that he had lured to his apartment building under false pretenses. He has admitted to engaging the victim in oral and vaginal intercourse in exchange for $100 and a pair of sneakers, but denies raping the girl, who was the younger sister of an acquaintance of his. He has also made claims that he was set-up with this victim by a famous enemy of his in an elaborate revenge scheme resulting from a failed $100,000 murder-for-hire plot. He was convicted upon a plea of guilty to one count of Rape Third and sentenced to forty-two months in state prison, followed by a five-year term of post-release supervision. He violated parole at age 31 and was resentenced to a year in prison. A.J. was diagnosed with Bipolar Disorder, Not Otherwise Specified (NOS); Cognitive Disorder, NOS (possibly resulting from the TBI); Paraphilia, NOS; ASPD; and Borderline Intellectual Functioning. A.J. waived his right to a jury and the Court found that he suffers from a mental abnormality. His case is currently scheduled for and pending the outcome of a dispositional hearing.

State v. R.Y. – R.Y.'s known acts of sexual deviance and cruelty towards young boys started at age 18, when he was adjudicated a youthful offender for Reckless Endangerment (threatening to shoot several children with a loaded gun) and later that same year for Endangering the Welfare of a Child (taking nude photos of an 8-year-old boy). Four years later, he was arrested for Sodomy First Degree, Unlawful Imprisonment First Degree, and Endangering the Welfare of a Child, when police learned that he had sodomized a 10-year-old boy after handcuffing and restraining him at gunpoint. R.Y inserted his penis and various foreign objects into the boy's anus and took nude photos of the victim. He was convicted by a jury on multiple counts, including Sex Abuse First, Unlawful Imprisonment, and Endangering the Welfare of a Child. At age 31, he was convicted of Reckless Endangerment Second and Menacing after he fired multiple shots from twenty-two caliber rifle at police upon their arrival to a domestic dispute. Four years later, at age 35, R.Y. was arrested and charged with engaging in numerous acts of cruel, tortuous, and deviant sexual contact with at least fourteen different male victims between the ages of five and fourteen, some of which were family members, children of his friends, and total strangers. During the investigation, additional children came forward and reported being sexually abused by R.Y. on prior occasions, but those cases could not be prosecuted due to the statute of limitations. R.Y. was on probation at the time he committed most of these offenses. R.Y. forced oral sodomy on and from his victims and he perpetrated anal sodomy upon the boys. He would also force the boys to perform sexual acts on each other while he watched, photographed, and recorded videos of the acts. R.Y. often displayed, fired, and threatened to use guns against the victims to gain their compliance and he threatened to kill the families of the boys if they disclosed the abuse. R.Y.'s sexual deviance was tortuous, as he would frequently lock the boys in rooms or use ties and handcuffs to restrain them, or threaten to rip off their genitals to gain further compliance. On one occasion, R.Y. "pig-tied" his victim while he inserted various objects into the boy's anus. Another, he tied to a tree and abandoned, only to return later to whip him with a belt, insert a spoon into his anus, and masturbate to the victim's crying. R.Y. was charged under three separate indictments to numerous counts of sexual crimes including: Use of a Child Less than 16 Years of Age in a Sexual Performance; Possession of a Sexual Performance by a Child Less than 16; Sodomy First Degree; Aggravated Sexual Abuse, Sexual Abuse First Degree; and

Endangering the Welfare of a Child. He pled guilty to and was convicted on 86 counts. The Court sentenced R.Y. to a twenty-year determinate term of incarceration. He is diagnosed with Pedophilic Disorder; Cocaine Use Disorder; and Sexual Sadism Disorder, Provisional. R.Y. waived his probable cause hearing, stipulated to a finding that he suffers from a mental abnormality, and consented to being a dangerous sex offender requiring confinement.

State v. D.S. – As early as age 9, and twice before he turned 13, D.S. was adjudicated a person in need of supervision and placed on probation. At 14, while still on probation, D.S. approached the home of a 13-year-old female classmate in the middle of the night. He removed all his clothes, broke into the house, and entered the sleeping girl's bedroom. The victim awoke to D.S. standing over her, completely naked, touching her legs and vagina. D.S. was adjudicated a juvenile delinquent and placed on probation, which he promptly violated by stealing a motorcycle, and was placed in residential treatment facility under local Department of Social Services custody. At age 15, the respondent was arrested for exposing his penis and masturbating in the front passenger seat of a van driven by a female staffer of the facility. When the staff member ordered him to stop, he grabbed and rubbed her thigh instead. When she rejected his advance and again directed him to stop masturbating, he grabbed the steering wheel – twice – in an effort to careen the van off the road in a collision. D.S. admitted to having suicidal thoughts resulting from the female staffer's rejection of his advances. He was again adjudicated a juvenile delinquent for Reckless Endangerment and was transferred to more secure facility. At that facility, D.S. exposed his penis to a female staffer and attempted to pull her into his bedroom. As a result, D.S. was administratively transferred to a higher security juvenile facility where he remained until he reached 18 and aged-out. Shortly after release, D.S. observed an unsuspecting 17-year-old female waiting in line at an ice cream stand. Unannounced, he approached her from behind, pulled her pants down, and grabbed her bare buttocks before running away. Several days later, D.S. was arrested for public lewdness after multiple drivers and passersby observed him standing on top of a bridge/overpass, publicly masturbating. At age 19, D.S. committed the qualifying offense when he molested his 5-year-old niece by touching her buttocks and vagina. D.S. was convicted upon a plea of guilty to Attempted Sexual Abuse First Degree, and was sentenced to 42 months incarceration with 10-years post-release supervision. While awaiting sentencing on the qualifying offense, D.S. tried to escape from police custody, and in the process, he assaulted and choked a corrections officer. D.S. is diagnosed with Other Specified Disruptive, Impulse-Control and Conduct Disorder: Hypersexuality - Recurrent Behavioral Outbursts of Inappropriate and/or Coercive Sexual Content; Unspecified Paraphilic Disorder; Antisocial Personality Disorder; Intellectual Developmental Disorder/Intellectual Disability (Mild). D.S. waived his right to a jury and proceeded with a bench trial. The Court's decision is forthcoming.

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, 2016, 470 dangerous sex offenders with mental abnormalities are being civilly managed. Of that, 429 are being treated in a secure treatment facility, while 131 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.*