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SEX OFFENDER MANAGEMENT BUREAU

A Report On The Sex Offender Management Treatment Act

April 1st, 2016 to March 31, 2017

AMENDED

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INTRODUCTION

In passing the Sex Offender Management and Treatment Act (SOMTA) 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 (MHL), 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 Ten Years," provides updated statistics and case data that are current as of March 31, 2017. 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 dangerous sex offenders, New York is unique in that it provides an alternative to confinement and allows

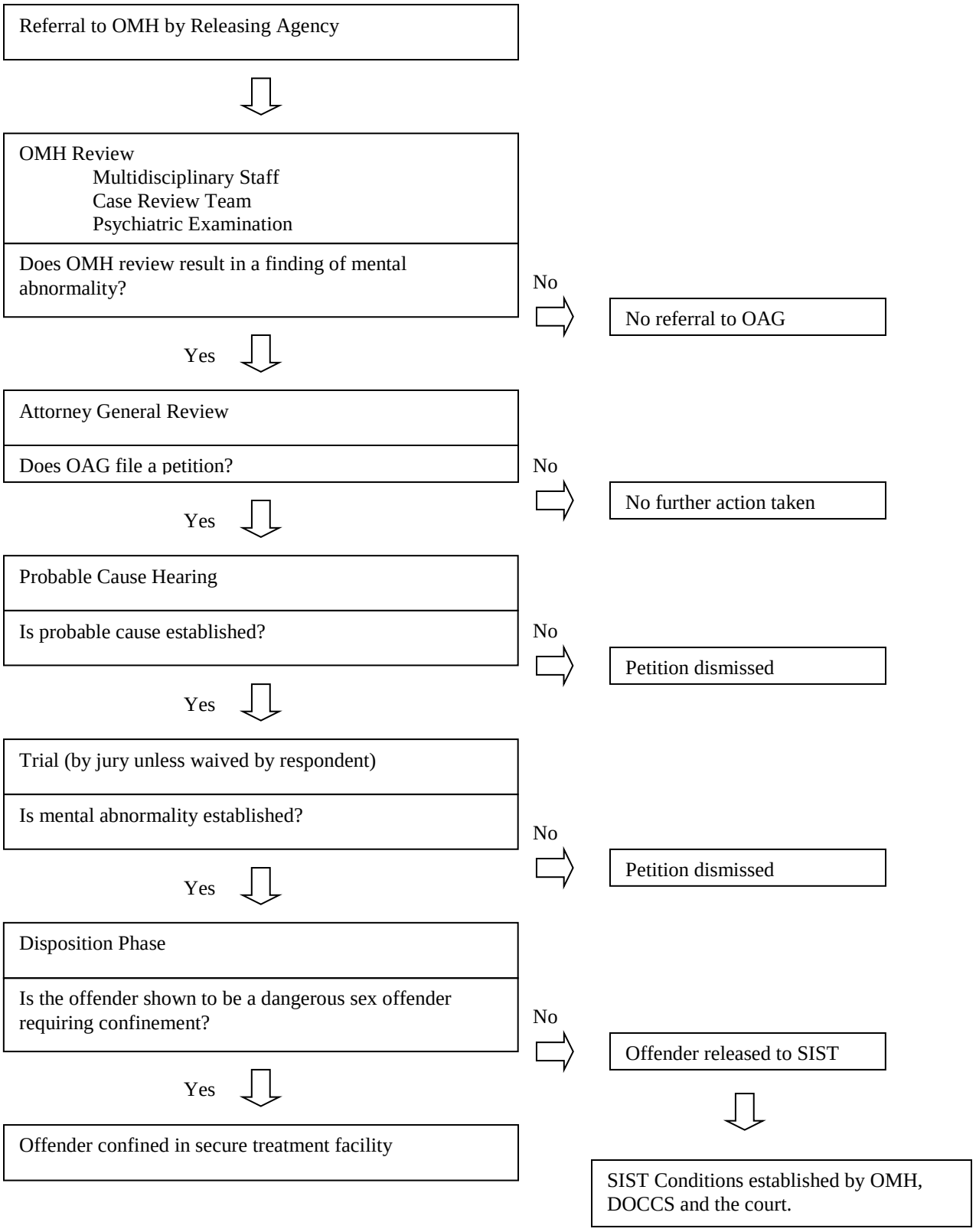
[6] MHL §§10.05, 10.03(a),(q),(g) and (i).

some offenders to be managed in the community under strict and intensive supervision and treatment (SIST). After a legal finding that an offender suffers from a "mental abnormality," MHL Article 10 contemplates two distinct dispositional outcomes; 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 whether the individual is a dangerous sex offender requiring confinement. If the court does not find that he is a dangerous sex offender 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

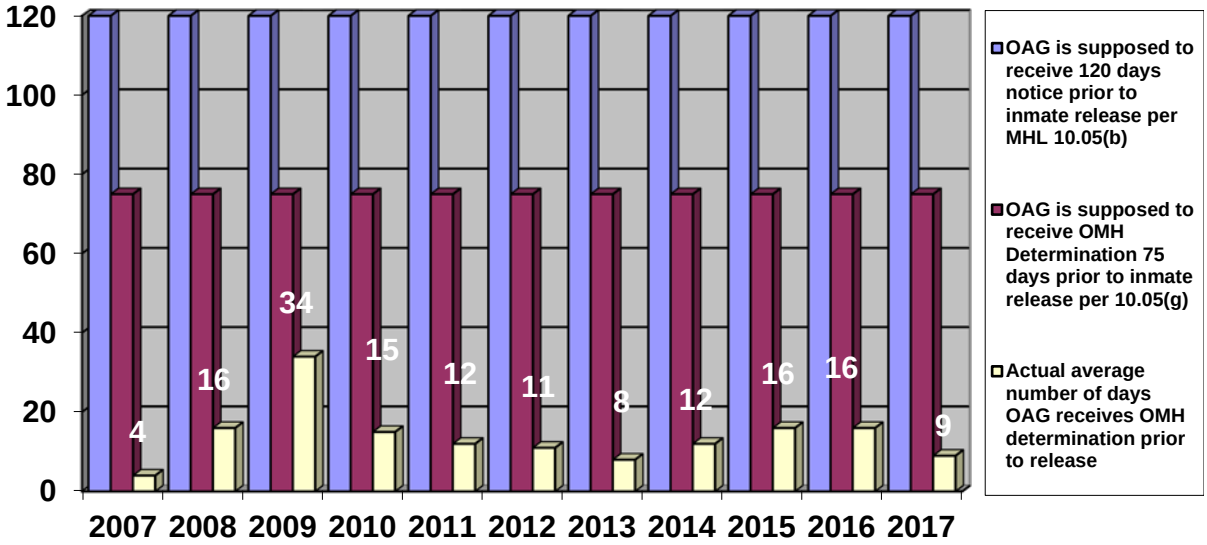
When an individual who may be a "detained sex offender" is nearing anticipated release from custody of an agency with jurisdiction,[10] the agency gives notice of the offender's anticipated release to both the NYS Office of Mental Health (OMH) and the NYS Office of the Attorney General (OAG).[11] The 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]

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

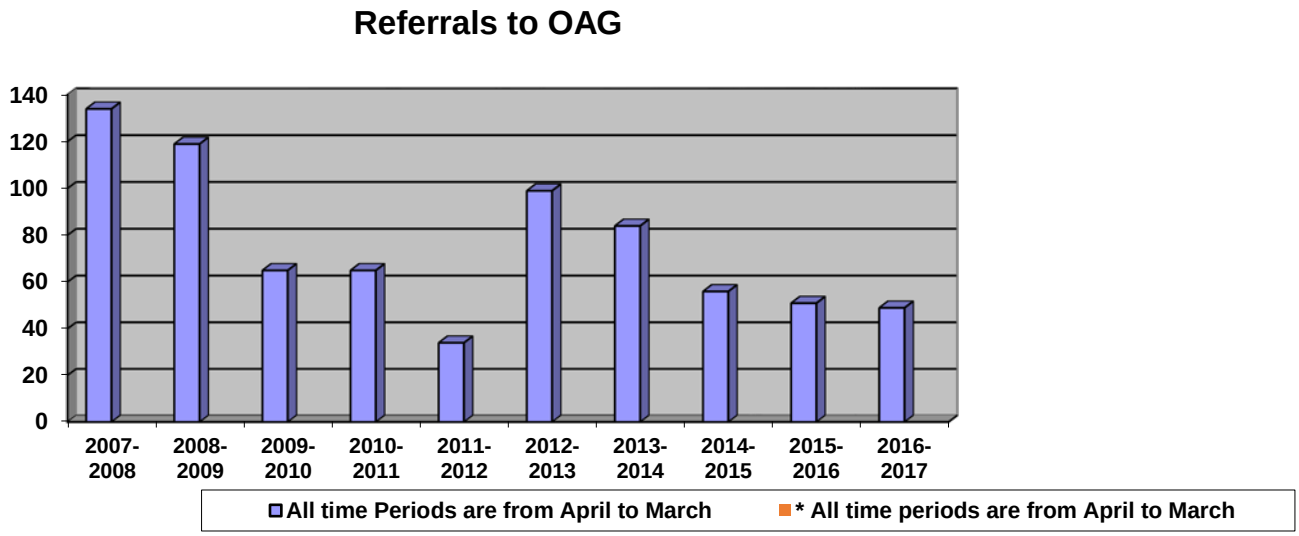
In practice, the actual time in which the OAG receives OMH's determination is much less. In 2007, the actual average time between the OAG's receipt of such notification and the offender's release date was 4 days; in 2008 it was 16 days; in 2009 it was 34 days; in 2010 it was 15 days; in 2011 it was 12 days; in 2012 it was 11 days; in 2013 it was 8 days, in 2014 it was 12 days, in 2015 it was 16 days, and through March 31, 2016, it was 16 days and through March 31, 2017 it was 9 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. In 2015 to 2016, OMH has referred 51 cases to the OAG and in 2016 to 2017,

49 cases were referred. 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

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

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

Shortly after the petition is filed, a hearing is held to determine whether there is probable cause to believe respondent[19] is a sex offender requiring civil management.[20] If the court finds probable cause exists, the offender is transferred to an OMH secure treatment facility pending trial. The appellate courts have determined that a finding of probable cause is sufficient to hold a respondent in 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

[17] MHL §10.06(b).
[18] *Id*., MHL §10.07(a).
[19] Once a petition is filed, the sex offender is referred to as the "respondent" in the legal proceedings.
[20] MHL §10.06(g).
[21] MHL §10.06(k).
[22] *Id*.
[23] MHL §10.07(a).
[24] MHL §10.07(b).
[25] MHL §10.07(a), (d), MHL 10.03(g), (i).

prove by clear and convincing evidence that the respondent is a "detained sex offender"[26] who suffers from a "mental abnormality."

A “mental abnormality” is statutorily defined as:

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

The jury, or judge if the jury is waived, must find by unanimous verdict that the State of New York met its burden. 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

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

> danger to others and to commit sex offenses if not confined to a secure treatment facility.[31]

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

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

[31] MHL §10.03(e).
[32] MHL §10.07(f).
[33] *Id*.
[34] MHL §10.01(b).

treatment facility. An offender may at any time petition the court for discharge and/or release to the community under a regimen of SIST. The court may deny the petition finding it is frivolous or that it does not provide sufficient basis for re-examination at that time, or the court may order an evidentiary hearing be held.[35]

Furthermore, and by statute, each sex offender is examined once a year for evaluation of their mental condition to determine whether they are currently a dangerous sex offender requiring confinement.[36] Each respondent is entitled to an annual review hearing based upon the findings of the annual evaluation. The court will hold an evidentiary hearing if the sex offender submits a petition for annual review or if it appears to the court that a substantial issue exists as to whether the offender is currently a dangerous sex offender requiring confinement.[37] The Attorney General calls the OMH examiner to testify at the annual review hearing and the respondent often presents independent expert testimony on his or her behalf. These safeguards ensure the offender's legal rights are respected and that civil commitment decisions withstand legal scrutiny. If the court finds by clear and convincing evidence that the respondent is currently a dangerous sex offender requiring confinement, it will continue respondent's confinement. If it finds respondent is not currently a dangerous sex offender requiring confinement, it will issue an order providing for the discharge of respondent into the community on a regimen of SIST.[38] As of March 31, 2017, 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

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

under a regimen of strict and intensive supervision and treatment in the community, and still protect the public, reduce recidivism, and ensure offenders have proper treatment.[39]

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

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

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

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

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

[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).

supervision.[47] Upon receipt of a petition for modification or termination, the court may hold a hearing. The party seeking modification of the terms and conditions of SIST has the burden to establish by clear and convincing evidence that the modifications are warranted.[48] However, when the sex offender brings a petition for termination, 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.

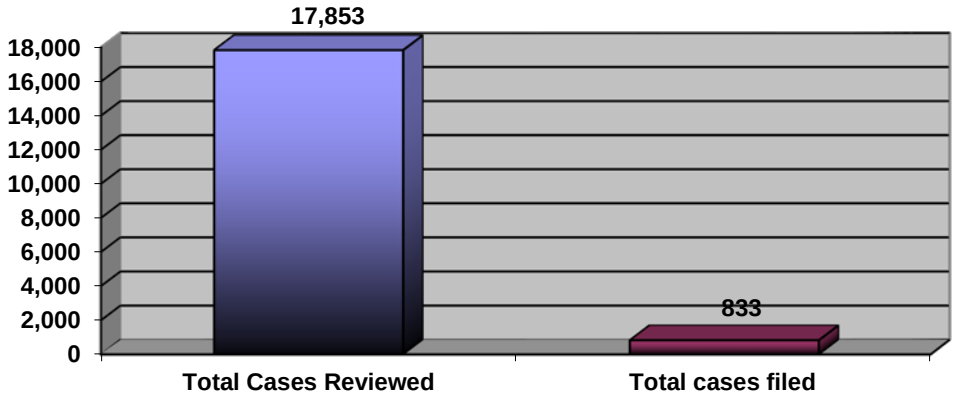
As time passes, it is expected that the number of offenders on SIST will grow considerably because of (1) the number of offenders that are released to SIST after trial, but also because (2) every time an offender is released from a secure treatment facility, the court has found he or she still suffers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

II. CIVIL MANAGEMENT AFTER TEN YEARS

A. REFERRALS AND CASES FILED

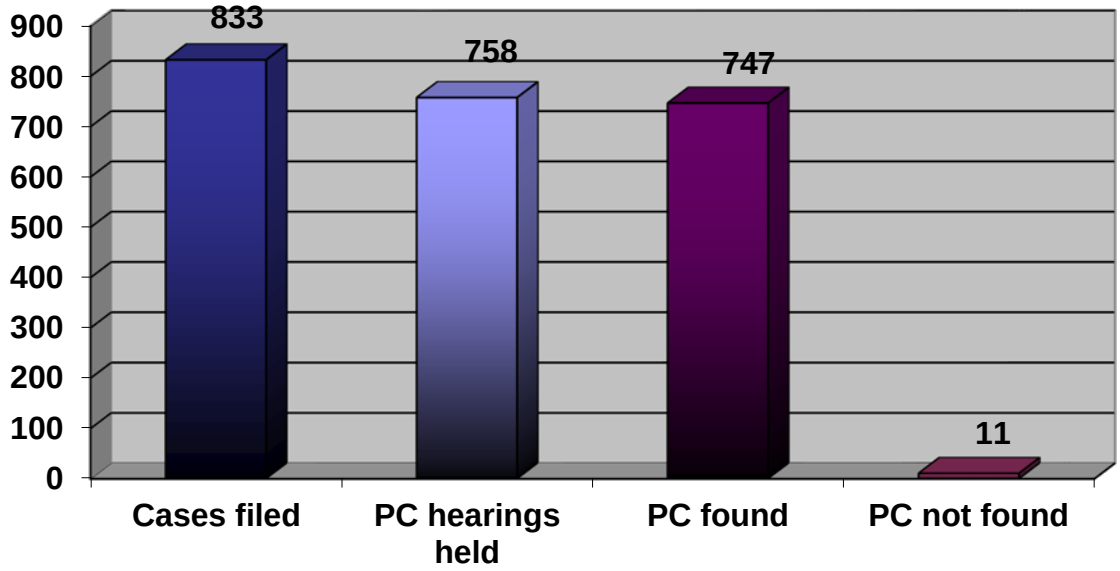
In the ten years since Mental Hygiene Law Article 10 became law, the New York State Office of Mental Health has reviewed 17,853 sex offenders to determine whether they are appropriate for referral to civil management. Of the cases reviewed, only 833 have resulted in OAG filing an Article 10 Petition. This includes what is considered the "Harkavy" cases addressed in previous reports.

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



B. PROBABLE CAUSE HEARINGS

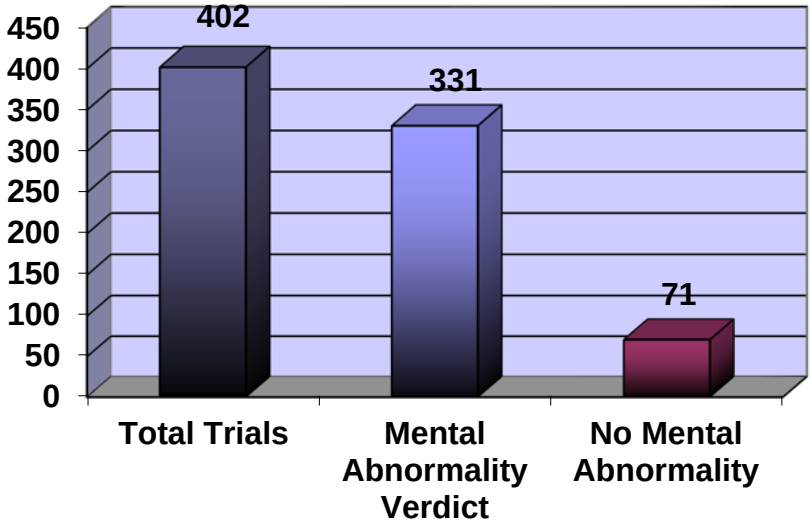
In the ten years since SOMTA's inception, OMH referred a total of 838 sex offenders for civil management.[50] The OAG has filed 833 petitions, conducted 625 probable cause hearings, and respondent has waived his right to the hearing on 202 occasions. The courts found probable cause to believe the offender suffered from a mental abnormality and was in need of civil management 747 times out of the 758 hearings held to date.



[50] These referrals include the Harkavy cases.

C. MENTAL ABNORMALITY

Of the 402 trials, the jury or judge rendered a verdict that 331 of those sex offenders suffered from a mental abnormality and 71 were adjudicated to have no mental abnormality.



D. DISPOSITIONS

1. Dangerous Sex Offender Requiring Confinement (DSORC)

From April 13, 2007, to March 31, 2017, a total of 398 offenders have been found to be dangerous sex offenders requiring treatment in a secure OMH facility. Of that number, 175 respondents admitted they were dangerous sex offenders requiring treatment in a secure treatment facility, and 223 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, 2017, a total of 156 offenders were initially placed on a regimen of SIST after a finding that he suffers from a mental abnormality. Of that number, 110 admitted they were sex offenders requiring SIST, and after a dispositional hearing 46 were

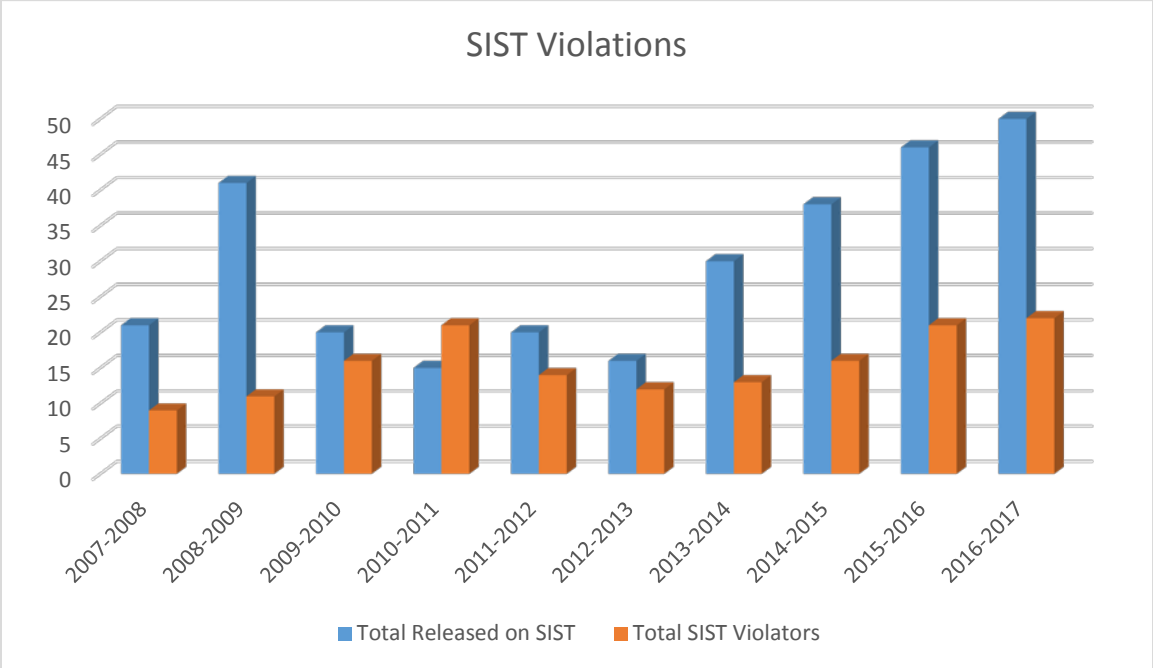
adjudicated by the court to be sex offenders requiring SIST.

3. SIST Violations

The data below reflects the total number of offenders placed on SIST annually and the total number of SIST violations occurring annually:

	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015	2015-2016	2016-2017
Total released to SIST	21	41	20	15	20	16	30	38	46	50
Total SIST Violators	9	11	16	21	14	12	13	16	21	22

At the time of this annual report, approximately 105 individuals were in the community subject to terms and conditions of SIST.



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.

E. ANNUAL REVIEW HEARINGS

The number of annual review hearings held each year trends consistently with the increases in the number of sex offenders who are receiving treatment in a secure facility. The number of dangerous sex offenders requiring confinement who petition for annual review is expected to rise. Since SOMTA's inception, while some offenders have waived their right to a hearing and consented to continued treatment in the facility, over 536 dangerous sex offenders have had an annual review hearing held by the court. In the current report period, April 1, 2016 to March 31, 2017, there have been 150 evidentiary hearings.

F. SIST TERMINATION HEARINGS

Of the 297 offenders placed on SIST, 47 have been released from SIST supervision altogether, and are either being supervised under their standard conditions of parole or have reached their maximum expiration date for parole and are unsupervised in the community subject to the requirements of the Sex Offender Registration Act (SORA).

III. SIGNIFICANT LEGAL DEVELOPMENTS

Again this year, as has been the trend over the past several, between April 1, 2016, and March 31, 2017, courts at the Federal, State, and local levels decided a number of remarkable cases, each having a dynamic impact on Article 10 litigation.

A. NEW YORK STATE COURT OF APPEALS

The New York Court of Appeals issued one significant MHL Article 10 case between April 1, 2016, and March 31, 2017.

1. Evidence & Substantive Due Process: Legal Sufficiency of Mental Abnormality.

In a decision dated July 5, 2016, the Court of Appeals held in Matter of State of New York v. Dennis K., 27 N.Y.3d 718 (2016) that the legal sufficiency of a mental abnormality under MHL § 10.03(i) is satisfied where a sex offender has been diagnosed with conditions, diseases, and/or disorders in addition to anti-social personality disorder (ASPD). This decision is the culmination of the Court's two prior cases, In the Matter of State of New York v. Shannon S., 20 N.Y.3d 99 (2012) and In the Matter of State of New York v. Donald DD., 24 N.Y.3d 174 (2014), and clarifies the jurisprudence on using clinical diagnoses to support the legal definition of mental abnormality.

In Shannon S., the Court held that a sex offender's mental disease or disorder does not need to be listed in the American Psychological Association's Diagnostic and Statistical Manual of Mental Disorders (DSM), to qualify as a mental abnormality under the Mental Hygiene Law. 20 N.Y.3d at 105-106. In Donald DD. the Court held that evidence that a sex offender suffers from ASPD alone cannot be used to satisfy the mental abnormality requirement under Mental Hygiene Law § 10.03(i), since, the Court reasoned, ASPD only establishes a general tendency toward criminality and is not indicative of whether a person has difficulty controlling his or her sexual behavior. 24 N.Y.3d at 191.

Here in Dennis K., the Court held that when a diagnosis of ASPD is accompanied by a condition, disease, or disorder that is recognized as a predisposition to commit sexual offenses, there is legally sufficient evidence to support a finding of a mental abnormality under the Mental Hygiene Law. 27 N.Y.3d at 733. The condition, disease, or disorder need not be a sexual disorder, but it must affect the "emotional, cognitive, or volitional capacity of a person that predisposes him or her to the commission of conduct constituting a sex offense." Id. at 781. The

Court's reasoning is based on the language of MHL § 10.03(i) which states that the mental abnormality must be based on a, "congenital or acquired condition, disease or disorder." While the Court ruled in Donald DD. that ASPD by itself was not proof of a sexual abnormality, it did not add a requirement that the condition, disease, or disorder must be a sexual disorder.

Thus, while the State may not rely solely on a diagnosis of ASPD to establish mental abnormality under MHL § 10.03(i), the aggregate of several disorders and conditions whether directly sexual or not, may be legally sufficient to show that the sex offender is predisposed to commit sexual offenses, and make it seriously difficult for the sex offender to control his or her conduct.

B. THE NEW YORK STATE APPELLATE DIVISIONS

Statewide, between April 1, 2016 and April 1, 2017, the Appellate Divisions decided a total of 33 cases addressing MHL Article 10 matters. The breakdown by department is as follows: The First Department 1 decision; Second Department 15 decisions; Third Department 3 decisions; and Fourth Department 14 decisions. The following sections summarize the notable decisions.

FIRST DEPARTMENT:

2. Petition and Pleadings: Composite Diagnoses Including ASPD are Sufficient to State a Cause of Action Under Article 10.

Decided on October 13, 2016, in State of New York v. Richard L., 143 A.D.3d 519, the First Department unanimously reversed the trial court and reinstated the petition for civil management.

Granting the motion to dismiss, the trial court decision relied on Matter of State of New York v. Donald DD., 24 NY3d 174 (2014) and found that the petition to failed to state a cause of action. In reversing, the First Department relied on the Court of Appeals' subsequent decisions in Matter of State of New York v. Dennis K., 27 N.Y.3d 718, and Matter of State of New York

v. Jerome A., 137 A.D.3d 557, to find that "the petition alleging a mental abnormality based on a composite diagnosis of antisocial personality disorder, substance-use disorders, psychopathy and sexual preoccupation, and supported by expert evidence that is not patently deficient, is facially valid."

3. Due Process: "Within 60-Days" Deadline Not a Strict Time Limit; *Barker* Factors Used to Assess Delay in Article 10 Trials.

Decided on April 27, 2017, in In re the State of New York v. Keith F. (149 A.D.3d 671), the First Department unanimously affirmed the trial court's ruling that the respondent is a dangerous sexual offender who needs confinement and committed him to a secure treatment facility—despite the delay of proceeding to trial which exceeded the statutory 60-day deadline.

MHL § 10.07(a) states that a trial shall be commenced within 60 days after a probable cause determination, but, as the decision here notes, this deadline is not a "strict time limit," citing Matter of State of New York v. Enrique T., 93 AD3d 158, 173 (1st Dep't 2012), lv dismissed 18 NY3d 976 (2012). The First Department states that there is no clear legislative intent to comply with the timeframe in order to continue jurisdiction. The Court points out that article 10 repeatedly asserts that "failure to comply with various deadlines does not affect the validity of the petition or the various actions subject to those deadlines (see MHL §§ 10.05(b), (g); 10.06(h); 10.08 (f); 10.11(d)(2), (4))."

The First Department held that the 15-month delay between Keith F's declaration of readiness for trial and commencement of trial did not violate his due process rights. The court relied upon the four-factor balancing test from Barker v. Wingo, 407 US 514 (1972)(see also Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The Court noted that the first factor, the length of delay, "may be considered presumptively prejudicial."

The second factor, the reason for the delay, carried little weight against petitioner. Though a five-month delay was attributable to the petitioner, a large part of the delay was held attributable to Keith F., whose experts were unavailable and due to other circumstances outside petitioner's control, including the respondent's refusal to attend court twice and the matter having been judicially reassigned to a different judge with a crowded docket.

Respondent's assertion of his rights, the third factor in Barker, favors respondent in so far as the adjournments to which he objected. Nonetheless, the Court notes that "his failure to retain any experts for, or to testify in, the article 10 proceedings, his consent to delays, his refusal to appear in court twice, and his engagement in abusive conduct directed against those associated with the proceeding suggest that respondent did not desire an early judicial hearing." (internal quotations and citations omitted).

The Court found that the fourth Barker factor, prejudice to respondent, favors the petitioner because there was "no oppressive pretrial incarceration" since respondent chose to be confined in a local prison rather than in an OMH secure treatment facility throughout the proceedings, and the trial delay did not affect respondent's ability to put on a defense.

SECOND DEPARTMENT:

4. Detained Sex Offender: Related Offense and Sexual Motivation.

Decided April 27, 2016, in Matter of State of New York v. Philip B., 138 A.D.3d 1124, the Appellate Division affirmed the Supreme Court's order for civil confinement after a jury found Philip B. to suffer from a mental abnormality.

Philip B. committed an assault while paroled on an unexpired term of post-release supervision for a manslaughter in the first-degree conviction. In the article 10 proceeding, the Supreme Court submitted to the jury the question of whether the assault and manslaughter crimes

were sexually motivated. Arguing that he was only in custody for the assault committed while on parole, not his manslaughter conviction, Philip B. contended that it was an error to invite the jury to consider the manslaughter offense.

The Court held that the trial court properly submitted to the jury the sexual motivation question on both convictions, because Philip B.'s current term of incarceration (on the assault) is a "related offense" under the statute and satisfies the definition of a "detained sex offender." The Court wrote, "appellant was a detained sex offender by virtue of his conviction of manslaughter-a 'sex offense' because it was a sexually motivated designated felony and his incarceration for assault, a 'related offense' because it was the basis for the order of commitment."

The Second Department also upheld the verdict, finding that the jury made a fair interpretation of the evidence that the manslaughter and assault offenses were sexually motivated, since they "were committed in whole or in substantial part for the purpose of [Philip B.'s] direct sexual gratification." Likewise, based on a fair interpretation of the trial evidence, the Court found a valid line of reasoning upon which the jury could conclude Philip B. suffered from a mental abnormality.

Based on the evidence presented at the dispositional hearing, the Court also upheld the trial Court's determination that Philip B. is a dangerous sex offender requiring confinement.

5. Evidence: Respondent's Strong Predisposition to Commit Sex Offenses and Such an Inability to Control His Behavior is Legally Sufficient to Support the Verdict of a Mental Abnormality and Dangerous Sex Offender Requiring Confinement.

Decided May 11, 2016 in Matter of State of New York v. Cleophus H., 139 A.D.3d 868 (2d Dep't 2016), the Second Department upheld an order from the Supreme Court, Kings County, finding that Cleophus H. suffered a mental abnormality as defined in Mental Hygiene Law § 10.03(i) and is currently a dangerous sex offender requiring civil confinement. The

Second Department found the evidence at trial legally sufficient, stating that, "clear and convincing evidence supports the Supreme Court's finding that the State established that the appellant suffers from 'a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control, that he is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility.'"

6. Jury Trial: Including a Conviction Not Deemed a Designated Felony Under Article 10 on Verdict Sheet Results in General Verdict Requiring New Trial.

Decided on June 11, 2014 in the Matter of State of New York v. Todd L., 118 A.D. 3d 805 (2nd Dept., 2014), the Appellate Division reversed the Supreme Court finding that the appellant committed a sexually motivated designated felony offense and ordered the Supreme Court, Queens County to undertake a new trial and if necessary, a new dispositional hearing.

Todd L. was convicted and sentenced to prison for promoting prostitution in the second degree, promoting prostitution in the third degree, assault in the second degree. The MHL article 10 petition alleged that Todd L.'s conviction for assault in the second degree and promoting prostitution in the second degree, qualified him as a detained sex offender since those crimes were sexually motivated, designated felonies. At trial, the verdict sheet submitted to the jury included asked whether "assault in the second degree or promoting prostitution in the second degree or promoting prostitution in the third degree constitute a sexually motivated offense?"

On appeal, Todd L. argued that promoting prostitution in the third degree is not a designated felony offense under MHL §10.03(f), thus it cannot subject him to civil confinement even if the jury were to find that offense was sexually motivated. The State countered that such objection was not raised at trial and thus unpreserved for appeal, and any resulting error is harmless in light of the other evidence.

The Court found that including on the verdict sheet a crime that is not a designated felony was so fundamental an error that even though Todd L. did not object to its inclusion at trial, the Court may exercise its discretion and consider it on appeal. Subsequently, regarding the jury's conclusion that Todd L's commission of assault in the second degree or promoting prostitution in the second degree were sexually motivated, the Court stated, "the evidence was legally sufficient to support those findings, as there was a valid line of reasoning to support them, and moreover, they were not against the weight of the evidence, as they were based on a fair interpretation of the evidence."

Nevertheless, including the count of promoting prostitution in the third degree presented a "flawed legal theory" to the jury and resulted in an ambiguous "general verdict." Since it was unclear to the court upon which of the three convictions the jury relied to render the verdict, a new trial was necessary.

7. Jury Verdict Upheld Based on Fair Interpretation of the Evidence; No Error in Admitting Hearsay of Prior Charged Sex Offense; Attorney's Closing Remarks Fair Response; Denial of *Frye* Hearing For Actuarial Risk Instrument Proper.

Decided June 15, 2016 in Matter of State of New York v. Dean G., 140 A.D.3d 972 (2d Dep't 2016), the Second Department upheld the Supreme Court's order for civil management based on a jury verdict finding mental abnormality and a dispositional hearing wherein Dean G. was determined to be a dangerous sex offender requiring confinement.

On appeal, Dean G. argued that the jury verdict and finding of the Supreme Court was contrary to the weight of evidence. In rejecting that argument, the Court held that legally sufficient evidence supported the verdict and was not contrary to the weight of the evidence, as it was supported by a fair interpretation of the evidence.

The Court also rejected Dean G.'s assertion that the Supreme Court erred in refusing to

preclude hearsay of a prior charged sex offense that did not result in a conviction or acquittal and his claim that counsel for petitioners closing arguments deprived him of a fair trial. The Court found that the challenged remarks were a fair response to Dean G.'s attorney and no so pervasive as to have deprived him of a fair trial.

Lastly, the Court rejected the contention that the Supreme Court erred in denying Dean G.'s motion for a hearing pursuant to Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) concerning the admissibility of the STATIC-99 actuarial risk assessment. Citing Matter of Ian I., 127 A.D.3d 766, the Court recognized that this instrument has been generally accepted as a reliable means of assessing sexual recidivism risk.

8. *Frye*: Trial Court Should Have Granted Motion for *Frye* Hearing Challenging "Otherwise Unspecified Paraphilic Disorder" Diagnosis.

Decided on June 29, 2016 in the Matter of State of New York v. Hilton C., 118 A.D. 3d 805 (2nd Dept., 2014), the Appellate Division held the balance of the appeal in abeyance and remitted to the Supreme Court, Nassau County for a hearing pursuant to Frye v. United States, 293 F 1012 (DC Cir.), to determine whether a diagnosis of "other unspecified paraphilic disorder" (a.k.a. unspecified paraphilic disorder) has achieved general scientific acceptance in the psychiatric and psychological communities.

The Court noted that since the primary basis relied on to show mental abnormality of Hilton C. was the diagnosis of "other unspecified paraphilic disorder" assigned to him by the State's experts, the Supreme Court should have conducted a Frye hearing to determine whether such diagnosis has achieved general acceptance in the scientific and psychological communities.

9. Evidence: Harmless Error to Admit Hearsay, Given Expert Did Not Rely Upon Unproven Criminal Conduct; Allowing State Expert to Testify at the Dispositional Hearing by Video-Teleconference Harmless Error In Light of the Overwhelming Evidence Submitted.

Decided on June 29, 2016 in Matter of State of New York v. James M., 140 A.D.3d 1178 (2nd Dept., 2016), the Appellate Division affirmed the Supreme Court order directing civil management based on a jury verdict finding mental abnormality and after dispositional hearing, the trial court's finding that James M. is a dangerous sex offender requiring confinement.

The Second Department noted that at the jury trial stage, the Supreme Court erred in admitting certain hearsay evidence regarding allegations of past criminal conduct, however, the error was harmless since the petitioner's expert testified that she did not rely on these allegations at all. Moreover, the Court held the evidence legally sufficient to support the jury's finding of a mental abnormality and stated that the verdict was based on a fair interpretation of evidence that was not against the weight of the evidence.

Additionally, the Appellate Division noted that while the Supreme Court erred in allowing the State's expert to testify at the dispositional hearing via video tele-conference, such error was harmless in light of the overwhelming evidence presented.

10. Evidence & Frye: Post-trial Challenge to General Acceptance of Diagnosis was Unpreserved and was Issue of Fact for Jury to Resolve.

Decided on July 13, 2016 in the Matter of State of New York v. Patrick L., 141 A.D.3d 591, the Appellate Division affirmed the Supreme Court order directing civil management based on a jury verdict finding mental abnormality and after dispositional hearing, the trial court's finding that Patrick L. is a dangerous sex offender requiring confinement.

On appeal, Patrick L. contended that the diagnosis used by the State's expert to establish his mental abnormality was legally insufficient since it was not generally accepted in the relevant scientific community. The Court found that since the appellant did not request a hearing prior to trial or object to the testimony during, the contention was not preserved for appellate review. Moreover, the Court noted that the reliability of the diagnosis as a viable predicate for mental

abnormality was an issue of fact for the jury to resolve. Further, the Court held that the jury verdict was based on a fair interpretation of evidence. Regarding the Supreme Court's finding that the appellant is a dangerous sex offender requiring civil confinement, the Second Department notes was supported by clear and convincing evidence. Lastly, the Court deemed all of Patrick L.'s other contentions on appeal, including a challenge to comments of the State's attorney made in summation, unpreserved for review and without merit.

11. Challenge to Waiver of Jury Trial Unpreserved and Without Merit; Challenge to Hearsay Evidence Presented in Dispositional Hearing Unpreserved.

Decided on July 27, 2016, Matter of State of New York v. Clyde J. (Anonymous), 141 A.D.3d 723, the Second Department affirmed the order and decision of the Supreme Court, Queens County, upon Clyde J.'s waiver of trial and admission to mental abnormality and after a dispositional hearing, found he was a dangerous sex offender requiring civil confinement.

Clyde J. based his appeal on a challenge to his waiver of his right to a jury trial on the issue of "mental abnormality." In upholding the waiver, the Court observed that, under MHL §§ 10.07(b), 10.08(f), a jury trial may be validly waived "where an on-the-record colloquy shows that the person made a knowing and voluntary waiver" after an opportunity to consult with his attorney. Here, the Court noted, the Supreme Court conducted an on-the-record colloquy during which the appellant stated that he had consulted with his attorney regarding the waiver, and he was knowingly and voluntarily waiving his right to a trial.

Clyde J. also contended that the Supreme Court improperly admitted hearsay evidence against him during the dispositional hearing. On that point, the Second Department found that the State established by clear and convincing evidence that the appellant was a dangerous sex offender requiring civil confinement, and that appellant did not preserve a challenge to purported hearsay evidence that was introduced at his hearing. The decision notes that aside from the

challenged hearsay, overwhelming evidence showed that Clyde J. is a dangerous sex offender requiring confinement.

12. SIST: Failure to Establish "Serious Difficulty" Results in SIST Termination.

Decided October 12, 2016, in Matter of State of New York v. Stanley D. (Anonymous), 143 A.D.3d 832, the Second Department reversed the trial court's denial of a petition for termination of strict and intensive supervision and treatment (SIST).

Stanley D. petitioned for a termination of SIST in 2014 and after an evidentiary hearing, the Supreme Court modified his conditions, but did not terminate his SIST regimen.

On appeal, Stanley D. argued that the state failed to prove by clear and convincing evidence that he has serious difficulty controlling himself from committing sex offenses. Upon review of the hearing, the Second Department agreed, finding that the State did not establish that the appellant had "serious difficulty" under MHL article 10.

The Court reasoned that the only evidence in the record was his long history of sex offenses in the past, but no evidence that Stanley D. had committed any offenses since 2002. The Court also found persuasive the fact that Stanley D. was in full compliance with his SIST conditions and "had been successful in treatment, where he learned and used skills and modalities to help him control himself from engaging in criminal sexual conduct."

13. SIST: Initial Admission to Mental Abnormality Established Mental Abnormality for Purposes of Subsequent SIST Violation.

Decided October 12, 2016, in Matter of State of New York v. Wayne J. (Anonymous), 143 A.D.3d 834, the Second Department held that an offender's admission to mental abnormality on an initial petition sufficiently established that he suffered from a mental abnormality in so far as that was required to subsequently prove that he is a dangerous sex offender requiring confinement, upon his violation of SIST.

In the initial article 10 petition, Wayne J. admitted to having a mental abnormality and consented to the Court's determination that he was a sex offender requiring SIST. After being ordered to a regimen of SIST, Wayne J. was taken into custody for violating his conditions. The State filed a petition seeking his confinement as a dangerous sex offender. After a SIST violation hearing, the Supreme Court granted the petition and ordered Wayne J.'s confinement at a secure treatment facility.

Citing Matter of State of New York v. Breeden, 140 A.D.3d 1649 and Matter of State of New York v. Jason H., 82 A.D.3d 778, 779, the Second Department found that Wayne J.'s initial admission that he suffered from a mental abnormality established his continuing mental abnormality for the purposes of the State's petition seeking confinement upon his SIST violation.

The Court also found that the State established by clear and convincing evidence that Wayne J. was a dangerous sex offender requiring confinement, in that he has "such an inability to control behavior" that he "is likely to be a danger to others and to commit sex offenses if not confined to a securer treatment facility." MHL § 10.07(f). Lastly, the Court viewed the totality of the record and contrary to his contentions, held that Wayne J. was not denied the effective assistance of counsel.

14. Petition and Pleadings: Composite Diagnoses Including ASPD are Sufficient to State a Cause of Action Under Article 10.

Decided February 15, 2017, in Matter of State of New York v. Ezikiel R., 147 A.D.3d 959, the Second Department held that the Supreme Court erred in dismissing the State's Article 10 petition on the ground that it failed to state a cause of action.

Supported by expert opinion, the State's petition alleged that Ezikiel R. suffered from a mental abnormality under MHL article 10, based in part upon a diagnostic profile that included antisocial personality disorder (ASPD). Upon a motion to dismiss for failure to state a cause of

action pursuant to CPLR § 3211(a)(7) and in reliance upon the Court of Appeals decision in Donald DD., 25 N.Y.3d 174, the Supreme Court dismissed the petition.

In reversing, the Second Department noted that while Donald DD. makes clear that a diagnosis of ASPD alone is insufficient to find mental abnormality, in this proceeding, the State presented a composite diagnosis which included not only ASPD but also psychopathy, conduct disorder, a provisional diagnosis of sexual sadism disorder, and the petition was supported by expert evidence suggestive of Ezikiel R.'s potential for deviant sexual behavior and/or sexual preoccupation. As such, the Court cited Dennis K. (*supra*.) and held the petition was facially valid, therefore not subject to dismissal prior to a probable cause hearing.

The Court wrote that such composite diagnostic evidence "was not so deficient as to warrant dismissal of the petition at this early juncture;" rather, its persuasiveness is to be determined by the court at a probable cause hearing or by the factfinder at trial. See also Richard L., *supra*. The petition, having been reinstated, was remitted to the Supreme Court for a probable cause hearing.

15. Due Process: On-the-Record Colloquy Required for a Knowing and Voluntary Waiver of Right to Jury Trial.

Decided March 1, 2017, in Matter of State of New York v. Jesus M., 148 A.D.3d 173, the Second Department held that the constitutional and statutory right to a jury trial in a MHL article 10 proceeding may be validly waived "only where an on-the-record colloquy shows that the respondent made a knowing and voluntary waiver of such right, after an opportunity for consultation with his or her attorney." See Ted B., 132 A.D.3d 28, 37.

After an alleged waiver of trial and a dispositional hearing resulting in his confinement, Jesus M. appealed the legal sufficiency of his waiver of the right to a jury trial. The State moved to expand the record on appeal to include electronic mail which substantively demonstrated Jesus

M.'s intent to waive his trial. However, in denying that application, the Court quoted Ted B. at 37 and stated that "such off-the-record communications regardless of content, are insufficient to ensure that a respondent's decision to forgo his . . . right to a jury trial is the product of an informed and intelligent judgment . . . ." (internal quotations and citations omitted).

The Court reiterated that a valid waiver may be given through personal appearance in court or participation via video conferencing, but to be valid, an on-record colloquy must establish the offender is knowingly and voluntarily waiving said right after an opportunity to consult with his attorney. Since Supreme Court conducted no such on-record colloquy here, the matter was reversed and remitted for a trial on the issue of mental abnormality.

THIRD DEPARTMENT:

16. Annual Review Hearing Evidence: Continued Confinement Upheld Based on Clear and Convincing Evidence of Serious Difficulty In Controlling Sexual Conduct.

Decided January 5, 2017, in Matter of Rene I. v. State of New York., 146 A.D.3d 1056, the Third Department affirmed Supreme Court's order for continued confinement after an annual review hearing, wherein Rene I. was found to be a dangerous sex offender requiring confinement.

The Supreme Court denied the petitioner's application for discharge from the secure treatment facility upon the determination that he was a dangerous sex offender requiring confinement. Rene I. appealed, claiming that the respondent failed to establish that he suffers from a mental abnormality in so far as the State did not present clear and convincing evidence that he had "serious difficulty in controlling" his sexual conduct within the meaning of MHL §10.03(i).

Citing Matter of State of New York v. Donald DD., 24 NY3d at 188, the Third Department noted that to establish that a sex offender has difficulty controlling his or her behavior requires more than just a showing "that a sex offender did not make efforts to avoid arrest and reincarceration." By comparison, the Court cited Matter of State of New York v. Dennis K., 27

NY3d 718 (*supra.*) and stated that a "detailed psychological portrait…would doubtless allow an expert to determine the level of control [an] offender had over his [or her] sexual conduct."

In this proceeding, the State offered the testimony of an expert and the report she prepared as part of her psychological evaluation of Rene I. The Third Department found that the examiner provided a sufficiently "detailed psychological portrait" to support the opinion that the petitioner lacks control over his propensity to engage in sexual misconduct. Said portrait, the Court points out, included evidence of Rene I.'s age when he began committing sex offenses, proximate timing of the offenses, disciplinary record, which included multiple instances of public exposure and masturbating in presence of staff, and his pejorative attitude towards women. The Court also cited the expert's testimony that Rene I. scored as a "high risk" to reoffend on a rating scale used to measure sexual recidivism, and found compelling that he had not completed treatment, had poor insight, an inability to understand his triggers, and that "if temptation is present, he will act."

The Third Department wrote, "[a]ccording deference to the trial court's ability to evaluate the [expert's] opinions, and absent any conflicting evidence, we find that respondent established by clear and convincing evidence that the petitioner continues to be a dangerous sex offender requiring civil confinement (*see* Matter of Sincere KK. v. State of New York, 111 A.D.3d at 1984)."

17. Annual Review Hearing Evidence: Deference Given to Trial Court in Evaluating Weight and Credibility of Conflicting Expert Testimony

Decided June 1, 2017, in Matter of Craig W. v. State of New York, 151 A.D.3d 1135 (3d Dep't 2017), the Third Department affirmed the Supreme Court's order denying Petitioner's application for discharge from a secure treatment facility (annual review) based on a finding that the Petitioner remained a dangerous sex offender requiring confinement. See MHL § 10.09.

Craig W. had an extensive history of sexual offenses against underage and prepubescent

females, and he was repeatedly incarcerated for violating his probation and parole as a result of other sexual misconduct and assaults. While in prison, he committed two sexual misconduct violations, one for consensual sex with a fellow inmate, and the second for masturbating and exposing himself to a female staffer.

Upon the initial article 10 petition, Craig W. was found to suffer from a mental abnormality and determined to be a dangerous sex offender requiring confinement. This particular proceeding from which he appeals was his seventh annual review/application for discharge. After a hearing wherein the Supreme Court heard from two experts, one called by the State and the other by Craig W., his petition for discharge was denied.

On appeal, while acknowledging the requisite mental abnormality, the petitioner argued that the respondent failed to prove by clear and convincing evidence that he had an inability to control his behavior and was likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility. Upon review of the record, the Court rejected his contention. In its decision, the Third Department recounted the relevant competing expert testimony provided at the hearing, including the expert's similar diagnostic impressions and risk assessments of Craig W., and discussed the specific facts which informed each expert's opinion.

The Court noted that Craig W. still masturbates to fantasies of his prior victim, a four-year old girl, and he continues to maintain that she "knew what she was doing and wanted to do it." In addition to endorsing other offense supportive attitudes, the decision also noted that Craig W. admitted to having deviant sexual thoughts about a facility staffer and acknowledged that he was 'afraid of attacking her." While the State's expert acknowledged Craig W. had began taking medication which reduces his libido, he had yet to progress far enough in treatment after eight years and had even been demoted back to a lower treatment phase based on frequent altercations,

aggressive conduct, and poor emotional regulation, all of which are part of his offense cycle.

The Third Department noted that Craig W.'s expert opined he was not so dangerous as to warrant confinement. His expert found persuasive that Craig W. had developed a situational awareness when struggling with deviant thoughts and relies upon treatment staff to assist him. Also, the Court noted that while Craig W. admitted to his expert that he continued to have deviant sexual fantasies about children, his expert found informative that there was no recent evidence that he masturbated to those thoughts, indicating to the her that he was not unable to control his sexual behavior.

In upholding the finding that the petitioner is a dangerous sex offender, the Third Department cited Rene I. (*supra.*), stating that the "Supreme Court was in the best position to evaluate the weight and credibility of the conflicting expert testimony presented, and it was free to credit [the State's expert's] testimony over [Craig W.'s expert's] testimony." (internal quotations and citations omitted).

FOURTH DEPARTMENT:

18. Multiple Procedural and Substantive Appeals Denied, Verdict for Civil Management Upheld.

Decided May 6, 2016, in Matter of State of New York v. Williams, 139 A.D.3d 1375, the Fourth Department unanimously affirmed an order of the trial court, committing respondent to a secure treatment facility after a jury verdict finding mental abnormality and a dispositional finding that he is dangerous sex offender requiring confinement.

Williams, a convicted rapist who also pleaded guilty to two counts of reckless endangerment for having unprotected sexual relations with over 42 adult women and girls under the age of 14, knowing that he was HIV-positive and deliberately not informing his victims, resulting in transmission of the disease to at least 13 females, was placed under article 10 civil

management after a jury found he suffered from a mental abnormality and a dispositional hearing finding him to be a dangerous sex offender requiring confinement.

The respondent raised a number of issues in his prior appeal (see Williams, 92 A.D.3d 1274) and again here, in his current appeal, which were consolidated in this decision, including: that he was not a sex offender at the time of the petition for civil management, that the court erred in refusing a venue change for trial, that the evidence was insufficient to justify finding a mental abnormality, that he was prejudiced by the surprise appearance of a past victim who testified for the State, that the admission of certain hearsay evidence denied him a fair trial, and that he was denied meaningful and effective representation.

The Fourth Department unanimously affirmed on both appeals. First, the Court rejected, as it had in his prior appeal (92 A.D.3d 1274), the notion that Williams was not a detained sex offender at the time the petition for civil management was filed. The Court also rejected Williams assertion that due to the notoriety of his conviction, he could not receive a fair trial in the county of venue and that Supreme Court's refusal to change venue was error. In explaining why that contention was rejected, once again, the Court cited its previous decision, stating that "conclusory statements unsupported by facts are insufficient to warrant a change of venue." (Williams, 92 A.D.3d 1274).

Next, the Court found that, even viewing the evidence in the light most favorable to Williams, there was ample and sufficient evidence to conclude that he suffered from a mental abnormality. Pursuant to Matter of State of New York v. Richard TT., 131 AD3d 872, 873, the Fourth Department determined here that the litany of expert testimony finding Williams' extreme antisocial personality traits, psychopathy, polysubstance abuse, and sexual sadism disorder, combined with respondent's past crimes, his prison disciplinary record, and his own statements

indicating a future intent to inflict further sexual violence and infect young girls with HIV, were sufficient to create a "detailed psychological portrait" of respondent, which legally justified his civil confinement.

Furthermore, the Court rejected the contention that a prior victim who appeared at trial and testified about Williams' violent attempted rape of her when she was 13 years old was surprising enough to create prejudice, in light of the fact that the name of the victim appeared on the witness list and no objections were raised until after her testimony was paused by a trial recess.

With respect to Williams' hearsay contention, the Court found that it met minimum requirements of relevance and reliability in conformity with the due process standard pronounced in Floyd Y., 22 NY3d 95, 105. Though unpreserved for review, the Court also rejected Williams' claim that some of the State attorney's comments during summation deprived him of a fair trial. While conceding that some were inappropriate, the Court wrote, "none of those remarks was so egregious or prejudicial as to deny respondent his right to a fair trial." (internal quotations and citation omitted).

In rejecting his ineffective assistance claim, the Court determined that the respondent's attorney may have had a strategic or legitimate explanation for not challenging the validity of Williams' HIV diagnosis and that respondent's counsel provided the zealous representation required of his position. Finally, the Fourth Department rejected Williams' contention that Donald DD. compelled the conclusion that he does not have a mental abnormality.

19. Annual Review Hearings: Evidence of Mental Abnormality Sufficient when ASPD is Part of a Composite Diagnostic Profile; Deference Given to Trial Court's Determination of Weight of Evidence and Credibility of Expert Witnesses; Refusal to Remove Offender's Shackles for Hearing Absent Particularized Reason for Restraint, Harmless Error.

Decided June 10, 2016, in Matter of Vega v. State of New York, 140 A.D.3d 1608, the Fourth Department unanimously affirmed the trial court's order for petitioner's continued confinement in a secure treatment facility after an annual review hearing.

The Court considered petitioner's two appeals in this one consolidated decision. On appeal number one, Vega challenged the trial court's finding that he suffered from a mental abnormality and the order directing his continued confinement. Vega contended that the evidence brought against him was insufficient. On appeal number two, Vega challenged an order that denied his motion pursuant to CPLR § 5015(a) to vacate the court's prior order (the subject of appeal number one) which continued his confinement in a secure treatment facility.

Furthermore, petitioner argued that he was entitled to a new hearing due to a violation of his due process rights resulting from the trial court's refusal to release him from shackles during the hearing.

The Fourth Department affirmed both appeals. Though the Court reiterates the well-established principle that anti-social personality disorder (ASPD) on its own is insufficient to support a finding of mental abnormality, citing Matter of Groves v. State of New York, 124 AD3d 1213, 1214 (2015), it nevertheless found that the evidence presented here was sufficient. The Court points out that both respondent's and petitoner's expert agreed that the petitioner suffered from a mental abnormality predicated upon diagnoses of ASPD, coupled with alcohol and drug dependency, psychopathic traits, sexual preoccupation, and a number of sadistic behavioral indicators. Citing Matter of State of New York v. Parrott, 125 AD3d 1438, 1439, lv.

denied, 25 NY3d 911, the Fourth Department held that the trial court was best able to weigh expert testimony, and that there is no reason to disturb the court's decision regarding which expert to credit.

Finally, with respect to petitioner's demand for a new hearing based on a theory that remaining in shackles violated his due process, the Court found that, though the trial court erred in failing to provide a particular reason for refusing to remove petitioner's shackles, the error was harmless beyond a reasonable doubt, as it had no effect on the determination in question.

20. Mental Abnormality: Condition, Disease, or Disorder Prong Does Not Require that the Condition, Disease, or Disorder be a Sexual Disorder

Decided September 30, 2016, in Matter of Suggs v. State of New York, 142 A.D.3d 1283, the Fourth Department reversed on the law the trial court's grant of petitioner's motion for directed verdict during an annual review hearing which found that petitioner did not suffer from a mental abnormality.

In granting the motion for directed verdict after that State's proof in an annual review hearing, the trial court relied upon Donald DD., 24 NY3d 174 (2014) to find that, despite petitioner's ASPD and psychopathic traits which predisposed him to conduct constituting sex offenses, his disorder and traits were not themselves sexual disorders that qualified as mental abnormalities under mental hygiene law.

In this decision, the Fourth Department contrasted the Court of Appeals holding in Donald DD. with its subsequent decision in Dennis K., 27 NY3d 718, 743 (*supra*.), and found that the trial court erred in granting the petitioner's directed verdict motion. The Court stated, "the [trial] court erred in granting petitioner's motion for a directed verdict inasmuch as Donald DD. did not engraft upon the condition, disease, or disorder prong a requirement that the condition, disease or disorder must constitute ad sexual disorder." Dennis K. at 743 (internal

quotation marks omitted). Thus, viewing it in the light most favorable to the nonmoving party, the evidence submitted at the annual review hearing was sufficient to withstand a motion for directed verdict.

21. Mental Abnormality: ASPD, Psychopathic Traits, Pedophilic Disorder Part of Offender's "Detailed Psychological Portrait" Sufficient to Satisfy *Donald DD*.

Decided September 30, 2016, in Matter of New York v. Bushey, 142 A.D.3d 1375, the Fourth Department unanimously affirmed the trial court order finding Bushey to suffer from a mental abnormality and to be a dangerous sex offender requiring confinement in a secure treatment facility.

Bushey appealed from the court's order, however, the Fourth Department pointed out that he failed to preserve his contention that the evidence concerning any mental abnormality was insufficient, as he neither moved for a directed verdict nor challenged the evidence present on such grounds. Nevertheless, the Fourth Department discussed legal sufficiency and compared the evidence presented by the State with the sufficiency standards of recent decisions.

Using Donald DD. and Dennis K. the Court noted that the two expert witnesses who testified for the State regarding Bushey's ASPD, psychopathic traits, pedophilic disorder, along with factors which significantly increased his risk of committing sexual offenses in the future, such as his refusal to admit attraction to children and his failure to develop a relapse prevention plan, operated in tandem to provided a "detailed psychological portrait" sufficient to satisfy Donald DD. Likewise, the Court notes that clear and convincing expert testimony established that Bushey's mental abnormality involved such a strong predisposition and 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.

22. Annual Review Hearings: Evidence of Personality Disorder, Not Otherwise Specified, With Antisocial Traits, Combined With Cocaine and Alcohol Use Disorder, Sufficient Predicate for Mental Abnormality.

Decided November 10, 2016, in Matter of State of New York v. Melvin Walls, 144 A.D.3d 1558, the Fourth Department affirmed Supreme Court's order for Walls confinement after conducting an annual review hearing wherein the court determined that he is currently a dangerous sex offender requiring confinement.

Following the decision of the Court of Appeals in Donald DD., Walls moved to vacate his order of confinement pursuant to CPLR § 5015(a), claiming the evidence at the annual review hearing was not sufficient to support a finding of mental abnormality. The Supreme Court denied the motion.

In affirming, the Fourth Department noted that the expert tesetimony at the hearing established that petitioner has predisposing conditions based upon the diagnosis of personality disorder, not otherwise specified, with antisocial traits, combined with cocaine and alcohol abuse. The State's expert also testified that Walls exhibited markers of an abnormal sexual interest in nonconsenting sexual behavior. Citing Dennis K., the Court held the evidence legally sufficient to sustain the finding of mental abnormality.

23. Evidence: ASPD and Pedophilic Disorder Sufficient Predicate for Mental Abnormality, Deference Given to Jury on Weight of Conflicting Expert Opinion; Supreme Court in Best Positon to Weigh Credibility of Competing Experts.

Decided on November 18, 2016 in Matter of State of New York v. Peters, 144 A.D.3d 1654, the Fourth Department affirmed the Supreme Court's order finding mental abnormality after a jury verdict and for confinement of Peters as a dangerous sex offender requiring confinement after a dispositional hearing.

On appeal, Peters raised three contentions. The first was that the expert testimonial

evidence at trial was legally insufficient to support a finding of mental abnormality because it failed to establish that he had serious difficulty in controlling his sex offending behavior. Citing Dennis K., the Fourth Department rejected this contention noting that the State had produced the opinion of two expert psychologists who opined that Peters suffered from Pedophilic Disorder and ASPD. The Court noted that such evidence provided a "detailed psychological portrait" of the respondent sufficient to meet the burden of demonstrating by clear and convincing evidence Peters' serious difficulty in controlling his sex-offending behavior.

His second contention was that the jury's verdict regarding mental abnormality was against the weight of the evidence since an expert testified on his behalf that he suffered from posttraumatic stress disorder (PTSD) stemming from his own childhood sexual abuse, and that he did not suffer from pedophilic disorder. The court rejected this contention noting that petitioners' psychologists' non-adherence to each strict criterion of the Diagnostic and Statistical Manual of Mental Disorders (DSM) did not render their independent diagnosis of pedophilic disorder against the weight of evidence and that as such, the jury's verdict was entitled to deference.

Peters' third contention was that the evidence presented at the dispositional hearing was legally insufficient to establish that he requires confinement. In rejecting, the Fourth Department noted that the Supreme Court "was in the best position to evaluate the weight and credibility of the conflicting [expert] testimony…, and we see no reason to disturb the court's decision to credit the testimony of petitioner's experts."

24. Evidence Found Sufficient for MA When Based On Personality Disorder (NOS) With Antisocial Traits, Alcohol And Cocaine Dependency, Sexual Preoccupation And Two Behavioral Traits

Decided on November 18, 2016 in the Matter of Gooding v. State of New York, 144

A.D.3d 1644, the Fourth Department affirmed the Supreme Court order denying the petitioner's motion to vacate an order for continued confinement.

The petitioner was seeking vacatur of the order based on insufficiency of evidence to prove "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 commission of conduct constituting sex offense" and further contended that the mental abnormality finding of the court was based on a diagnosis of antisocial personality disorder, which is insufficient as a standalone ground.

The court rejected this contention by noting that the finding of mental abnormality was in fact based on respondent's expert's opinion that petitioner suffered from personality disorder not otherwise specified (NOS) with antisocial traits, alcohol and cocaine dependency, a history of sexual preoccupation and two behavioral traits indicative of sexual sadism. All of these grounds taken together conclusively support a finding of mental abnormality.

25. Evidence & SIST Violations: Finding of DSORC Reversed Where Based Solely Upon Substance Use and Insufficient Evidence of Inability to Control Sexual Behavior; No Obligation to Consider Less Restrictive Alternative to Confinement.

Decided on December 23, 2016 in the Matter of State of New York v. Husted, 145 A.D.3d 1637, the Fourth Department reversed the Supreme Court order determining that respondent violated SIST and that he is a dangerous sex offender requiring confinement. The petition of the State was denied and remitted to the Supreme Court for further proceedings. The court considered the fact that the respondent had violated his conditions of SIST only in terms of having consumed alcohol and marijuana and that his treatment provider was willing to acknowledge he was otherwise appropriately engaged, had no sexual misconduct allegations during treatment and that he was diagnosed with antisocial personality disorder, alcohol use

disorder, and cannabis use disorder. Further, the court noted that only those sex offenders that are unable to control their sexual conduct meet the criteria for confinement, while those that have difficulty in controlling their sexual conduct are to be "supervised and treated as outpatients". In light of this, the court found that evidence was insufficient to prove that "respondent had such inability to control his behavior that he was likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility".

The court declined to consider denial of due process to respondent based on lack of legally sufficient evidence that he is a dangerous sex offender requiring confinement, since the respondent did not preserve the contention for review. The court also rejected the respondent's assertion that the court should have considered a less restrictive alternative to confinements since there is no obligation on the court to do so. Further, since respondent failed to move for leave to renew or reargue his initial appeal to appear anonymously in the proceedings that had been denied, the court did not consider the same.

26. Evidence: Expert Testimony and Report Demonstrated by Clear and Convincing Evidence That Petitioner Had Serious Difficulty in Controlling His Sex-Offending Conduct.

Decided on March 24, 2017, in Matter of Akgun v. State of New York, 148 A.D.3d 1613, the Fourth Department affirmed Supreme Court's order placing Akgun on SIST after an annual review hearing in which he was found to no longer require confinement.

Petitioner appealed an order determining that he is a detained sex offender who suffers from a mental abnormality. The Court found that the expert's testimony and report constituted clear and convincing evidence that petitioner suffered from a mental abnormality. The psychologist testified that the petitioner was a self-described "anger rapist," who had committed a series of increasingly violent rapes against women. The psychologist also stated that Akgun's

pattern and his admissions of continued arousal to elements of fear, humiliation, and control, among other factors, led her to conclude that petitioner had not developed adequate skills to manage his behavior. Additionally, the State's expert testified that his score on an actuarial risk assessment indicated that he was in the high risk group for re-offending sexually.

The Court, citing Dennis K., 27 NY.3d, stated that the evidence "provided a detailed psychological portrait" meeting the respondents' burden of clear and convincing evidence that petitioner continued to suffer from a mental abnormality as defined my Mental Hygiene Law Article 10.

27. Annual Review Hearings: Evidence of Petitioner's Failure to Address Sexual Deviance Against Children in His Treatment Service Plan Sufficient to Support Continued Confinement.

Decided March 24, 2017, in Matter of Pierce v. State of New York, 148 A.D.3d 1619, the Fourth Department affirmed an order of Supreme Court which, among other things, continued Pierce's confinement in a secure treatment facility, after an annual review hearing.

Upon a Pierce's petition for annual review and an evidentiary hearing, Supreme Court determined that Pierce was a dangerous sex offender requiring confinement based on clear and convincing evidence that he had an inability to control his behavior. Petitioner appealed this order.

The Fourth Department reviewed the evidentiary record, and noted that the State expert's testimony documented Pierce's history of criminal sexual conduct against female teenagers and children and his diagnosis of Pedophilic Disorder. Though Pierce's expert had initially opined, consistent with the State expert, that he suffered from a mental abnormality and was a dangerous sex offender requiring confinement, that expert subsequently issued an addendum to his report which, in sum, stated that upon review of petitioner's most recent treatment records, he no longer

required further confinement.

The Court noted that the State's expert had based her opinion in part upon Pierce's treatment providers which indicated that while he had discussed in detail his offenses against teenagers, he had yet to address his sexual attraction to children in the treatment program, as well as he continued to display cognitive distortions and failed to understand his offense cycle. As a result, Pierce's treatment service plan was amended to adequately address his sexual deviance and attraction to children. The Court also noted the expert testimony regarding Pierce's moderate-high risk of recidivism which was sufficient to warrant continued confinement. Likewise, the Court noted that Pierce's own examiner agreed that there were additional risk factors that indicated that petitioner would not be able to comply with the rules of SIST if he were released to the community.

The Court therefore found that the petitioner required further confinement based on clear and convincing evidence.

In rejecting Pierce's contention that State's expert interfered with his treatment providers' assessment of his progress and that her opinion was inconsistent with his treatment notes and his own expert's opinion, the Fourth Department found credible the State expert's explanation that she was concerned with the change in petitioner's service plan goals of addressing his sexual deviance, and therefore chose to confer with his treatment providers to discover the reason for said change. The Court also notes that the State's expert also testified that prior to her conference with Pierce's providers, they had already issued an amended plan to reflect the determination that they should not have discontinued the goal addressing sexual deviance.

The Fourth Department deferred to the Supreme Court's determinations regarding the weight of the evidence and credibility of the expert testimony, and saw no reason to disturb the

finding that Pierce remains a dangerous sex offender requiring confinement.

28. Mental Abnormality: Absent a Ground for Review Under CPLR § 5015, Court Retains Authority to Grant Discretionary Vacatur of Its Prior Orders for Confinement, But Annual Review and Biannual Petitions for SIST Release are More Appropriate Remedy For Substantive Challenges.

Decided April 28, 2017, in the Matter of State of New York v. William D, 149 A.D.3d 1556, the Fourth Department affirmed the trial court's decision to deny William D.'s motion for discretionary vacatur of the prior order which found him to suffer from a mental abnormality and deemed him a dangerous sex offender requiring confinement.

The Fourth Department acknowledged that even absent grounds enumerated in CPLR § 5015(a), a trial court retains inherent discretion in reviewing and vacating its own prior orders. However, here, it was not abuse of that discretion to deny William D.'s motion to vacate. The Court further found that Respondent's confinement is subject to annual review and also that he may petition for discharge pursuant to MHL § 10.09 (f), which was the "more appropriate remedy for any of respondent's substantive claims."

29. Mental Abnormality: Detailed Psychological Portrait Sufficient.

Decided April 28, 2017, in Matter of Christopher J. v. State of New York, 149 A.D.3d 1549, the Fourth Department upheld Supreme Court's bench trial verdict finding mental abnormality as well as the trial court's adjudication that placed the Petitioner on strict and intensive supervision and treatment.

The Fourth Department concluded that the State's expert psychologist presented a "[a] detailed psychological portrait' " that included petitioner's diagnosis of pedophilic disorder and personality disorder with antisocial and narcissistic traits, which in combination created "the perfect storm" that lead to the conclusion that petitioner suffers from mental abnormality. The

expert permissibly relied upon the petitioner's "prolific offending history" to support her conclusion that petitioner has serious difficulty in controlling his sexual conduct. Further, the Court found that the trial court's determination that the petitioner suffers from a mental abnormality was not against the weight of the evidence. It was permissible for the court to resolve credibility issues against the petitioner. Given the trial court's "opportunity to evaluate the weight and credibility of conflicting expert testimony," the court's determination is entitled to great deference. (internal quotations omitted).

D. TRIAL COURT DECISIONS

30. Disclosure: When Should Clinical Records Be Disclosed To Offenders?

In the decision Matter of Robert V. v. State of New York, 52 Misc.3d 613, 614 (Sup. Ct. Oneida Cty 2016) dated May 10, 2016, the Oneida County Supreme Court denied a motion by the petitioner, Robert V., to grant access to any record in the possession of his attorneys.
Mental Hygiene Law § 33.16(b)(1) requires facilities, upon written request, to release any clinical records in their possession to patients. Matter of Robert V., 52 Misc.3d 613 at 614. However, there are limitations on this disclosure. Under § 33.16(c)(3), a facility may deny access to all or part of a patient's record if the treating practitioner believes that a release of the clinical record could, "reasonably be expected to cause substantial and identifiable harm to the patient or client or others." Id. at 614-615.

In the case of Robert V., the Mental Hygiene Legal Services argued that the Court should grant its motion for access to the records because the interests of justice outweighed the confidentiality of the records. The Court disagreed, and stated that, "[i]f the liberty interests of a confined sex offender were always to be viewed as a predominant concern over confidentiality, every Mental Hygiene Law Article 10 respondent could view records as supplied by his counsel,

thereby negating the directive to adhere to the procedures set forth in Mental Hygiene Law § 33.16." Id. at 15.

The Court reasoned that the system was designed to balance individual rights with the diagnostic, treatment, and safety concerns of the mental health practitioner, facility staff, other residents, and the individual himself. Id. And to grant complete discretion the confined sex offender's counsel would upset the delicate balance established by Mental Hygiene Law § 33.16.

The Court's ruling was a departure from the precedents set out in In the Matter of State of New York v. Craig S. and In the Matter of Brian H. v. State of New York,. Sup Ct, Oneida County, June 28, 2019, index No. CA2010-000529; Sup Ct, Oneida County, Feb. 4, 2015, index No. CA2010-000529. However, the Court's present interpretation more closely comports with the Court's conclusion that Mental Hygiene Law § 33.16 provides governing procedure. Matter of Robert V., 52 Misc.3d 613 at 617.

31. Does The Absence Of Sexually Offensive Behavior While Incarcerated Always Demonstrate That The Offender Does not Have Has Serious Difficulty In Controlling Conduct That Constitutes A Sex Offense?

In the Matter of the Application for Discharge of Willie Y. v. the State of New York, 52 Misc.3d 1210(A) (Sup. Ct. Oneida Cty 2016) the Oneida County Supreme Court ruled in a decision dated July 15, 2016, that the absence of sexually offensive behavior while incarcerated and civilly confined did not suggest an element of control based on a fact specific analysis. This decision distinguished Frank P., where the First Department assigned weight to the absence of sexual misconduct during a 33-year incarceration. Matter of Willie Y., 52 Misc.3d 1210(A). In Frank P., the sex offender engaged and succeeded in treatment, and the expert witness was unable to quantify his diagnosis. Id. In contrast, the present sex offender had not meaningfully participated in treatment. Id.

Moreover, the timing of his offenses suggested that he has a serious difficulty in controlling his conduct while not in custody. Id. He committed an offense against his mother while criminal charges were pending from an arrest for another sexual offense committed the previous week, he committed another offense despite the fact that there was an order of protection in place, and he violated SIST within a short time of his release. Matter of Willie Y., 52 Misc.3d 1210(A). As his offenses were against women with whom he had a relationship, and, as these women have been unavailable to him while incarcerated and confined, the absence of sexually offensive behavior while incarcerated and civilly confined does not suggest that the offender is able to control his behavior. Matter of Willie Y., 52 Misc.3d 1210(A).

Considering the diagnosis by an expert witness, the offender's behavior both in the community and in custody, and his lack of meaningful participation in treatment, the Court found by clear and convincing evidence that the individual had serious difficulty controlling conduct that constituting a sex offense. Id.

32. *Frye*: The Diagnosis Of Other Specified Paraphilic Disorder (OSPD) Hebephilia Is Not Generally Accepted Within The Psychiatric Community.

After holding a *Frye* hearing, the New York County Supreme Court held in In the Matter of State of New York v. Ralph P., 53 Misc.3d 496 (Sup. Ct. New York Cty 2016), in a decision dated August 9, 2016, that a diagnosis of other specified paraphilic disorder hebephilia could not provide the basis for finding that a sex offender required civil management pursuant to Mental Hygiene Law Article 10. The Court ruled that hebephilia, generally defined as a sexual interest in pubescent children, was not generally accepted as a mental disorder within the psychiatric community under the Frye standard. Ralph P., 53 Misc.3d 496 at 554-555.

The *Frye* test is based on whether a diagnosis is generally accepted within a scientific community. Id. at 541. After hearing the testimony of six expert witnesses, 3 from the petitioner

and 3 from the respondent, the Court noted that existing research supported the idea that some men are preferentially aroused to pubescent children. Id. at 546. However, the Court also noted that there was significant evidence that most members of the sex offender psychiatric community have opposed the introduction of a hebephilia diagnosis. Id. at 553.

A diagnosis for pedo-hebophilia was proposed for inclusion in the DSM-5, but it was ultimately rejected by the Board of trustees of the American Psychiatric Association (hereinafter, the APA). Ralph P., 53 Misc.3d 496 at 504. As the APA maintains a code of silence, the rationale behind their decision was not available to the Court. Id.

The DSM-5 defines pedophilic disorder as persons with a preference for prepubescent children. Id. The six experts who testified at trial agreed that, although the age of pubescence varies between races, genders, and cultures, to the extent that an age must be assigned to prepubescent children, 10 years old or less is appropriate. Id. The proposed hebephilic disorder would have been defined as persons with a preference for pubescent children. Ralph P., 53 Misc.3d 496, 504. At trial, the six experts agreed that, to the extent that an age must be assigned to pubescent children, between 11 and 14 years old is appropriate. Id.

In contrast, the DSM-5 defines prepubescent children as "generally age 13 or younger." Ralph P., 53 Misc.3d 496 at 544. The Court noted that, "[t]his fundamental contradiction is widely recognized by experts in the field." Id. And opined that, perhaps this contradiction was created as a "back door" to allow a hebephilia diagnosis to be included in the DSM-5. Id.

However, to the extent that the Frye test applies to hebephilia, the Court accredited the testimony of one expert witness who testified that 83% of scholarly articles on the subject opposed a hebephilia diagnosis, and found that a diagnosis of OSPD hebephilia is not generally accepted today in the sex offender psychiatric community. Id. at 523; 554-555.

33. *Frye*: The Diagnosis Of Other Specified Paraphilic Disorder (OSPD) Non-Consent Is Not Generally Accepted Within The Psychiatric Community.

Decided March 29, 2016, in Matter of State of New York v. Kareem M., 51 Misc3d 1205(A) (Sup. Ct. NY County, 2016), the trial court determined that it was necessary to conduct a hearing pursuant to *Frye v. United States*, to determine whether the diagnosis of Other Specified Paraphilic Disorder (OSPD), with the specifier "non-consent" has gained general acceptance in the relevant psychiatric community. Following the hearing, the court concluded that the general diagnosis of Unspecified Paraphilic Disorder (USPD) is generally accepted, but held that the OSPD diagnosis with the specifier "non-consent" is not generally accepted. Thus, OSPD, with the specifier "non-consent" is not a valid diagnosis for the purposes of MHL Article 10.

34. Legal Sufficiency: Sexual Disorders And DSM Diagnosis Are Not Required For A Finding of Mental Abnormality.

Decided March 9, 2016, in Matter of the State of New York v. Jason C., Riviezzo, J. (Sup. Ct. Kings County, March 9, 2016), the trial court denied respondent's motion for summary judgment after a *Frye* hearing finding that OSPD: Non consent did not meet that standard for purposes of MHL Article 10. In this case however, in addition to the now precluded diagnosis of OSPD: Non-consent petitioner's expert also diagnosed respondent with ASPD, alcohol use disorder, and considered but did not assign sexual sadism disorder. In its decision, the court noted that Donald DD. did not require a sexual disorder, and Shannon S. does not require a DSM diagnosis. The court also noted that in addition to the diagnoses, petitioner's expert found that the respondent presented evidence of arousal to the physical and psychological suffering of others. These factors in addition to the diagnoses, as well as those considered but not assigned, is enough to overcome respondent's motion for summary judgment.

35. Legal Sufficiency: What, In Addition To An Anti-Social Personality Disorder (ASPD) Diagnosis, Makes Article 10 Diagnoses Valid?

In a decision dated October 21, 2016, the New York County Supreme Court held that conditions, which are not merely diagnostic labels, and that play an integral role in sexual offenses, are legally sufficient to prove mental abnormality under Mental Hygiene Law Article 10. In the Matter of State of New York v. Gary K., 53 Misc.3d 1207(A) (Sup. Ct. New York Cty 2016).

The Court began its analysis by examining the evolution of Article 10 diagnoses. Gary K., 53 Misc.3d 1207(A). In Donald DD. and Dennis K. the Court of Appeals ruled that an ASPD diagnosis alone is an insufficient Article 10 predicate. Id. In Dennis K., the Court of Appeals ruled that an Article 10 diagnoses does not need to include a sexual disorder, and that specific combinations of disorders are legally sufficient. Id. An analysis of the impact of these rulings on both public safety and the fundamental liberty interests of detained sex offenders revealed inherent contradictions. Id.

Nonetheless, the Court attempted to make sense of these rulings and apply them to the current case. Gary K., 53 Misc.3d 1207(A). The Court noted that while the Court of Appeals repeatedly described psychopathy as an extreme form of ASPD, they never found that a diagnosis of ASPD plus psychopathy was legally insufficient to prove mental abnormality under Article 10. Id. Thus, the Court found that the offender's diagnoses of ASPD; psychopathy; indica of sexual deviance; and severe cannabis, alcohol, and phencyclidine all played an integral role in his sexual offenses, and that they were legally sufficient to find probable cause that the respondent is a sex offender requiring civil management. Id.

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.M. – DM's sexual offense cycle began at age 17 when he engaged in sexually motivated violent offenses against pre-pubescent boys in his community. DM used his purported status as a martial arts instructor to initiate contact and groom his victims. For his first reported incident, he secluded two boys, ages 10 and 11, in an abandoned warehouse. There, under threat of physical harm with a martial arts sword, he ordered them to remove their clothing and perform sexual acts upon one another. The boys were able to escape this encounter without performing the acts, however, only days later, DM lured a different 10-year-old boy to another secluded area and tied him up and restrained him under the false pretense of teaching the boy how to use martial arts weapons. For these three incidents, DM was convicted of Criminal Possession of a Weapon 4th (2 counts) and Endangering the Welfare of a Child (2 counts). He was adjudicated a Youthful Offender and given a three-year term of probation. He violated probation when he was found in possession of martial arts weapons. Also while on probation, DM committed the instant offense against two brothers, ages 10 and 8, on two separate occasions. On the first, he lured the 10-year-old to his apartment where, under threat of killing the boy's mother, DM forced the boy to remove his pants and lie down on his bed where he proceeded to anally rape the victim. On a separate occasion, DM anally raped the 8-year-old brother by using a martial arts sword to gain submission. DM was convicted by a jury of two counts of Sodomy, Sex Abuse 1st, and Endangering the Welfare of a Child. He was sentenced to an aggregate 10 - 30-year indeterminate term of incarceration. While in DOCCS, DM has consistently denied his offenses, blamed others, and refused sex offender treatment, while amassing over 56 tier ticket violations. In addition to displaying a high number of psychopathic character traits, DM has been diagnosed with various disorders including Pedophilic Disorder, Narcissistic Personality Disorder, Antisocial Personality Disorder, Adjustment Reaction with Anxious Mood and Mixed Emotional Features, and Intermittent Explosive Disorder. DM is currently pending trial for civil confinement.

State v. R.S. – R.S.'s known sexual offenses spanned over approximately 25 years. He victimized six females ranging from ages 6 (his own daughter) to age 25. The four other victims were between ages 8 and 12. His qualifying offense occurred when he provided alcohol to an 11-year-old girl and her 12-year-old friend. Upon her intoxication, he forcibly raped the 11-year-old. R.S. pleaded guilty to Rape in First Degree in full satisfaction of all charges and he was sentenced to a 10-year term of incarceration. His prior criminal record includes convictions for numerous petit larcenies, a vehicle theft, driving while intoxicated, and possession of a weapon. Prior to the instant offense, R.S. was convicted upon a plea of guilty to Attempted Burglary, Second Degree and Sex Abuse, Third Degree after he broke into the home of a co-worker in the middle of the night. Inside, R.S. snuck into the bedroom where the co-worker and his 25-year-old girlfriend and her 2-year-old child were all in bed asleep. The female victim awoke and screamed when she felt and recognized R.S. who was moving his fingers inside her vagina. He committed this offense while out on bail for DWI and Sex Abuse charges and committed the qualifying offense while on probation supervision. R.S. is diagnosed with Pedophilic Disorder, Nonexclusive Type, Sexually Attracted to Females and Alcohol Use Disorder. R.S. waived his trial and consented to having a mental abnormality. R.S. also consented to being a dangerous sex offender requiring confinement and is currently in a secure treatment facility receiving sex offender treatment.

State v. W.M. – W.M. began his diverse criminal history at age 22 when he committed Burglary in the Third Degree. Over his next 14 years, he was arrested for various burglaries and assaults, an

attempted arson, a criminal mischief, and resisting arrest. Though he was convicted of several of those, his first known sex offense conviction was for Third Degree Sex Abuse stemming from his victimization of a 36-year old cognitively impaired female. During that time, W.M. also self-reported other separate offenses for which he was not charged, including raping a 16-year-old girl, oral and anal sodomy of two different boys ages 7 and 8, as well as sexually abusing a 6-year-old female. His Article 10 qualifying offense occurred thereafter when, at age 36, he subjected four separate victims to various deviant sexual contact. W.M. vaginally raped as well as orally and anally sodomized a 12-year-old girl. He forcibly touched the breasts of a 14-year-old girl. Also, W.M. perpetrated anal sodomy and oral sodomy on two different boys, ages 7 and 9. For these acts, W.M. was arrested on a multi-count indictment which resulted in him pleading guilty to one count of Sodomy, First Degree in full satisfaction and being sentenced to 18 years incarceration, plus a five-year term of post-release supervision. W.M.'s mental abnormality is predicated in part upon his multiple diagnoses of Pedophilic Disorder, Antisocial Personality Disorder, Alcohol Use Disorder, Cocaine Use Disorder, and Other Substance Use Disorder. Additionally, he exhibits a high number of psychopathic character traits and is sexually preoccupied and hypersexual. W.M. waived his jury trial and was found to suffer from a mental abnormality after a bench trial. He consented to the Court finding that he is a dangerous sex offender requiring confinement and is currently receiving sex offender treatment in a secured treatment facility.

State v. O.T. – O.T.'s criminality began at age 14 and includes a diverse variety of crimes in New York as well as two other states. He was arrested over 28 times resulting in, among others, multiple theft, fraud, drug, assault, and domestic violence convictions. His Article 10 qualifying offense is a sexually motivated, Manslaughter in the First Degree. O.T. engaged in violent and deviant sex with his female neighbor whom he strangled until she asphyxiated. Upon her death, O.T. redressed and moved her back to her apartment next door so that his live-in girlfriend would not discover the body. Prior to the qualifying conviction, he served a six-year prison sentence out-of-state for abducting, beating, sexually violating, and strangling a young woman until she lost consciousness. Upon his release there, he absconded from parole supervision and fled to New York. In addition to being noted as hypersexual and sexually preoccupied, O.T. is diagnosed with Sexual Sadism Disorder, Antisocial Personality Disorder with Psychopathic Features, Cocaine Use Disorder, Alcohol Use Disorder, and Cannabis Use Disorder. O.T. is currently awaiting his Article 10 trial.

State v. K.G. – As a teenager, K.G. was suspected of involvement in small fires set in his school and surrounding vicinity though he was never charged. His one and only set of offenses occurred in the late 1960's and involved arson and the sexual assault, strangulation, and murder of a young woman and her 2-year old son who lived across from him in an apartment building. K.G. gave a full confession with a detailed description of the events comprising the convictions. He had seen the lady who lived across from him on several occasions and found her attractive. On the early morning of the crimes, he knocked on the door of the victim's home and the husband of the victim answered. Claiming that his own phone was not working, he was allowed in to use theirs to call his employer. While inside, K.G. noticed the young woman wearing only a nightgown and became sexually aroused. He lied to the couple that he could not reach his boss because the line was busy and that he would need to try again later. After leaving, he kept watch through the security peep-hole of his apartment door and waited for the victim's husband to leave for work. Upon his departure, K.G. returned to the victim's apartment and asked to use the phone again. While inside, he feigned multiple attempts to call his boss, instead dialing his own number each time to avoid

an actual conversation and prolong the encounter with the victim who eventually offered him a cup of coffee while he waited. He considered her offer of coffee to mean that she also wanted to have sex with him. He approached her in the kitchen from behind, spun her around by the shoulder and groped her breast, which caused her to become angry and yell at him to leave. Her rebuff angered K.G. who began to strangle her, initially with his hands, but after her defensive struggle resulted in a laceration to his neck, he grabbed a nearby towel to cover her head and choke her until she stopped resisting. After she asphyxiated, he moved her lifeless body to the bathroom where he partially removed her clothing, exposing her breasts and vagina, which he fondled for several minutes while masturbating. He stated his intent at that point was to engage in sex, however, he prematurely ejaculated before he could penetrate the victim. At that point, the victim's 2-year old son entered the bathroom and began laughing which K.G. perceived as the toddler making fun of his premature ejaculation. His embarrassment triggered his anger and he reacted by drowning the baby in a partially filled bathtub. He then placed the mother's body in the same tub. He began rummaging through the apartment looking for things to steal and decided to start a fire in the victim's closet and bed, as well as the baby's bedroom, to cover up what he had done. A neighbor saw him leaving the apartment where smoke was billowing out and another neighbor upstairs reported that K.G. approached him and asked for help with two dead people in the apartment below.

K.G. was convicted by a jury of Arson and two counts of Murder, for which he received a 15-year to life sentence. In numerous parole-hearings, he has given elaborate accounts of his crimes all of which vastly differ from his original confession and the evidence obtained in the investigation. Consistently showing no remorse or empathy in these varied accounts, he has blamed the victim for coming on to him and initiating sex and that when he refused, she tried to rape him, stabbing him in the neck in the process. He also denied killing the baby, claiming that he must have fallen in the tub and drowned on his own.

While in prison, K.G. accumulated 31 disciplinary violations, notably including some arson violations and 2 sex related tier tickets. The sexual assault and sexual abuse violations involved K.G. luring a younger inmate to his cell where he choked him until he passed out. When the young man gained consciousness, K.G. was anally raping him. In addition to gaining a reputation in prison as an aggressive homosexual who preys on younger inmates, K.G. has been found to suffer from a rare congenital condition known as "47 XYY Syndrome" which affects males with an extra Y chromosome. Research has shown that some individuals with this syndrome exhibit disturbed behavioral dyscontrol, explosive tempers, impulsivity, hyperactivity, and defiant actions. Additionally, K.G. was diagnosed with Other Specified Personality Disorder with Schizotypal, Antisocial and Borderline Features. K.G. is awaiting his Article 10 trial.

State v. C.C. – C.C.'s diverse and extensive criminal history began at age 16 when he was adjudicated a Youthful Offender and placed on probation for Attempted Sexual Abuse in the First Degree after molesting his 4-year old niece. He violated probation after being convicted of Burglary, the first such conviction of numerous other Burglary, Grand Larceny, Identity Theft, Issuing a Bad Check, Arson, and drug and alcohol related crimes. Though never charged, C.C. has also admitted to victimizing the two young grandchildren of his father's girlfriend. He groomed the children when they all lived together in the same house, he with his father, and the

victims with their grandmother. The first victim was a 3-year-old male who reported that C.C. touched his penis. The second was a 5-year old female who, among other incidents, reported that C.C. photographed and touched her bare buttocks and vagina. At age 31, he acquired his Article 10 qualifying convictions for Sexual Abuse in the First Degree and Unlawful Surveillance in the Second Degree. These convictions resulted from a cluster of multiple related incidents that were uncovered during the criminal investigation. The first involved C.C.'s repeated sexual exploitation and oral sodomy of an eight-year old boy. It also covers C.C.'s unlawful videography of a 6-year old boy, the son of C.C.'s former roommate, which captured his exposed genitals while urinating and changing his clothes in a bathroom. The video of the boy was discovered on an electronic storage device, which also contained child pornography consisting of numerous photos of several unknown female victims appearing between the ages of 6 and 12. After pleading guilty to the qualifying convictions, he was sentenced to a 3-year determinate term of incarceration with a 10-year term of post-release supervision. He is diagnosed with Pedophilic Disorder, sexually attracted to both males and females, non-exclusive type (provisional); Generalized Anxiety Disorder; and Alcohol Use Disorder, severe, in a controlled environment. C.C. waived his right to a trial and stipulated to the Court finding that he suffered from a mental abnormality. A SIST investigation conducted by DOCCS and OMH determined that, at this time, C.C. could be managed and treated in the community under SIST. He waived a dispositional hearing and was Ordered released to the community under a regimen of SIST.

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, 2017, 442 dangerous sex offenders with mental abnormalities are being civilly managed. Of that, 318 are being treated in a secure treatment facility, while 124 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 sex 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 that 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 have 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.*