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SEX OFFENDER MANAGEMENT BUREAU

A Report On The Sex Offender Management Treatment Act

April 1, 2023 to March 31, 2024

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INTRODUCTION

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

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

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

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

This report provides an overview of the application of SOMTA since its inception. Part one, "The Civil Management Process," explains how convicted sex offenders are screened, evaluated, and referred for civil management, as well as how the subsequent legal process works. Part two, "Civil Management After 17 Years," provides updated statistics and case data that are current as of March 31, 2024. Part three, "Significant Legal Developments," highlights the most significant decisions rendered in Article 10 cases over the last year. Part four, "Profiles of Sex Offenders Under Civil Management," provides case synopses of sex offenders who entered the civil management system over the past year. Finally, the report concludes with part five, "SOMTA's Impact on Public Safety." An appendix containing resources for victims is also provided.

I. THE CIVIL MANAGEMENT PROCESS

A. OVERVIEW

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

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

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

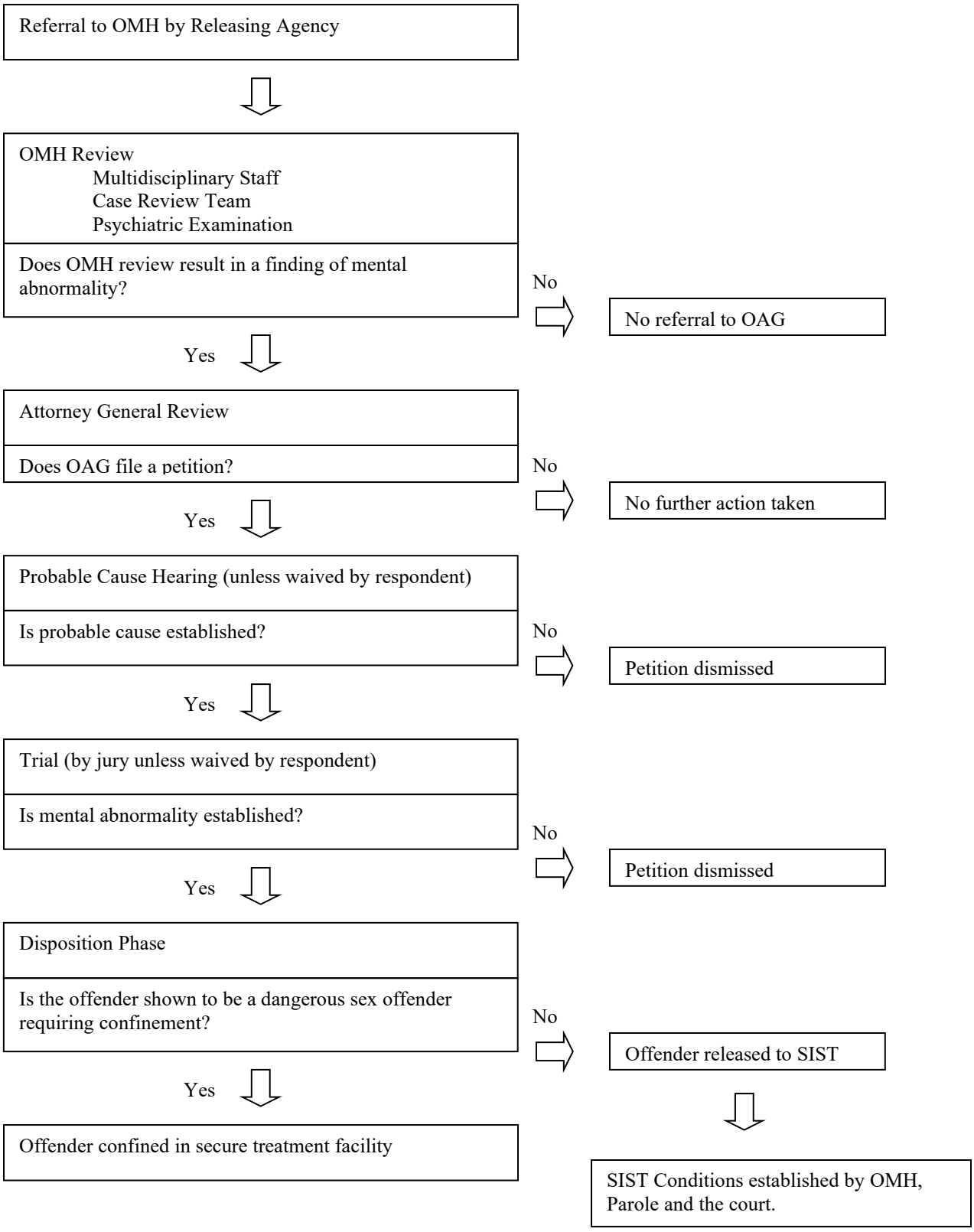
[6] MHL §§10.05, 10.03(a),(q),(g) and (i).

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

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

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

THE MHL ARTICLE 10 CIVIL MANAGEMENT PROCESS



B. THE EVALUATION PROCESS

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

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

The statute provides a time frame for this process: When an individual who may be a "detained sex offender" nears anticipated release, the statute requires the agency with jurisdiction to provide OMH and the OAG with 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 shorter. In 2007, the average time between the OAG's receipt of such notification and the offender's release date was 4 days; in 2008 it was 16 days; in 2009 it was 34 days; in 2010 it was 15 days; in 2011 it was 12 days; in 2012 it was 11 days; in 2013 it was 8 days; in 2014 it was 12 days; in 2015 it was 16 days; in 2016 it was 16 days; in 2017 it was 9 days; in 2018 it was 12 days; in 2019 it was 22.5 days; in 2020 it was 14 days; in 2021 it was 11 days, in 2022 it was 18 days, in 2023 it was 30 days, and in 2024 it was 15 days. These notification time frames are advisory, not mandatory, but the statute contemplates that OMH should give the OAG approximately 75 days-notice of its determination of referral for civil management.

The number of cases referred by OMH had declined dramatically since the inception of SOMTA in 2007, and though it slightly increased in, or about, the 2013 time-period, it has now leveled off. In the 2007-2008 fiscal year, OMH referred 134 cases to the OAG for filing a civil management proceeding. In 2008-2009 OMH referred 119 cases, in 2009-2010, there were 65 cases referred; in 2010-2011 65 cases; in 2011-2012, 34 cases; in 2012-2013, 99 cases; 2013-2014, 84 cases; in 2014 - 2015, 56 cases; in 2015-2016, 51 cases; in 2016-2017, 49 cases; in 2017-2018, 44 cases; in 2018-2019, 97 cases; in 2019-2020, 45 cases; in 2020-2021, 45 cases; in 2021-2022, 52 cases; in 2022-2023, 33 cases; and in 2023-2024, 51 cases. The various and complex factors driving annual referrals exceed the scope of this report.

C. LEGAL PROCEEDINGS

If upon referral by OMH the OAG determines that civil management is appropriate, a petition is filed on behalf of the State of New York by the OAG in the supreme or county court where the sex offender is located.[15] At the time a petition is filed, the sex offender is generally "located" in a state correctional facility responsible for his or her custody. Therefore, the petition is typically filed in the county within which the correctional facility is located. Once a petition is filed, the offender is entitled to an attorney. Most sex offenders are represented by Mental Hygiene Legal Service (MHLS), a state-funded agency. If a court determines MHLS cannot represent the offender, it will appoint an attorney eligible for appointment pursuant to County Law Article 18-B.[16]

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

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

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

DOCCS pending trial.[21] If the court determines that probable cause has not been established, it will dismiss the petition and the offender will be released in accordance with other provisions of Article 10. [22]

Once it is established there is probable cause to believe respondent is a sex offender requiring civil management, the case proceeds to trial to determine whether respondent is a "detained sex offender" who suffers from a "mental abnormality."[23] The respondent is entitled to a twelve-person jury trial but may waive the jury and proceed with a trial before the judge alone.[24]

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

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

The jury, or judge if the jury is waived, must find by unanimous verdict that the State of New York met its burden that the respondent is a “detained sex offender” who suffers from a “mental abnormality.” If a jury does not reach a unanimous verdict, the sex offender will remain in custody and a second trial will be held. If the jury in the second trial is unable to render a

[21] MHL §10.06(k).
[22] *Id*.
[23] MHL §10.07(a).
[24] MHL §10.07(b).
[25] MHL §10.07(a), (d), MHL 10.03(g), (i).
[26] MHL §10.03(g)
[27] MHL §10.03(i).

unanimous verdict, the petition is dismissed.[28] If a unanimous jury, or court if a jury is waived, determines the State of New York did not meet its burden, the petition is dismissed, and the respondent is released in accordance with other provisions of law.[29]

When the jury, or court if a jury is waived, determines that the State of New York met its burden of proof and finds 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 civil management trial is known as the dispositional phase and the court alone must consider whether the sex offender is a "dangerous sex offender requiring confinement" (DSORC) in a secure treatment facility or a sex offender requiring "strict and intensive supervision and treatment" (SIST) in the community.[30]

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

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

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

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

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

is supervised by parole officers from DOCCS and is required to abide 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] A respondent found to be a dangerous sex offender requiring confinement is transferred to an OMH Secured Treatment and Rehabilitation Center, generally either Oakview in Marcy, New York, or Bridgeview in Ogdensburg, New York.

A determination that a respondent is found to be a dangerous sex offender requiring confinement does not necessarily mean the offender will serve the rest of his or her life in a secure treatment facility. An offender may at any time petition the court for discharge and/or release to the community under a regimen of SIST. While the court may hold an evidentiary hearing, it also has the authority to deny the petition if found to be frivolous or insufficient for a re-examination at that time.[35]

Furthermore, and by statute, each dangerous sex offender requiring confinement is examined once a year by OMH for evaluation of their mental condition to determine whether they are currently a dangerous sex offender requiring confinement.[36] Each such respondent is entitled

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

to this annual review hearing based upon the findings of the OMH 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]

At the annual review hearing, the OAG calls the OMH examiner to testify at the hearing concerning their evaluation of respondent's mental condition and their determination of whether respondent is currently a dangerous sex offender requiring confinement, and the respondent often presents independent expert testimony on his or her behalf. These safeguards ensure the offender's legal rights are protected and that civil confinement decisions withstand legal scrutiny. If the State fails to prove that the offender still suffers from a mental abnormality, the court will order the offenders release from civil management. Assuming the offender's mental abnormality is established, the court has two options. 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 that respondent is a sex offender requiring strict and intensive supervision and treatment in the community, it will issue an order providing for the discharge of respondent into the community on a regimen of SIST.[38]

2. Strict and Intensive Supervision and Treatment (SIST)

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

Before a sex offender is released into the community, DOCCS and OMH conduct a SIST

[37] MHL §10.09(d).
[38] MHL §10.09(h).
[39] MHL §10.01(c).

investigation to develop appropriate supervision requirements. These supervision requirements may include, but are not limited to, electronic monitoring or global positioning satellite (GPS) tracking, polygraph monitoring, restrictions from the internet and social media platforms, specification of housing and 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 must participate in anger management, alcohol abuse, or substance abuse counseling. Each case is examined on an individual basis and the treatment plan is tailored to that individual's needs. Strict and intensive supervision is intended only for those sex offenders who can live in the community without placing the public at risk of further harm.

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

Sex offenders in the community on a regimen of SIST are subject to a minimum of six face-to-face supervision contacts and six 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

[40] MHL §10.11(a)(1).
[41] *Id*.
[42] MHL §10.11(b)(1).

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 State of New York 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 State of New York has not met the threshold elements to establish that the respondent is a dangerous sex offender requiring confinement, it will return the offender to the community under the previous, or a modified, order of SIST conditions.[46] Not all violations of SIST conditions will result in confinement.

Unlike sex offenders in a secure treatment facility who are entitled to annual review, the offenders on SIST are entitled to review every two years. The offender may petition every two years for modification of the terms and conditions of SIST or for termination of SIST supervision.[47] Upon receipt of a petition for modification or termination, the court may hold a hearing. The party seeking modification of the terms and conditions of SIST has the burden to establish by clear and convincing evidence that the modifications are warranted.[48] However, when

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

the sex offender files a petition for termination of SIST supervision, the State of New York has the burden to show by clear and convincing evidence that the respondent remains a dangerous sex offender requiring civil management. If the State of New York does not sustain its burden, the court will order respondent discharged from SIST and released from civil management supervision.[49] From April 13, 2007, to March 31, 2024, 281 offenders who had been placed on SIST have had their SIST conditions terminated and have been discharged from civil management supervision.

As time passes, it is expected that the number of offenders on SIST will grow considerably because of (1) the number of offenders that are released to SIST after trial, but also because (2) typically when 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 17 YEARS

A. REFERRALS AND CASES FILED

In the seventeen years since Mental Hygiene Law Article 10 became law, OMH has reviewed 26,920 sex offenders to determine whether they are appropriate for civil management referral to the OAG. Of the cases reviewed, OMH has referred a total of 1,127 sex offenders for civil management. Of the 1,127 cases referred, 1,102 have resulted in the OAG filing an Article 10 Petition. This includes what is considered the "Harkavy"[50] cases addressed in previous reports.

[49] MHL §10.11(h).

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

B. PROBABLE CAUSE HEARINGS

As referenced above, OMH has referred a total of 1,127 sex offenders for civil management to the OAG.[51] The OAG has filed 1,102 petitions and conducted 1,039 probable cause hearings. The courts found probable cause to believe the offender suffered from a mental abnormality and needed civil management 1,033 times out of the 1,039 hearings held to date.

C. MENTAL ABNORMALITY TRIALS

Since SOMTA's inception in 2007, 530 matters have proceeded to trial. Of the 530 trials, the jury or judge rendered a verdict that 448 of those sex offenders suffered from a mental abnormality and 82 were adjudicated to have no mental abnormality.

D. DISPOSITIONS

1. Dangerous Sex Offender Requiring Confinement (DSORC)

From April 13, 2007, to March 31, 2024, a court determined in 1,366 instances that an offender is a dangerous sex offender requiring treatment in a secure OMH facility. This number includes individuals previously confined, but were later released to SIST, who violated and were returned to confinement.

2. Strict and Intensive Supervision and Treatment (SIST)

From April 13, 2007, to March 31, 2024, a total of 566 offenders were placed on a regimen of SIST after a finding that they suffer from a mental abnormality.

3. SIST Violations

[51] These referrals include the Harkavy cases.

Presently, 162 offenders are currently on a regimen of SIST. The information below reflects the total number of offenders placed on SIST initially after trial, as well as those placed on SIST from confinement after an annual review hearing, and the number of those offenders who violated a condition of SIST. In SOMTA's second year, the SIST violation rate was 32%, with 40% of those violations taking place the first month on SIST. By the end of the third year, the SIST violation rate was up to 44%, increasing to 59% in the fourth year. In the fifth and sixth years it leveled to 61% and 62%, respectively. Since then, however, the DOCCS policy that it would file a violation if a Respondent violated any condition, e.g., late curfew, has changed.

In addition to the Court receiving quarterly reports on each offender's status on SIST, DOCCS and/or OMH may, as needed, submit Incident Reports, which are issued to inform the Court of a Respondent's concerning behaviors. Upon receipt of a quarterly report and/or Incident Report, the Court may schedule Compliance Calendars, at which the Respondent is brought to Court to address and correct the behavior before it escalates and results in the filing of a violation. This new policy has led to less SIST violations and to the overall success of Respondents on SIST.

E. ANNUAL REVIEW HEARINGS

The number of annual review hearings 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. Some offenders have waived their right to a hearing and consented to continued treatment in the facility. However, since 2007, over 1,079 dangerous sex offenders have had an annual review hearing held by the court. In the current report period, April 1, 2023, to March 31, 2024, there have been 93 annual review hearings.

F. SIST MODIFICATION OR TERMINATION HEARINGS

Since 2007, 281 offenders have been released from SIST supervision altogether and are either being supervised under their standard conditions of parole or have reached their maximum expiration date for parole and are unsupervised in the community subject to the requirements of the Sex Offender Registration Act (SORA).

III. SIGNIFICANT LEGAL DEVELOPMENTS

Between April 1, 2023, and March 31, 2024, the courts have decided a number of significant cases, each having a dynamic impact on article 10 litigation.

A. FEDERAL CASES

Two notable cases were decided at the Federal level during this review period.

1. Detained Sex Offender's *Pro Se* § 1983 Claim of False Imprisonment Against OMH Commissioner Seeking $1.5M in Damages is Time-Barred and Meritless.

Decided May 22, 2023, in Barnes v. Sullivan, 2023 U.S. Dist. LEXIS 8610; 2023 WL 3582552, the U.S. District Court for the Southern District of New York dismissed Plaintiff-Barnes' suit against Defendant-Sullivan.

Barnes was a detained sex offender nearing release from his term of incarceration when OMH (through its Commissioner-Sullivan, the named defendant) gave notice that he was being referred for civil management pursuant to MHL § 10.05.

Barnes sued in Federal Court claiming that Defendant, Commissioner Sullivan, was responsible for a "dereliction of duty" for filing the MHL article 10 petition "in such close proximity" to his maximum release date. After the article 10 proceeding was commenced,

plaintiff spent nearly 10 months in various DOCCS correctional facilities pending trial on the civil management petition. For this, plaintiff asserted claims for "false imprisonment" against Commissioner Sullivan under 42 U.S.C. § 1983 seeking $1.5 million in damages.

The District Court determined that plaintiff's false imprisonment claims under Section 1983 were time-barred. The Court further determined that, even if plaintiff's claim were not time-barred, he could not prevail. In essence, the Court determined that a claim against the Commissioner acting in her official capacity is a claim against the State of New York. The Court determined that the Eleventh Amendment bars plaintiff from asserting an official-capacity claim for damages under section 1983, because, unless the State has waived Eleventh Amendment immunity or Congress has abrogated it in specific legislation, it cannot be sued in Federal Court, neither of which applied here.

The Court also determined that Barnes could not sue Sullivan in her personal capacity either, because he did not allege that she had any direct and personal involvement in his detention and a defendant may not be held personally liable solely because they employ or supervise a person who allegedly violated a plaintiff's rights.

Lastly, the Court determined that while District Courts have broad discretion in granting pro se litigants leave to amend their complaint to cure defects in the pleadings, leave may be denied if a plaintiff was previously provided an opportunity to amend and failed to cure the deficiencies in an amended complaint. Here, the Court declined to grant further leave to amend and dismissed Barnes' suit, further certifying under federal law that "any appeal from this order would not be taken in good faith, and therefore, *in forma pauperis* status is denied for purposes of an appeal."

2. Sex Offender's § 1983 Claim Against Former Court-Appointed Attorney Dismissed With Prejudice.

Decided October 4, 2023, in Myers v. Trott, 2023 U.S. Dist. LEXIS 179197; 2023 WL 6463084, the U.S. District Court for the Western District of New York dismissed Myers' 42 U.S.C. § 1983 civil rights violation claims against Trott with prejudice, and dismissed his state law claims without prejudice.

Plaintiff-Myers is a detained sex offender being civilly managed in a secure treatment facility operated by OMH. After his article 10 appeal, his original order of confinement was vacated, and his article 10 proceedings were remitted to Supreme Court for retrial to be conducted pro se, without an attorney representing him, but with "legal advisors" who could assist him with his own defense. Myers informed the trial court judge that he needed to release those advisors "because they could not keep up with his demands for help." In response, the trial court appointed Defendant-Trott to represent him at trial. Myers alleges various miscommunications between himself and Ms. Trott, as well as her paralegal, Ms. Torelli, that eventually resulted in Trott sending Myers a letter terminating her services because she could no longer meet his demands. After the trial court scheduled conferences where Trott did not appear, Myers called her office demanding that she file a motion asking to be removed and to appear at court to "testify on her motion." When Plaintiff's paralegal, Torelli, explained to Myers that Trott no longer represented him, the conversation became heated, and Myers alleges that Torelli called him a "control freak." Myers responded by filing a motion for sanctions against Trott, and in his pleadings, he stated that "the judge is likely to be on Trott's side because she is an attorney."

In explaining its dismissal of Myers' claims, the Court indicated that to be successful in a § 1983 civil rights violation action, a plaintiff must sufficiently allege in the pleadings that the challenged conduct is attributable to a person acting under color of state law. The Court further explained that it is well-settled that court-appointed attorneys "are not persons acting under color of state law when performing a lawyer's traditional function." The Court determined that no liability would rest with said attorney under § 1983 when a claim fails to allege that the attorney was working with state officials to deprive the plaintiff of their protected federal rights. Here, the Court pointed out that Myers did not allege facts supporting a conspiracy, and consequently the complaint must be dismissed. The Court noted that because a better pleading would not cure the defects in Myers' claims, leave to amend the complaint would be futile.

The Court noted that Myers simply alleged that Trott failed to keep up regular communication and failed to appear for certain court conferences or file a timely motion to withdraw from his case, which, whether true or not, are actions resulting from the performance of a lawyer's traditional functions. Having established that Myers' allegations did not support a viable federal claim, the Court declined to exercise its jurisdiction over any of Myers' state law causes of action. After dismissing both the federal claims (with prejudice) and the state claims (without prejudice), the Court denied leave to amend the complaint and certified that "any appeal from this Order would not be taken in good faith and leave to appeal … as a poor person is denied."

B. NEW YORK STATE COURT OF APPEALS

There were no reported MHL article 10 cases decided by the Court of Appeals during this review period.

C. THE NEW YORK STATE APPELLATE DIVISIONS

FIRST DEPARTMENT DECISIONS:

The First Department did not publish an MHL article 10 decision during this review period.

SECOND DEPARTMENT DECISIONS:

The following noteworthy MHL article 10 cases were decided by the Second Department during this review period.

1. SIST Violations: Prehearing Detention Based on Probable Cause Under MHL 10.11(d)(4) is Constitutional.

Decided April 19, 2023, in People ex rel. Neville v. Toulon, 215 A.D.3d 874, the Second Department determined that MHL § 10.11(d)(4), which governs the procedure for detaining an offender when he is alleged to have violated SIST, comports with the New York State and the Federal Constitution, both on its face, and as applied in this case.

Here, the Court converted a petition for a writ of habeas corpus brought by Neville on behalf of Ralph S., a sex offender suffering from a mental abnormality who was civilly managed on SIST, to an action for a declaratory judgment.

Ralph S. was taken into custody when his SIST Parole Officer discovered that he had violated the terms of his release by ingesting alcohol and tampering with his alcohol monitoring unit on multiple occasions. After he was taken into custody, Parole notified the Attorney General's Office and Ralph S.'s attorney of the evaluation that was required by MHL §10.11(d)(4) and conducted to determine whether he was a dangerous sex offender requiring confinement. Thereafter, within the required five-day timeframe, OMH issued a report concluding that Ralph S. was a dangerous sex offender requiring confinement and, pursuant to

the statute, the Attorney General filed a petition seeking revocation of SIST and his confinement in a secure treatment facility.

Upon filing the petition by SOMB, the Court signed an Order to Show Cause wherein, based upon the alleged violation and the OMH evaluation, it found probable cause existed to believe that Ralph S. was a dangerous sex offender requiring temporary confinement in a local correctional facility pending a full evidentiary hearing on the issue within thirty-days, consistent with MHL § 10.11(d)(4). Ralph S. challenged his detention via a writ of habeas corpus before the SIST revocation hearing was held and alleged that he was denied the opportunity to be heard on the State's papers and the Court's probable cause determination. The trial court denied the writ prior to the SIST violation hearing.

Ralph S. appealed the trial court's denial of the writ prior to the SIST violation hearing. The SIST violation hearing was eventually held, and thereafter, Ralph S. was found not to need confinement. He was returned to SIST, but prior to the Second Department deciding the appeal on the habeas corpus denial.

Acknowledging the matter as academic and moot in light of Ralph S.'s liberty and upon his return to SIST, the Second Department decided this matter based on an exception to the mootness doctrine, converted the writ of habeas corpus to a declaratory judgment, and rendered a full decision on the issue of whether, MHL § 10.11(d)(4) was unconstitutional on its face and as applied to Ralph S.

Ralph S. argued that because he was not permitted to be heard on the State's SIST violation papers prior to the Court's determination of probable cause based thereon, he was unconstitutionally denied due process of law, and that MHL § 10.11(d)(4) is unconstitutional on its face, as well as unconstitutional as applied to him.

The Second Department noted that a party making a facially unconstitutional claim bears a substantial burden of proving that "in any degree and in every conceivable application, the law suffers wholesale constitutional impairment," meaning, as the Court clarified, that a "challenger must establish that no set of circumstances exists under which the Act would be valid."

Here, the Court held that Ralph S. failed to meet that substantial burden. The Court recognized that while important liberty interests are at stake in MHL article 10 proceedings, "the risk of erroneous deprivation is limited by the significant procedures already in place" under MHL § 10.11(d)(4). Significant to the Court was the fact that the statute in question only applies after an offender has been found by clear and convincing evidence to suffer from a mental abnormality, signifying that they are already predisposed to committing sex offenses and have serious difficulty controlling their conduct. Such mental abnormality, the Court held, inherently includes "the necessary finding of an offender's dangerousness, so as to come into the scope of those statutes upheld by the United States Supreme Court that authorize [civil] commitment or detention." Thus, the Court concluded that the procedures set forth MHL § 10.11(d)(4) are "sufficient to protect an offenders' liberty interests from erroneous deprivation, especially when balanced with the State's strong interest in providing treatment to sex offenders with mental abnormalities and protecting the public from their recidivistic conduct" (internal quotations and citations omitted).

In addition to rejecting his claim that the statute was facially unconstitutional, the Second Department also rejected Ralph S.'s contention that the statute was unconstitutional as applied to him, since his violation related to alcohol use, not sex offending behaviors.

While it acknowledged that to prove a SIST violator is a dangerous sex offender requiring confinement the State's evidence must demonstrate the offender has "such an inability

to control" his behavior, the Court nevertheless scorned the notion that the standard can only be satisfied by proof of an offender's sexually inappropriate behavior on SIST. Indeed, the Court reiterated the established principle that the "State need not await further sexual offending before it concludes that an offender is unable to control his or her sexual behavior" (internal quotation and citations omitted). Specifically, the Court was persuaded by the report of the State's expert indicating that by his own admission, Ralph S. "identified a connection between his alcohol use and his sex offenses, including telling treatment providers that if he started drinking alcohol, he would reoffend."

2. Proof of Offender's Mental Abnormality and that he is a Dangerous Sex Offender Requiring Confinement Was Clear and Convincing.

Decided June 21, 2023, in Matter of State of N.Y. v. Patrick F., 217 A.D.3d 870, the Second Department affirmed the trial court decisions and orders finding Patrick F. suffers from a mental abnormality and is a dangerous sex offender requiring confinement.

Despite Patrick F.'s contention on appeal, the Second Department concluded that the State presented clear and convincing evidence that he suffered from a mental abnormality. The Court cited the State's proof that Patrick F. suffered from several predicate disorders that, in combination, were linked to his predisposition to commit sex offenses. Further, the Second Department found no basis to disturb the trial court's reliance on the credibility of the State's expert.

As to the dispositional hearing and the trial court's decision finding Patrick F. to be a dangerous sex offender requiring confinement, the Second Department credited the State's expert who determined that Patrick F.'s deviant sexual interests, poor impulse control, cognitive distortions, including characterizing children and his own son as catalysts of his sexual offensive

behavior, as well as his antisocial attitudes, made it likely that he would sexually reoffend if not confined for treatment. The Court also noted that the State presented credible evidence that Patrick F. had not successfully engaged in sex offender treatment, that he failed to develop a viable relapse prevention plan, and that he demonstrated an inability to control his impulses.

Lastly, in upholding the trial court determinations, the Second Department stated that contrary to his assertion, the record established that Patrick F. was not deprived of the effective assistance of counsel, and that the remainder of his contentions were meritless.

3. Proof of Mental Abnormality and Dangerous Sex Offender Requiring Confinement Was Clear and Convincing.

Decided on September 27, 2023, in Matter of State of N.Y. v. Anthony A., 219 A.D.3d 1524, the Second Department affirmed the trial court decisions and orders finding Anthony A. suffered from a mental abnormality and that he is a dangerous sex offender requiring confinement.

Following a bench trial, the Supreme Court determined that the State had proved, by clear and convincing evidence, that the Anthony A. suffered from a mental abnormality. The Second Department determined that, in contrast to his contention, there was legally sufficient evidence and a valid line of reasoning for the trial court to conclude that the Anthony A. suffered from a mental abnormality, that the verdict was not against the weight of the evidence, and that there was no basis to disturb the trial court's decision to credit the testimony of the State's expert.

Furthermore, at the dispositional hearing, the State's expert testified that, although the appellant declined to participate in interviews, records revealed that the Anthony A.'s deviant sexual interests, overall impulse control, cognitive distortions, and antisocial attitudes and behaviors made it likely that he would sexually reoffend. The Second Department noted that the State had provided credible evidence that Anthony A. had not successfully engaged in treatment,

had not developed relapse prevention strategies, and had a persistent inability to control his impulses.

Though Anthony A. asserted that he was deprived of the effective assistance of counsel, the Court indicated that the record, viewed in its totality, contradicted such contention.

4. New *Frye* Hearing Unnecessary Where Recent Hearing Determined General Acceptance; Proof that Dangerous Sex Offender Requires Confinement Was Clear and Convincing; Addendum Report Properly Admitted When Expert Unavailable.

Decided October 4, 2023, in Matter of State of N.Y. v. Shannon C., 220 A.D.3d 712, the Second Department affirmed the Supreme Court's bench trial verdict and findings that Shannon C. suffers from a mental abnormality and is a dangerous sex offender requiring confinement, after the trial court relied in-part upon the State's evidence of his condition of hypersexuality and a provisional diagnosis of frotteuristic disorder.

The Second Department upheld the trial court's admission of evidence of Shannon C.'s hypersexuality and its decision to decline to hold a *Frye* hearing challenging said condition. The Appellate Division stated that Supreme Court was not required to hold a *Frye* hearing "where it can rely upon previous rulings in other court proceedings as an aid in determining the admissibility of the proffered testimony." Here, the trial court relied upon a recent and thorough decision out of Kings County Supreme Court, which, after a seven-day *Frye* hearing, determined that the condition of hypersexuality is generally accepted within the relevant psychological community. Additionally, the Court concluded that the Supreme Court did not err by admitting into evidence the provisional diagnosis of frotteuristic disorder, which was ascribed to Shannon C. by the State's expert and relied upon to form the opinion that he suffered from a mental abnormality.

Moreover, the Second Department rejected Shannon C.'s claim that conflicting expert opinion negated the clear and convincing evidence presented at the dispositional hearing, holding

that such conflicting expert testimony presented a credibility determination for resolution by the trial court and the court's credibility determination was supported by the record. Here, the Second Department held that the trial court's determination was supported by the record, which demonstrated that Shannon C.'s level of dangerousness required confinement.

Lastly, pursuant to MHL § 10.08(g), the Appellate Division held that the Supreme Court properly admitted into evidence the addendum report of one of the State's experts, after a sufficient showing that the expert was unavailable to testify at the dispositional hearing.

5. Mental Abnormality Supported by Clear and Convincing Evidence of Offender's ASPD, Sexual Sadism Disorder, Other Specified Personality Disorder with Narcissistic and Antisocial Traits, and High Psychopathic Traits.

Decided December 6, 2023, in Matter of State of New York v. Kerry K., 222 A.D.3d 655, the Second Department affirmed the Suffolk County Supreme Court's finding, made after a bench trial, that Kerry K. suffers from a mental abnormality, and its subsequent determination that he is a dangerous sex offender requiring confinement made after a dispositional hearing.

The Second Department concluded that contrary to the Kerry K.'s contentions, the evidence at trial was legally sufficient to demonstrate, by clear and convincing evidence, that Kerry K. suffers from personality disorders that predispose him to commit sex offenses, and that he has serious difficulty controlling such conduct. The State's experts collectively established the existence of one or more predicate conditions through their opinions that he suffers from antisocial personality disorder (ASPD), sexual sadism disorder, other specified personality disorder with narcissistic and antisocial traits, and psychopathy.

Though Kerry K. argued that ASPD and other specified personality disorder were insufficient to establish a predicate condition, and that the sadism and psychopathy diagnoses were not supported by the record, the Appellate Division disagreed. The Court was persuaded

by the record and stated, "even assuming that a diagnosis of psychopathy was improper in light of the appellant's average score across two Psychopathy Checklist-Revised tests, the diagnosis of sexual sadism disorder, standing alone, was sufficient to constitute a predicate condition and was supported by the evidence." Regarding a State expert's opinion that Kerry K. presented with a "high level of psychopathic traits," the Court further stated, "even assuming that it was insufficient to support a formal psychopathy diagnosis, [evidence of high psychopathic traits] could have been considered by the court in conjunction with the other diagnoses when deciding the mental abnormality issue." The Court pointed out that the State's experts linked all of Kerry K.'s diagnoses to his predisposition to commit sex offenses, and the evidence was sufficient to demonstrate that he had serious difficulty controlling himself.

Rejecting Kerry K.'s remaining contentions, the Second Department held that the Supreme Court properly found clear and convincing evidence that his level of dangerousness required confinement rather than SIST, and it found no basis to disturb the trial court's determination to credit the State's experts, which was supported by the record.

6. Mental Abnormality Supported by Legally Sufficient Proof and a Valid Line of Reasoning.

Decided January 24, 2024, in Matter of State of New York v. Ramel J., 223 A.D.3d 830, the Second Department affirmed the Supreme Court's decision and order finding that Ramel J. was a detained sex offender who suffers from a mental abnormality as defined in Mental Hygiene Law 10.03(g) and (i), and that he is a dangerous sex offender requiring civil confinement.

Upon filing the petition seeking civil management of Ramel J. and after his probable cause hearing, Ramel J. assaulted several OMH employees and court officers. As a result, he pleaded guilty to attempted assault in the second degree and was sentenced to a two-to-four-year

indeterminate term of incarceration. The prior MHL article 10 petition was dismissed without prejudice to refile upon the respondent's release relating to his attempted assault conviction. Once Ramel J. neared release on the attempted assault conviction, the State refiled a petition seeking civil management, which resulted in the Supreme Court's finding that Respondent suffers from a mental abnormality and is a dangerous sex offender requiring confinement.

On appeal, the Second Department concluded that the State met its burden of proving by clear and convincing evidence that Ramel J. suffered from a mental abnormality. The Second Department stated that the Supreme Court's decision was "supported by legally sufficient evidence, as there was a valid line of reasoning by which the court could have concluded" that Ramel J. had a mental abnormality.

Furthermore, the Second Department concluded that the Supreme Court's determination was based on a fair interpretation of the evidence and, as a result, was not against the weight of the evidence. Acknowledging that the trial court, as trier of fact, was in the best position to evaluate the weight and credibility of the conflicting psychiatric testimony, the Appellate Division found no basis to disturb the lower court's decision to credit the testimony of the State's experts over that of the Ramel J.'s expert.

7. ASPD with Psychopathy is Legally Sufficient Evidence of Mental Abnormality; Trial Court Erred in Rejecting Sexual Sadism Disorder.

Decided January 24, 2024, in Matter of State of New York v. Ezikiel R., 223 A.D.3d 832, the Second Department held that the Supreme Court incorrectly determined Ezikiel R.'s diagnoses of ASPD and psychopathy cannot constitute the basis for a finding of mental abnormality.

Though the Second Department acknowledged that the Court of Appeals' 2014 precedent in *Donald DD*. prohibits a mental abnormality finding based upon ASPD alone, it reiterated that

subsequent cases have upheld ASPD with psychopathy as sufficient predicate conditions. (24 N.Y.3d 174; (see also *Matter of Doy Scott*, 196 A.D.3d at 1167; and *Jerome A.*, 137 A.D.3d 557). The Court stated, "[i]nasmuch as the Supreme Court determined that it was 'constrained to find, pursuant to the Court of Appeals' holding in *Donald DD*, that the respondent does not suffer from a mental abnormality as defined in Article 10 of the Mental Hygiene Law' based upon the respondent's diagnoses of ASPD and psychopathy, that determination was error."

Furthermore, the Second Department found that under the particularities of this case, the Supreme Court's determination that the State failed to prove Ezikiel R. suffers from sexual sadism disorder was not warranted by the facts. Even affording deference to the trial court's credibility determinations and recognizing that in a close case, the trial judge had the advantage of seeing and hearing the witnesses, the Appellate Division indicated that upon its review of the record, including the details of at least two brutally violent and excessively degrading rapes of women by Ezikiel R., as well as the testimony of one expert who gave him a provisional diagnosis, and another expert who gave him the full diagnosis, the State had proven by clear and convincing evidence that he suffered from sexual sadism disorder.

Therefore, the Second Department reversed the order and remitted the matter to the Supreme Court for a new trial on whether the Ezikiel R.'s diagnoses of ASPD, psychopathy, and sexual sadism disorder are sufficient to find that he suffers from a mental abnormality.

THIRD DEPARTMENT DECISIONS:

The Third Department issued the following MHL article 10 decision during this review period.

1. **SIST Violation: Proof that Dangerous Sex Offender Requires Confinement Was Clear and Convincing; Attorney's Failure to Request a *Frye* Hearing That Would Have Been Properly Denied is Not Grounds for Ineffective Assistance of Counsel.**

Decided June 22, 2023, Matter of State of N.Y. v. Andrew VV., 217 A.D.3d 1201, the Third Department affirmed the Supreme Court's finding that Andrew VV. is a dangerous sex offender requiring confinement, which it rendered after a SIST violation and revocation hearing, wherein both experts agreed that he was a dangerous sex offender requiring confinement.

Andrew VV. was released from confinement to a regimen of SIST after an annual review hearing. Just three months after his release, his parole officer observed him sitting at a bus stop across the street from the parole office and looking at what appeared to be an unapproved cell phone. Upon approaching and inquiring, the parole officer confirmed Andrew VV. to be in possession of an unauthorized mobile device with internet capabilities. The officer's examination revealed the device contained an unregistered email address, social media and messaging applications, a nude photograph of an unidentified female, and a search engine that had been used to access various internet pornography sites. Andrew VV. admitted that he had unlawfully obtained the phone without disclosing it to his parole officer and that he had used it to access social media and pornography sites. He was taken into custody and the State commenced a SIST revocation proceeding after an OMH evaluation determined that he was a dangerous sex offender requiring confinement.

The Supreme Court held a revocation hearing wherein two experts testified consistently with their respective reports and concluded that Andrew VV. was a dangerous sex offender requiring confinement. The first expert for the State was the OMH examiner who interviewed Andrew VV. just after he was taken into custody on the SIST violation. The other, an independent examiner appointed by the Court on Andrew VV.'s behalf, had previously evaluated him and supported his release to SIST in the annual review hearing.

The OMH examiner explained that Andrew VV. had an opportunistic "generalized

sexuality" that manifested in numerous situations in the community. Moreover, because he used two things, "sex and food to cope with stress," and because his stress, depression, isolation, and anger, had progressively increased to the point of overwhelming him almost immediately after his release to the community, this rendered him particularly unable to control his conduct on SIST. To cope with this stress, he obsessively turned to pornography on the internet, which consumed half of his days and led to negative feelings, which further put him at high risk of reoffending. Exacerbating the situation, the OMH examiner explained that Andrew VV. had stopped taking his prescribed antidepressant, which had the dual purpose of mitigating his depression, but also lowering his sexual libido. Andrew VV. admitted to the OMH examiner that he was so overwhelmed that he deliberately used the phone in front of the parole office so that he would be caught and returned to confinement. The examiner agreed with Andrew VV.'s own assessment that he used pornography and sexualized behavior as a coping mechanism, which placed him at great risk of reoffending and rendered him a dangerous sex offender requiring confinement.

The independent evaluator, who previously opined that Andrew VV. was appropriate for release to SIST, changed his mind in light of the violation and revelation of his behaviors within such a short time in the community. To the independent examiner, Andrew VV.'s hypersexuality "caused [him] to have a compulsive preoccupation with sex, including a focus on young children, and his pedophilic disorder, antisocial personality disorder and hypersexuality all impaired his ability to control his compulsive sexual behavior." Additionally, the expert explained that Andrew VV.'s decisions to seek pornography and sexualized social media exchanges, as well as to discontinue taking his antidepressant, reflected high ambivalence towards staying in the community and set him on a course of escalating sexual behaviors. In

light of these alarming behaviors, the independent examiner opined that there was simply no way Andrew VV. could be safely managed without exposing the community to undue risk and that his confinement was required.

Andrew VV. did not deny the conduct underlying his violation and did not present a witness on his own behalf, arguing instead that his behaviors did not reflect a difficulty in controlling his sexual conduct. Rejecting that argument, the Supreme Court revoked his release to SIST, having found clear and convincing evidence that he was a dangerous sex offender requiring confinement.

The Third Department stated, "deferring to the [trial] court's implicit assessment that the testimony of [both experts] was credible, we are satisfied that petitioner met its burden of showing that respondent has an inability to control his behavior such that he is likely to be a danger to others and to commit sex offenses if not confined." Thus, the Appellate Division held that the Supreme Court properly found Andrew VV. to be a dangerous sex offender requiring confinement.

Additionally, it rejected Andrew VV.'s contention that he was denied effective assistance of counsel because his attorney failed to request a *Frye* hearing on the condition of hypersexuality, which both experts had ascribed to him. The Third Department noted that even if his attorney had requested the hearing, the Supreme Court would have been correct to deny the application based on a recent decision rendered after a seven-day *Frye* hearing, which held that hypersexuality was generally accepted within the relevant psychological community. Moreover, the Court noted, "[t]here was therefore nothing ineffective in counsel's decision to forgo a request for a *Frye* hearing that stood little or no possibility of success and, suffice it to say, our review of the record as a whole establishes that respondent received meaningful representation."

FOURTH DEPARTMENT DECISIONS:

The Fourth Department issued the following notable decisions on MHL article 10 matters during this review period.

1. **Annual Review Hearing: Evidence that Offender Was Dangerous and Required Confinement Upheld.**

Decided April 28, 2023, Matter of Nushawn W. v. State of N.Y., 215 A.D.3d 1227, the Fourth Department affirmed the order for continued confinement of Nushawn W. in a secure treatment facility entered by Supreme Court after an annual review hearing. Nushawn W. appealed on several grounds, all of which the Court denied.

The Fourth Department rejected Nushawn W.'s contention that Supreme Court erred by denying his motion for a change of venue to New York County, holding that there was no abuse of discretion in denying that motion.

Next, the Fourth Department dispensed with Nushawn W.'s claim that there was legally insufficient evidence to establish that he is a dangerous sex offender requiring confinement. The Court assumed for argument only that Nushawn W. had preserved that contention for appellate review, but it nevertheless stated that his claim was without merit. The Court stated, "we conclude that it is legally sufficient to establish by clear and convincing evidence the 'predisposition prong of the mental abnormality test.'" Such standard was met here by evidence of Nushawn W.'s ASPD, three substance use disorders, psychopathy, and hypersexuality, which predisposed him to commit sex offenses.

Moreover, the Fourth Department rejected Nushawn W.'s contention that the State failed to prove he has serious difficulty controlling his behavior. The State's expert testified that Nushawn W. had not made sufficient progress in treatment, failed to address his deviance and

attraction to sex with underage girls, and that he failed to recognize how his substance abuse related to his sexual offenses. Additionally, the record indicated that Nushawn W. scored high on risk assessment instruments. The Court stated, "for the aforementioned reasons, we also conclude that [the State] met their burden of establishing that [Nushawn W.] has such an inability to control his behavior, that he is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility."

Lastly, the Court rejected Nushawn W.'s contention that the trial court's determination was against the weight of the evidence by determining that: "The evidence does not preponderate so greatly in [Nushawn W.'s] favor that the court could not have reached its conclusion on any fair interpretation of the evidence."

2. **Preclusion Based on Cumulative Evidence Properly Denied Where Two Experts with Similar Opinions, Yet Different Diagnoses Testified; Evidence of Dangerous Sex Offender Requiring Confinement Was Sufficient.**

Decided June 9, 2023, Matter of State of N.Y. v. Robert R., 217 A.D.3d 1413, the Fourth Department affirmed the Supreme Courts' order committing Robert R. to a secure treatment facility after a bench trial found him to be a dangerous sex offender requiring confinement.

Robert R. appealed the Supreme Court's order, asserting that it erred in refusing to preclude the testimony of one of the State's expert witnesses as cumulative of its other expert. In rejecting that assertion, the Fourth Department concluded that although both experts opined that Robert R. suffered from a mental abnormality, their testimony was not cumulative because of distinctions in their diagnoses.

Though Robert R. failed to preserve for appellate review his claim that the State failed to establish that he had serious difficulty controlling his sexually offending behavior, "inasmuch as he did not move for a directed verdict…or challenge the sufficiency of the evidence on those

points any other way," the Fourth Department nevertheless concluded that the evidence was legally sufficient to support that determination and that it was not against the weight of the evidence.

3. Annual Review Hearing: Proof that Dangerous Sex Offender Requires Confinement Was Clear and Convincing.

Decided July 28, 2023, Matter of Richard R. v. State of N.Y., 218 A.D.3d 1282, the Fourth Department affirmed the Supreme Courts' order for confinement of Richard R. as a dangerous sex offender requiring confinement, rendered after an annual review hearing.

The record of the annual review hearing established that Richard R. was diagnosed with pedophilic disorder and other specified personality disorder with antisocial features, which "when viewed in combination, predispose him to commit sex offenses." The Fourth Department concluded that the evidence was legally sufficient to establish the "predisposition prong of the mental abnormality test."

Furthermore, the Fourth Department concluded that the evidence was legally sufficient to establish by clear and convincing evidence that petitioner has "serious difficulty in controlling" his sexual conduct. The State presented evidence that Richard R. had failed to attend treatment groups, failed to have a relapse prevention plan, and scored high on risk assessment instruments." Under those circumstances, the State met its burden of establishing that petitioner has "such an inability to control [his] behavior, that [he] is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility."

4. Annual Reviews: Documentary Submission Insufficient, Evidentiary Hearing with Live Witnesses Required.

Decided October 6, 2023, Matter of Charles L. v. State of N.Y., 220 A.D.3d 1200, the Fourth Department reversed the order of Supreme Court which, in essence, had denied Charles

L.'s request for evidentiary hearing for his annual review.

Supreme Court on its own, without motion from the parties, issued a letter order directing that Charles L.'s annual review hearing would be decided on submission of documentary evidence only, meaning no evidentiary hearing with live witness testimony would be held. Charles L. initially moved to vacate that letter order of Supreme Court, which was denied by a second order of the trial court. Charles L. challenged both orders in separate appeals, contending that Supreme Court violated his statutory rights under article 10 of the Mental Hygiene Law by not scheduling an evidentiary hearing with live witness testimony.

The Fourth Department combined both appeals and concluded that the first appeal should be dismissed, because the letter order was not appealable as of right as it was entered sua sponte and did not decide a motion made upon notice. Regardless, the Court noted that all of Charles L.'s contentions were before the Court in the second appeal challenging the order denying his application to vacate the original letter order.

On that challenge, the Fourth Department stated that MHL §10.09(d) requires the court to "hold an evidentiary hearing . . . [if] the offender has petitioned or has not affirmatively waived the right to petition for discharge." In reversing and remitting for an evidentiary hearing, the Fourth Department noted that Charles L. petitioned for an annual review, and he is therefore entitled to an evidentiary hearing with live witness testimony where he may call and examine other witnesses, produce other evidence, and testify on his own behalf.

5. **Annual Review Hearing: Confinement Affirmed; Adequacy of Offender's Treatment Plan is Not Before the Trial Court.**

Decided October 6, 2023, Matter of Steven M. v. State of N.Y., 220 A.D.3d 1172, the Fourth Department unanimously affirmed the Supreme Court's order for confinement of Steven M. after an annual review hearing determination that he is a dangerous sex offender requiring

confinement.

On appeal, Steven M. alleged that his sex offender treatment plan must be modified to focus on his diagnoses of antisocial personality disorder and his condition of hypersexuality, as opposed to a provisional diagnosis of pedophilic disorder. Noting that said contention was raised for the first time on this appeal and not properly before it, the Fourth Department nevertheless stated that the "adequacy of a sex offender treatment plan is not before the [trial] court in an annual review proceeding."

6. **Amended Order for Confinement Unanimously Affirmed.**

Decided November 17, 2023, Matter of Joseph R. v. State of New York, 221 A.D.3d 1545, the Fourth Department unanimously affirmed (without discussion) an amended order of the Supreme Court that found Joseph R. to suffer from a mental abnormality and continued his confinement in a secure facility.

7. **Trial Court Determination that a Detained Sex Offender Suffers from a Mental Abnormality Unanimously Affirmed.**

Decided November 17, 2023, Matter of State of New York v. Nathan E., 221 A.D.3d 1601, the Fourth Department unanimously affirmed (without discussion) the order, for reasons stated in the trial court's decision, which adjudged Nathan E. to be detained sex offender who suffers from a mental abnormality.

8. **Continued Confinement at Secure Treatment Facility Unanimously Affirmed.**

Decided November 17, 2023, Matter of Albert J. v. State of New York, 221 A.D.3d 1602, the Fourth Department unanimously affirmed (without discussion) the order, for reasons stated in the decision of the Supreme Court, continuing Albert J.'s confinement at a secure treatment facility as a dangerous sex offender requiring confinement.

9. **Annual Review Hearing: Proof that Dangerous Sex Offender Requires Confinement Was Not Against the Weight of the Evidence.**

Decided November 17, 2023, Matter of Ezra B. v. State of New York, 221 A.D. 3d 1597, the Fourth Department unanimously affirmed the Supreme Court's finding, after an annual review hearing, that Ezra B. is a dangerous sex offender requiring confinement.

Contrary to Ezra B.'s contention, the Fourth Department concluded that Supreme Court's determination that he is a dangerous sex offender requiring confinement was not against the weight of the evidence. In so holding, the Fourth Department considered the expert testimony indicating that he made insufficient progress in treatment, in that he failed to address all the incidents of his abuse and his sexually deviant behavior.

Furthermore, in light of the two different risk assessments used by the experts, the experts determined that Ezra B. was at moderate risk of recidivism and both experts opined that he could not be safely managed under a regimen of SIST in the community. The Fourth Department found no basis to disturb the trial court's decision to credit the testimonies of the experts.

10. **Annual Review Hearing: Proof that Dangerous Sex Offender Requires Confinement Was Clear and Convincing.**

Decided March 15, 2024, in Matter of State of N.Y. v. Tyree A., 2024 NY Slip Op 01406, the Fourth Department rejected Tyree A.'s contention that he was not a detained sex offender within the meaning of MHL § 10.03(g)(1) and thus, was not subject to the State's jurisdiction.

Tyree A. alleged that he was not afforded the benefit of certain time credits that would have resulted in his release from prison prior to the filing of the MHL article 10 petition. The Appellate Division determined that the Supreme Court correctly denied Tyree A.'s motion to

dismiss. As numerous precedents previously established, even assuming for argument that he was unlawfully imprisoned, "the legality of a prisoner's custody is irrelevant to whether the prisoner is properly considered a detained sex offender within the meaning of the statute." Thus, the Fourth Department unanimously affirmed the order denying dismissal of the petition.

11. **Annual Review Hearing: Proof that Dangerous Sex Offender Requires Confinement Was Not Against the Weight of the Evidence.**

Decided March 15, 2024, in Matter of Kerry K. v. State of New York, 2024 NY Slip Op 01382, the Fourth Department affirmed the Supreme Court's order directing Kerry K.'s continued confinement in secure treatment facility, entered after an annual review hearing wherein he was found to be a dangerous sex offender requiring confinement.

The Fourth Department concluded that contrary to Kerry K.'s contention, the Supreme Court's determination that he suffers from a mental abnormality was proven through expert testimony and thus, was not against the weight of the evidence. Specifically, the Court noted that the combined diagnosis of ASPD and psychopathy is a legally sufficient basis for mental abnormality. It also noted that Kerry K. scored high on the Severe Sexual Sadism Scale, just one point shy of full diagnosis, and that he refused to interview with the State's expert witness, which the Court factored into its analysis. While Kerry K.'s expert opined that he did not have a mental abnormality, the trial court "was in the best position to evaluate the weight and credibility of the conflicting expert testimony," and the Appellate Division saw "no reason to disturb the court's decision to credit the testimony of the [State's] expert."

Though Kerry K. also argued that the trial court's determination that he is a dangerous sex offender requiring confinement was against the weight of the evidence, the Fourth Department rejected that argument. The Court reasoned that in addition to scoring in the high risk category based on an actuarial risk instrument, expert testimony "established that [Kerry K.]

has made very little progress in sex offender treatment based on his sporadic attendance and superficial participation" and that, in general, he "has shown a lack of interest in meaningfully discussing his prior offenses and has not been able to develop insight into his offense cycle."

12. **Annual Review Hearing: Proof that Dangerous Sex Offender Requires Confinement Was Clear and Convincing.**

Decided March 15, 2024, Matter of Steven L. v. State of N.Y., 2024 NY Slip Op 01461, the Fourth Department unanimously affirmed the Supreme Court's order continuing Steven L.'s confinement in a secure treatment facility after an annual review hearing.

The Court was persuaded by the record of the annual review hearing, which indicated that both the State's expert and the independent expert appointed by the Court on Steven L.'s behalf opined that he remains a dangerous sex offender requiring confinement in a secure treatment facility. In rejecting Steven L.'s contention that the determination was against the weight of the evidence, the Fourth Department perceived no basis in the record to disturb the court's determination to credit the opinions of those experts.

D. TRIAL COURT DECISIONS:

New York's trial courts decide the vast majority of MHL article 10 cases. Each year, the trial courts write numerous decisions on a wide variety of important issues. Due to the large volume of cases, it is not feasible to include summaries of each trial court decision within a given year in this annual report. However, below are several examples of significant decisions that are shaping this dynamic area of article 10 civil management in New York.

1. **Other Specified Paraphilic Disorder-Hebephilia Passes *Frye* Challenge.**

Decided September 14, 2023, in the Matter of the State of New York v. Frederick B., the Supreme Court, Onondaga County (McMahon, JSC) denied Frederick B.'s motion seeking to

preclude evidence and testimony regarding the diagnosis of "Other Specified Paraphilic Disorder - Hebephilic Disorder."

Frederick B. brought a motion to preclude evidence and testimony regarding the diagnosis of "Other Specified Paraphilic Disorder - Hebephilic Disorder" (Hebephilia) or in the alternative, a hearing pursuant to *Frye v. United States* (293 F 1013[DC Cir 1923]) to determine whether the diagnosis is generally accepted in the relevant scientific community.

After motion practice, Supreme Court scheduled a *Frye* hearing. Specifically, the Court was focused on recent developments regarding the diagnosis within the field since 2019. At the hearing, Dr. David Thornton and Dr. Jacob Hadden testified for the State and offered testimony in support of the diagnosis of hebephilia. Dr. Jerome Wakefield and Dr. Joe Scroppo testified on behalf of Frederick B., indicating that the diagnosis of hebephilia is not generally accepted in the relevant scientific community.

Dr. Thornton testified that he was a consultant on the development of the DSM-5 regarding paraphilic disorders. Dr. Thornton defined hebephilia as "a strong or preferential sexual interest that is also persistent into … pubescent children… in Tanner Stages 2 and 3, and who are usually in the age range of 11 to 14." Regarding the definition, Dr. Thornton also stated, "we have to express some caution in relation to these age ranges because individuals develop different[ly], start puberty at other ages, [and] so, these are averages." Dr. Thornton further testified that he reviewed 40 articles written since 2019 on the subject of hebephilia, and that all but one article indicated that the diagnosis of hebephilia as a paraphilia was generally accepted in the field. Similarly, Dr. Hadden also testified to hebephilia having gained general acceptance within the relevant scientific community, particularly since 2019.

Frederick B.'s expert, Dr. Wakefield, acknowledged that there is nothing in the DSM-5 to

limit a practitioner from diagnosing hebephilia as a paraphilia under Other Specific Paraphilic Disorder. Both Dr. Wakefield and Dr. Scroppo testified that an individual who presents with the characteristics of hebephilia are simply showing a "preference" for underage pubescent children as opposed to a "mental disorder."

The Court was not persuaded by either expert for Frederick B. as it noted that their "approaches were based in theory, not practice." In denying Frederick B.'s motion to preclude the diagnosis, the Court wrote, "the State has sustained its burden in finding the diagnosis of "Other Specified Paraphilic Disorder – Hebephilic Disorder … [is] overwhelmingly utilized by the relevant scientific community and is accepted in the research/peer review community by virtue of the articles reviewed and discussed in testimony."

2. Annual Review Hearing: Mental Abnormality Clearly and Convincingly Supported by Offender's ASPD and Psychopathic Traits; Insufficient Proof that Offender Currently Requires Confinement.

Decided January 12, 2024, In the Matter of the Application for Discharge of Tony T. v. State of New York, the Supreme Court, Oneida County (Merrell, JSC), determined that Tony T. was no longer a dangerous sex offender and ordered his release to SIST, following an annual review hearing.

At the hearing, the State's expert testified consistently with her report that petitioner-Tony T. suffers from a mental abnormality and that he continued to be a dangerous sex offender requiring confinement. The State expert diagnosed Tony T. with Antisocial Personality Disorder (ASPD), and the condition of psychopathic traits. The Court noted that Tony T. refused to interview with the State's expert for purposes of his annual evaluation.

The independent expert appointed by the Court on Tony T.'s behalf testified, consistently with his report, that Tony T. did not suffer from a mental abnormality and that regardless, if the

Court found that he did, he was not a dangerous sex offender requiring confinement. The independent examiner diagnosed Tony T. with ASPD, as well as Alcohol, Cocaine, and Cannabis Use Disorders-moderate, in sustained remission in a controlled environment.

The Court stated, "[p]ertinent to this proceeding is [Tony T.'s] medical condition." He had suffered a stroke in 2020, which caused some disability to the right side of his body. Additionally, the Court wrote that as a result of the stroke, Tony T. was in a wheelchair for a significant period of time. By the time of the hearing, he was able to ambulate with a cane. The Court pointed out that "no specific medical prognosis is in evidence."

The Court found that "based on the undisputed conclusions of the medical experts, together with the credible and reliable information on which the testimony was based, that [Tony T.] suffers from a mental abnormality."

In discussing the facts relevant to this finding, the Court noted that Tony T. was 57-years old and had been confined at the STF since 2021. His sex offense history occurred between 1979 to 2012 and involved at least six female victims between the ages of 14 to 63. His various offenses involved fondling victim's vaginas and breasts, physically assaulting them, and making threats to kill them, as well as threats made at knifepoint, attempted rape during a home invasion/burglary, and several completed rapes after breaking into the homes of the women victims. He also had an extensive criminal history of non-sexual crimes, involving violent offenses and property offenses, including burglaries and robberies.

In finding by clear and convincing evidence that Tony T. has a mental abnormality, the Court credited the State examiner's opinion regarding respondent's combination of ASPD and psychopathic traits as predisposing him to commit sex offenses and resulting in his serious difficulty in controlling his deviant sexual urges. The Court acknowledged that the combination

of ASPD and psychopathic traits are viable predicate conditions sufficient to support a finding of mental abnormality if they are linked to his predisposition and serious difficulty.

Despite differing expert opinion on whether Tony T. has a high level of psychopathic traits, the Court found the State expert's testimony more persuasive, noting that "psychopathy is a rarer and more serious condition than ASPD." Moreover, the Court noted that "most people with ASPD are not psychopathic, most of those who are psychopathic meet the diagnostic criteria for ASPD." The Court was persuaded by the State expert's testimony that indicated high psychopathic traits "is a combination of interpersonal and affective traits and the social deviance, lifestyle and anti-social type of traits that combine to make up the features of psychopathic individual." Further, the Court noted that with ASPD, experts look more for lifestyle and anti-social behaviors, and with psychopathy, they look to the combination of that antisocial lifestyle along with affective interpersonal features. Psychopathy, the Court noted, is diagnosed utilizing a 20-factor Psychopathy Checklist-Revised (PCLR) developed by Dr. Hare, which measures psychopathic traits on a scale from zero to 40. The Court stated that a score of 25 indicates that a person has "high psychopathic traits," as opposed to the full condition, which is usually ascribed with scores 30 and above. Tony T. scored in the 29.6 to 31.6 range over time, and the State expert's most recent assessment scored him as a 29.5. The Court noted that the independent expert who did not find psychopathic traits, also did not score him on the PCLR, as he believed that such traits do not constitute a predisposing condition, and that Tony T.'s sexual offending is better explained by his ASPD, which predisposes him to general criminal conduct, not sex offenses.

Analyzing the PCLR scores submitted in evidence, the Court noted that Tony T.'s scores were high on the factors "which are found to be distinct from those who have ASPD only," and

that his "average scores were just below the score of 30, which is recognized as the demarcation for whether one is a psychopath."

The Court noted that the evidence before it clearly and convincingly demonstrated that Tony T.'s ASPD and high psychopathic traits were linked to a pattern of violent sexual offending over years, that persisted despite detection, intervention, and legal sanctions.

Regarding whether Tony T. is a dangerous sex offender requiring confinement, the Court analyzed the proof through the lens of the Court of Appeals holding in Michael M., 24 NY3d 649 (2014), which highlighted the distinction between offenders "who have difficulty controlling their sexual conduct and those who are unable to control it." The Court stated, [a]lthough Michael M. might be read to require proof of total or absolute inability to control, that interpretation would place Michael M. at odds with the statutory language, which requires the Court to determine whether Petitioner has '*such* an inability to control' behavior that he must remain confined." (quoting James F., 50 Misc 3d 690). "This Court does not interpret Michael M. to require a finding of a total or complete inability to control behavior at all times, to compel continued confinement." Instead, the Court wrote, "Michael M. suggests that to form the basis for continued confinement Petitioner's 'detailed psychological portrait' must include reasonably recent conduct or behavior evidencing a current inability to control deviant sexual behavior." Consequently, and given that annual review hearings are *de novo* determination inquiring into an offender's current ability to control such behavior, "the Court generally gives greater weight to Petitioner's more recent conduct."

The Court noted that the testifying experts at Tony T.'s hearing differ on his "strong predisposition, current inability to control his behavior and dangerousness." Resolving this difference, the Court found the independent expert's analysis more persuasive. Given Tony T.'s

overall psychological portrait, the Court stated that there was "insufficient clear and convincing evidence that Petitioner currently has such a strong predisposition and such and inability to control his sex offending conduct." Further, the Court found that a number of risk factors were not present in Tony T.'s case and that, at the time of the evaluation, his expert placed significant weight on his confinement to a wheelchair, despite his limited mobility with a cane at the time of the hearing. The Court was persuaded by Tony T.'s expert, who opined that even with improved mobility, he would not change his opinion since he's still physically limited and his stroke "had changed his mental outlook with regard to his sex offending history, and compliance with SIST."

"In sum," the Court wrote, "there is insufficient clear and convincing evidence that Petitioner still has significant risk factors or demonstrated inability to control behavior, such that he presents a likelihood to be a danger to others and to commit sex offenses unless confined to a secure treatment facility."

3. Annual Review: Clear and Convincing Evidence that Dangerous Sex Offender Requires Continued Confinement.

Decided January 16, 2024, in Matter of Maurice M. v. State of New York, the Supreme Court, Oneida County (Lamendola, JSC) found that Maurice M. remained a dangerous sex offender requiring confinement ("DSORC") after an annual review hearing.

At the annual review hearing, the State presented an expert who diagnosed Maurice M. with Pedophilic Disorder, ASPD, Alcohol Use Disorder, Unspecified Depressive Disorder, Borderline Intellectual Functioning, and Hypersexuality. The evidence showed that Maurice M.'s sex offenses began in 1985 at age 14 and continued over a 25-year period. His victims ranged in age from five to 49 years old, included both relatives, acquaintances, and strangers. Some victims were identified as having special vulnerabilities or disabilities like partial

blindness, including his five-year-old autistic sister whom he anally sodomized.

Maurice M. stipulated that he continued to suffer from a mental abnormality, but he opposed the State's determination that he remained a sex offender requiring confinement. Maurice M. nevertheless presented no expert witness or evidence on his own behalf.

The Court found that the State met its burden of proving by clear and convincing evidence that Maurice M. continued to meet the definition of a dangerous sex offender requiring confinement despite evidence that he had recently increased his attendance and participation in group treatment programming as well as a general cessation of overt sexual behavior with peers at the secured treatment facility.

The Court was persuaded by and cited to Maurice M.'s inability to comply with supervision; sexual compulsivity; sexual compulsivity while under supervision; limited understanding of his sexual offense cycle; lack of community supports; and his difficulty in identifying high risk situations, as well as his "well above average" risk as measured on actuarial risk assessments, as the basis for finding that he remains a dangerous sex offender requiring confinement.

4. MHL § 10.06(k) Does Not Provide for Transfer from OMH Back to DOCCS.

Decided February 14, 2024, in the Matter of the State of New York v. Devonte K., the Supreme Court, New York County (Conviser, AJSC) denied Devonte K.'s motion seeking his return to the custody of the Department of Corrections and Community Supervision ("DOCCS") from an OMH secure treatment facility (STF). After a finding of probable cause, and pursuant to MHL § 10.06(k), Devonte K. was transferred from a DOCCS correctional facility to an OMH STF, where he resided for over a year while the MHL article 10 proceeding continued.

Citing difficulty in arranging family visits at the OMH facility compared to his previous correctional facility, Devonte K. filed a motion seeking his transfer back to his last DOCCS facility. He claimed that he was never informed of his right to consent to remain in DOCCS while awaiting adjudication under MHL Article 10.

After motion practice, Supreme Court scheduled a hearing to resolve the issue. At the hearing, Devonte K. testified consistent with his initial allegations. However, the State subpoenaed his prior MHLS counsel who initially handled the proceedings. Prior counsel testified that he did not recall conversations with Devonte K., but that it is his normal practice to inform his clients of their right to remain in DOCCS custody pending the article 10 proceedings. At the hearing, an e-mail was admitted into evidence, which indicated that prior counsel had indeed discussed the right to remain in DOCCS with Devonte K., and that he nevertheless knowingly chose to be transferred to OMH custody pursuant to MHL § 10.06 (k).

The Court noted that the statute provides for MHL article 10 respondents to remain in the custody of DOCCS upon consent and that they may be subsequently transferred to an OMH facility upon revocation of that consent, but the statute does not provide for the reverse scenario.

In denying the motion, the Court states, "[g]iven that Mr. K. apparently was informed of his right to remain in DOCCS custody and then apparently opted to be transferred to OMH, in the Court's view, the Court is not empowered to now transfer Mr. K. back to DOCCS custody in contravention of the plain language of the statute."

5. Preclusion of Retired Psychiatric Examiner Denied.

Decided on March 5, 2024, in Matter of State of New York v. Christopher G., the Supreme Court Kings County (Quinones, JSC), denied Christopher G.'s motion to preclude a retired psychiatric examiner, formerly employed by the New York State Office of Mental Health

("OMH"), who had evaluated him pursuant to MHL §10.05(e) and who wrote a report that formed the basis of the State's article 10 petition.

Christopher G. asserted preclusion was necessary where the OMH examiner who conducted the initial evaluation was no longer employed by OMH at the time of trial and that the State had retained an independent examiner, pursuant to MHL §10.06(d). Respondent argued that upon leaving OMH, the original examiner should now be considered an independent examiner and that MHL 10.06(d) only permits one independent examiner for each party. Further, Christopher G. claimed that allowing the retired evaluator to access his clinical records would constitute a violation of his privacy rights under the Health Insurance Portability and Accountability Act (HIPAA).

The Court rejected these arguments. In addition to listing numerous decisions under MHL article 10, which implicitly and expressly permitted the State to call two experts at trial, particularly where each expert's methods and/or diagnostic impressions were distinct, the Court found most persuasive the holding in Matter of State of New York v. James K., 135 A.D.3d 35 (3d Dep't 2015). The Third Department held that there is nothing fundamentally unfair in allowing the State to present two expert witnesses against Respondent's one. Id. at 39. Indeed, the Court quoted James K., stating that MHL article 10 "contains no requirement that both parties must have the same number of expert witnesses." Id. Accordingly, the Court rejected Christopher G.'s assertion that "it is fundamentally unfair or a denial of due process to allow the State to call two experts."

The Court also rejected Christopher G.'s claim that it was impermissible to allow the examiner who initially evaluated him under MHL § 10.05(e) to testify at trial, especially after she had retired from State service. Here again, the Court relied upon James K. and stated,

"nothing in the statute affirmatively precludes such continued participation and the Court of Appeals has held that relevant evidence may be admissible in article 10 proceedings when no statute prohibits its use." Id. at 37. The Court found that the retired examiner's testimony was particularly material and relevant to the issues at trial, given her testimony at the probable cause hearing, her familiarity with his records, and his "pathology." The Court further stated that her interview of Christopher G. becomes even more significant given his stated intention to refuse to communicate with and participate in the evaluation interview with the State's independent expert.

Next, the Court rejected Christopher G.'s claim that her retirement precluded the original examiner from testifying at trial. The Court dispensed with that notion by citing MHL § 10.03(j) - the definition of a "psychiatric examiner" - who "may but need not be" be an employee of OMH, and by stating that the examiner's "retirement does not disqualify her from serving as an examiner or testifying as an expert witness" at trial.

Lastly, in rejecting Christopher G.'s HIPAA claim, the Court cited Public Officer's Law § 73(8-a) which provides explicit authority for the continuation of duties by a former OMH psychiatric examiner as it relates to access to records. The Court also cited Enrique T., 114 A.D.3d 618 (1st Dep't 2014), which held that under article 10, the OMH Commissioner is expressly required to review records related to whether a respondent is sex offender requiring civil management, the limited disclosure for that purpose does not violate the privacy provisions of HIPPA.

IV. PROFILES OF OFFENDERS UNDER CIVIL MANAGEMENT

The following are case synopses of sex offenders who entered the civil management system during the review period. The names of the sex offenders are represented only by initials.

State v. V.P.

V.P.'s known sex offense history commenced at age 16, when he was charged with Attempted Rape 1st, and Criminal Possession of a Weapon, but those charges were dismissed. He was found guilty of various petit larceny and theft crimes when he was 17, and his behaviors quickly escalated into more serious drugs, weapons, and violent assault crimes throughout his twenties.

By 1993, at age 22, he was a convicted sex offender, having been found guilty of Sexual Misconduct (after being charged with rape for having sex with a girl under 17). In 1997, while on parole, he was again convicted of Attempted Sexual Abuse 1st after forcing sex upon a female acquaintance.

After his second release to parole in 1999, he committed the MHL article 10 qualifying offense when he approached an unknown female victim on the street, grabbed her by the neck, and placed a hard object against her head that she believed to be a weapon. He threatened to hurt her if she screamed and he coerced her to a nearby schoolyard where he forced her to perform oral sodomy on him, and vaginally raped the victim, ultimately ejaculating in her. He also stole her money and jewelry. The victim reported the assault, a rape kit was taken, and the victim became pregnant from the rape.

V.P. was identified, arrested two days later, and he ultimately pled guilty to Rape 1st for this assault. He was sentenced in January 2000 to a 10-year term of incarceration and was required to provide a DNA sample to the Department of Criminal Justice Services.

While incarcerated on the above conviction, V.P.'s DNA was matched to three other unsolved rapes of young women under similar circumstances. DNA linked V.P. to a 1993 forcible rape of an 18-year-old female stranger at gunpoint in the Bronx. In that assault, V.P. and another man approached two girls on the street. One girl fled and was chased by V.P.'s accomplice, leaving the victim and V.P. alone. He forced the girl onto the third floor of an apartment building where he proceeded to vaginally rape her. She immediately reported the incident, and a rape kit was collected consisting of semen and blood, which was used to match V.P. in 2003.

DNA also linked V.P. to an unsolved October 1999 rape and severe physical attack of a 29-year-old woman in a Bronx apartment building. The victim was found in the hallway, naked

from the waist down, lying unconscious and bleeding heavily with life-threatening wounds to her face and head. She was transported to the hospital and treated for numerous facial and cranial fractures. ER doctors confirmed upon examination that she had been sexually assaulted, and they were able to take and secure evidence of the rape. The victim required several months of medical treatment and rehabilitation and could not recall details or identify the attacker. Blood droplets forensically collected at the scene and on the victim's body were eventually used to match V.P.'s DNA in 2003.

The charges for these two separate rapes were consolidated and he pled guilty to one count of Rape 1st and Attempted Murder 2nd, and in 2004, he was sentenced to a 10-year and concurrent 22-year term of incarceration respectively for each conviction.

Additionally, in 2005, V.P.'s DNA was again matched to a third unsolved rape i.e., the rape of 13-year-old girl in the Bronx that occurred in 1997. Records indicate that the victim was walking home when V.P. grabbed her from behind, put her in a choke hold, and said "if you don't walk, I'll kill you!" He forced her to a remote location of a school yard and vaginally raped the girl. Before leaving, he also stole her wallet and jewelry. For this offense, in 2006, he pled guilty to Rape 2nd and he was sentenced to a consecutive two-to-four-year indeterminate term of incarceration in addition to the 10-year and 22-year prison terms.

V.P.'s committed six sex offenses while he was under probation or parole supervision, and several were committed within weeks after his release to the community. He also committed 47 disciplinary infractions while incarcerated.

V.P. has been diagnosed with Antisocial Personality Disorder and Alcohol Use Disorder, and he presents with a "very high" number of psychopathic traits on the assessment for Psychopathy (PCL-R).

State v. D.Y.

D.Y.'s known sex offense history commenced at age 16, when he repeatedly forced oral and anal sodomy on a four-year-old boy while they were being transported on a school bus. He later admitted that the cries of his victim heightened his arousal.

For this qualifying offense, D.Y. pled guilty in 2019 to Sexual Abuse in the First Degree and was sentenced to a five-year term of incarceration with 10 years of post-release supervision.

Following his arrest, D.Y. admitted to sexually offending against a different three-year-

old boy. While the abuse was investigated by police, the victim's parents chose not to pursue charges.

D.Y. was confined initially at a facility operated by the Department of Children and Family Services, where he received two disciplinary infractions for engaging in sexual acts with male children residing at the facility. At least one of these charges occurred while he was enrolled in treatment for sex offenders.

While in treatment, D.Y. admitted that he is still very attracted to children and if given the opportunity he would absolutely re-offend and have sex with a child again.

An OMH psychiatrist diagnosed D.Y. with several relevant conditions, including Pedophilic Disorder, Borderline Personality Disorder, Sexual Preoccupation/Hypersexuality, Antisocial Traits, and Other Specified Personality Disorder-Arousal to Non-Consent.

D.Y. was transferred to a county correctional facility after he reached age 18. Following completion of his sentence, D.Y. was moved to a secure treatment facility operated by OMH where he remains pending trial.

State v. V.F.

In 2015, after kissing and fondling the breasts and vaginal area of his seven-year-old cousin, 19-year-old V.F. pled guilty as a youthful offender to Sexual Abuse in the First Degree.

V.F.'s MHL article 10 qualifying sex offense occurred at age 24 in 2020, when he removed the diaper of a 14-month-old male infant and inserted his index finger in the child's anus after the victim's mother left the room to get a bottle for the baby.

V.F. pled guilty to Attempted Sex Abuse in the First Degree in 2020, and he was sentenced to an 18-month term of incarceration, followed by a nine-year term of post-release supervision.

After his release to parole supervision in 2022, V.F. exchanged messages that were sexual in nature with individuals whom he believed to be a 16-year-old female and a 12-year-old female. He asked in the messages if they would engage in sexual activity with him, and he exchanged multiple pictures, as well as requesting naked photographs of the 12-year-old. The recipients of the messages were law enforcement officers posing as underage children.

V.F. was arrested later that year for Sex Offense Registration Violation and Attempted Dissemination of Indecent Material to a Minor. He was allowed to plea bargain down to a

Registration Violation, and he was returned to prison on a parole violation assessment.

V.F. has been diagnosed with several conditions and disorders, including Pedophilic Disorder, Antisocial Personality Disorder, Intellectual Disability, and Alcohol Use Disorder.

In February of 2024, V.F. waived his right to an MHL article 10 trial. He stipulated to having a mental abnormality and he consented to being a dangerous sex offender requiring confinement. He is currently confined at a secure treatment facility operated by OMH where he is provided with intensive sex offender treatment.

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 continue to be a complex and contentious area of litigation. Despite the dynamic legal landscape, there are positive trends emerging from civil management in New York. As of March 31, 2024, 517 dangerous sex offenders with mental abnormalities are being civilly managed. Of that, 355 are being treated in a secure treatment facility, while 162 are being treated under a regimen of enhanced community supervision on SIST. But for SOMTA, these recidivistic, mentally abnormal sex offenders would have been released into the community, possibly without any treatment or supervision whatsoever. These offenders are now receiving treatment for their sexual offending behaviors and other mental abnormalities and conditions from which they suffer.

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

APPENDIX

VICTIM RESOURCES

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

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

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

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

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

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