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SEX OFFENDER MANAGEMENT BUREAU

A Report On The Sex Offender Management Treatment Act

April 1, 2012 to March 31, 2013



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INTRODUCTION

In 2007, the New York State Legislature recognized that recidivistic sex offenders pose a danger to society. It found that some sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses and that a system must be designed for treatment of the offender and protection of the public. Some goals of civil commitment and supervision are to protect society, supervise offenders, manage their behavior to ensure they have access to proper treatment, and to reduce recidivism.¹

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.² It also found that for other sex offenders, effective and appropriate treatment can be provided via a regimen of strict and intensive outpatient supervision.³

In response to the enactment of the Sex Offender Management and Treatment Act (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 Article 10 litigation and develops statewide protocols in conjunction with The NYS Office of Mental Health (OMH), The NYS Department of Corrections and Community Supervision (DOCCS), The NYS Office of People with Developmental Disabilities (OPWDD) and The NYS Division of Criminal Justice Services (DCJS) to further the goals of Article 10 and ensure public safety.

¹ See Mental Hygiene Law (MHL) § 10.01; 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 (b).

³ See MHL §10.01 (c).

This report provides an overview of the application of SOMTA. The first part explains the analysis of how convicted sex offenders are selected for civil management and how the subsequent legal process works. The second part of the report gives current data and statistics of the civil management system after six years. The statistics generated in this report are current as of April 1, 2013.

THE CIVIL MANAGEMENT PROCESS

AN OVERVIEW

There are three key elements necessary to understand civil management in New York.

First, civil management does not apply to every convicted sex offender. The legislation applies only to offenders who:

- (a) have been convicted of a sex offense or designated felony; and
- (b) 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
- (c) have been determined to suffer from a mental abnormality.⁴

Second, on a nationwide scale, compared to other states, New York's civil commitment system is unique as it offers two options for treatment and supervision of sex offenders requiring civil management. After a legal finding that an offender suffers from a "mental abnormality," only two dispositions are available. 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

⁴ MHL §§10.05, 10.03(a), (q), (g) and (i).

offenses if not confined to a secure treatment facility.⁵ ⁶ The final disposition is to be made by the court after a hearing on dangerousness. If the court does not find dangerousness, it is required to find the offender is appropriate for strict and intensive supervision and treatment (SIST) in the community.⁷

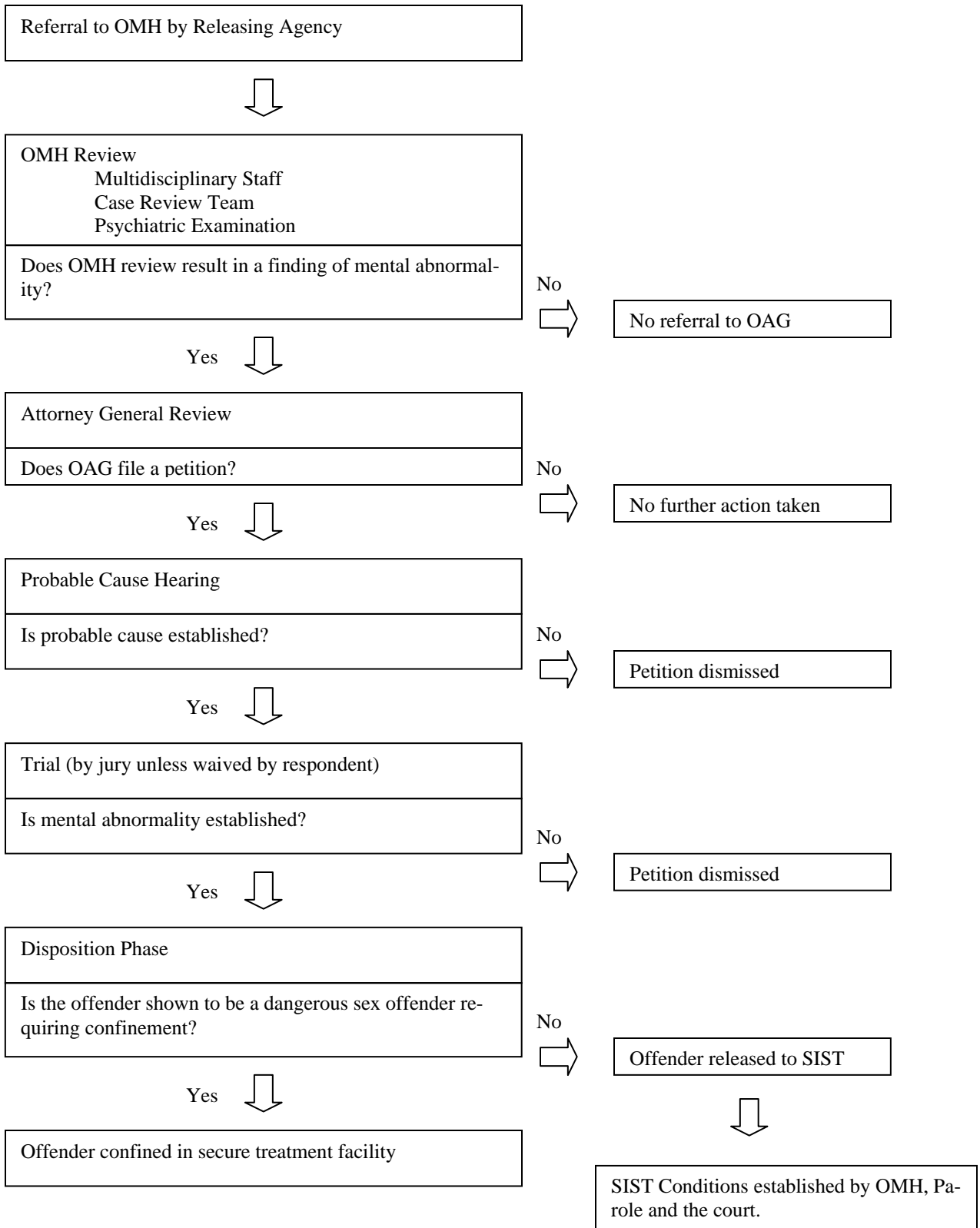
Third, civil management is part of a comprehensive system designed to protect the public, reduce recidivism, and ensure offenders have access to proper treatment. The legislature expressly identifies the need to protect the public from a sex offender's recidivistic conduct. Prior to the enactment of SOMTA, a convicted sex offender suffering from a mental abnormality would often be released from prison into the community under standard parole conditions or with no supervision at all. 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 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 as a court determines the offender is no longer a "sex offender requiring civil management."

⁵ Also known as a dangerous sex offender requiring confinement and referred to hereafter as DSORC.

⁶ MHL § 10.07(f).

⁷ *Id.*

THE MHL ARTICLE 10 CIVIL MANAGEMENT PROCESS



THE EVALUATION PROCESS

When an individual who may be a "detained sex offender" is nearing anticipated release from custody of an agency with jurisdiction,⁸ the agency gives notice of the offender's anticipated release to both the NYS Office of Mental Health and the NYS Office of the Attorney General.⁹ 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).¹⁰ 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.¹¹ If the CRT and psychiatric examiner determine the offender is appropriate for civil management, the case is referred to the NYS Attorney General's Office to commence legal proceedings. If the CRT and examiner find the offender does not require civil management the case is not referred and is closed.

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

⁸ 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).

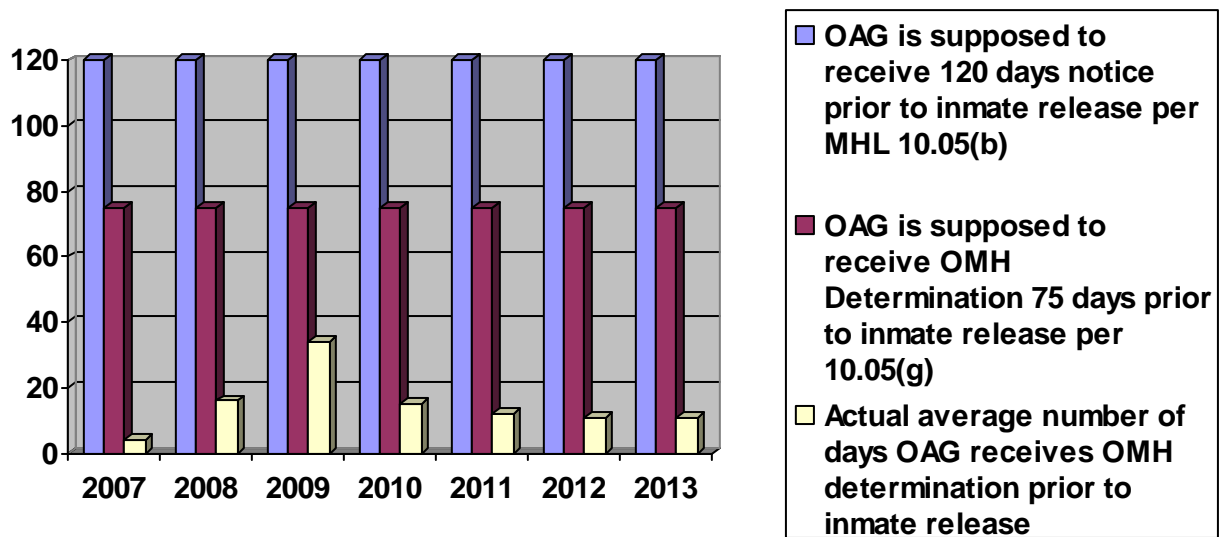
⁹ MHL §10.05(b).

¹⁰ MHL §10.05(d)

¹¹ MHL §10.05(e).

written notice of its determination as to whether the case will be referred for civil management.¹²

In reality, the actual time in which the OAG receives OMH's determination is much less. In 2007 the actual average time between the OAG's receipt of such notification and the offender's release date was 4 days; in 2008 it was 16 days; in 2009 it was 34 days; in 2010 it was 15 days; in 2011 it was 11 days; and in 2012 through March 31, 2013 on average, it was 11 days.

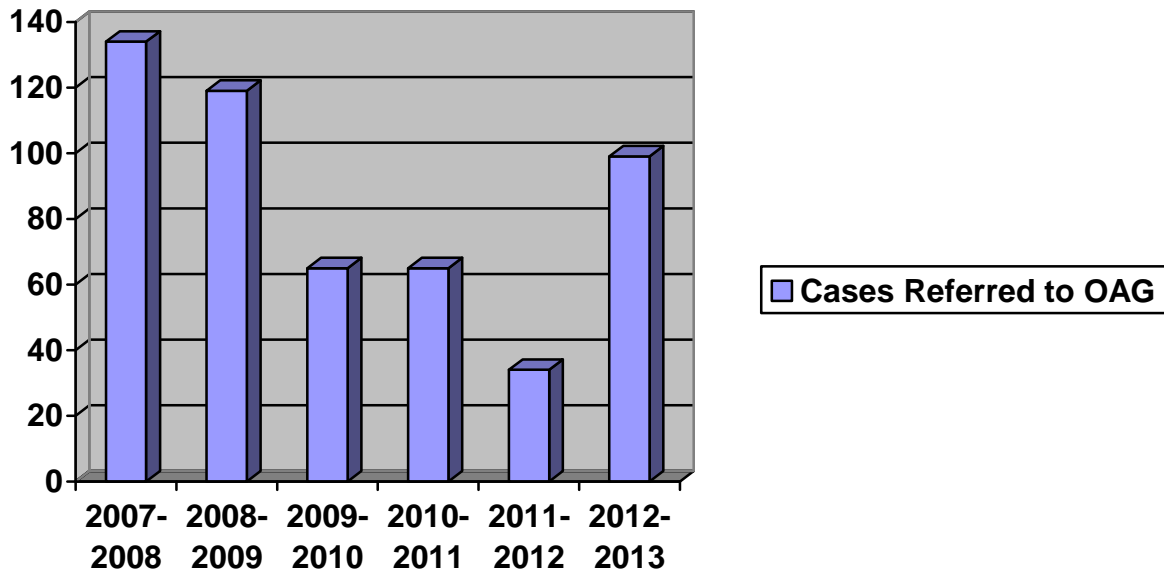


These notification time frames are advisory, not mandatory, but together recognize that OMH should give the OAG approximately 75 days notice of its determination of referral for civil management.

The number of cases referred by OMH had declined dramatically since the inception of SOMTA but started to increase this past year.

¹² MHL §10.05(g).

In 2007-2008 OMH referred 134 cases to the OAG for filing a civil management proceeding; in 2008-2009 it referred 119 cases; in 2009-2010 it referred 65 cases; in 2010-2011 it referred 65 cases; in 2011-2012 it referred 34 cases; and in 2012-2013 it referred 99 cases. The reasons for such changes in referrals are beyond the scope of this report.



LEGAL PROCEEDINGS

If upon referral by OMH, the OAG determines that civil management is appropriate, a petition is filed by The State of New York in the supreme or county court where the sex offender is located.¹³ At the time a petition is filed, the sex offender is generally "located" in a state prison responsible for his or her custody. Therefore, the petition is filed in the county within which the prison is located. Once a petition is filed, the offender is entitled to an attorney. Most sex offenders are represented by Mental Hygiene Legal Service (MHLS), a state-funded agency. If a court determines MHLS cannot represent the offender, it will appoint an attorney eligible for appointment pursuant to County Law Article 18-B.¹⁴

The statute authorizes the sex offender to remove the case to the county of the underlying sex offense conviction(s).¹⁵ If an offender does not request venue to be transferred back to the county of the underlying sex offense, the OAG may bring a motion for such transfer.¹⁶

Shortly after the petition is filed, a hearing is held to determine whether there is probable cause to believe respondent¹⁷ is a sex offender requiring civil management.¹⁸ If the court finds probable cause exists, the offender is transferred to an OMH secure treatment facility pending trial. In lieu of transfer to a secure treatment facility, an offender may request to remain in prison under the custody of the Department of Corrections and Community Supervision pending trial.¹⁹ If the court determines that probable cause has not been established, it will dismiss the petition and the offender will be released in accordance with other provisions of law.²⁰

¹³ MHL §10.06(a).

¹⁴ MHL §10.06(c).

¹⁵ MHL §10.06(b).

¹⁶ *Id.*, MHL §10.07(a).

¹⁷ Once a petition is filed, the sex offender is referred to as the "respondent" in the legal proceedings.

¹⁸ MHL §10.06(g).

¹⁹ MHL §10.06(k).

²⁰ *Id.*

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."²¹ The respondent is entitled to a twelve person jury trial, but may waive the jury and proceed with a trial before the judge.²²

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.²³ The State of New York has the burden to prove by clear and convincing evidence that the respondent is a "detained sex offender"²⁴ who suffers from a "mental abnormality."

A mental abnormality is a legal term 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.²⁵

The jury, or judge if the jury is waived, must find by unanimous verdict that the State of New York met its burden. If a jury does not reach a unanimous verdict, the sex offender will remain in custody and a second trial will be held. If the jury in the second trial is unable to render a unanimous verdict, the petition is dismissed.²⁶ On the other hand, if the jury unanimously, or the court if a jury is waived, determine the State of New York did not meet its burden, the petition is dismissed and the respondent is released in accordance with other provisions of law.²⁷

²¹ MHL §10.07(a).

²² MHL §10.07(b).

²³ MHL §10.07(a), (d), MHL 10.03(g), (i).

²⁴ MHL §10.03(g)

²⁵ MHL §10.03(i).

²⁶ *Id.*

²⁷ MHL §10.07(e).

When the jury, or court if a jury is waived, determines that the State of New York met its burden of proof and found that the respondent is a detained sex offender who suffers from a mental abnormality, the court must then determine what the disposition will be. The second part of the trial is known as the dispositional phase and the court alone must consider whether the sex offender is a "dangerous sex offender requiring confinement" (DSORC) in a secure treatment facility or a sex offender requiring strict and intensive supervision and treatment (SIST) in the community.²⁸

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.²⁹

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.³⁰

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 (SIST) in the community.³¹ A sex offender placed into the community under a regimen of SIST is supervised by parole officers from DOCCS and abides by conditions set by the court.

²⁸ MHL §10.07(d), (f).

²⁹ MHL §10.03(e).

³⁰ MHL §10.07(f).

³¹ *Id.*

MENTAL HEALTH TREATMENT AFTER MENTAL ABNORMALITY IS ESTABLISHED

A. 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 reoffend. 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.³² Generally a respondent found to be a dangerous sex offender requiring confinement is transferred to either Central New York Psychiatric Center (CNYPC) in Marcy, New York, or St. Lawrence Psychiatric Center in Ogdensburg, New York.

The fact that a respondent is found to be a dangerous sex offender requiring confinement is not a life sentence and does not mean the offender will serve the rest of his or her life in a secure treatment facility. An offender may at any time petition the court for discharge and/or release to the community under a regimen of SIST. The court may deny the petition finding it is frivolous or does not provide sufficient basis for re-examination at that time, or the court may order an evidentiary hearing be held.³³

Furthermore, each sex offender is examined once a year for evaluation of their mental condition to determine whether they are currently a dangerous sex offender requiring confinement.³⁴ Each respondent is entitled to an annual review hearing based upon the findings of the annual evaluation. The court will hold an evidentiary hearing if the sex offender submits a

³² MHL §10.01(b).

³³ MHL §10.09(f).

³⁴ MHL §10.09(b).

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.³⁵ The Attorney General calls the OMH examiner to testify at the annual review hearing and the respondent often presents independent expert testimony on his or her behalf. These safeguards ensure the offender's legal rights are respected and that civil commitment decisions withstand legal scrutiny. If the court finds by clear and convincing evidence that the respondent is currently a dangerous sex offender requiring confinement, it will continue respondent's confinement. If it finds respondent is not currently a dangerous sex offender requiring confinement, it will issue an order providing for the discharge of respondent into the community on a regimen of SIST.³⁶ As of March 31, 2013, 42 offenders have been released from secure treatment facilities back into the community on a regimen of SIST.

B. 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.³⁷

Before a sex offender is released into the community, DOCCS and OMH conduct a SIST investigation to develop appropriate supervision requirements. These requirements may include but are not limited to electronic monitoring or global positioning satellite (GPS) tracking, polygraph monitoring, specification of residence, prohibition of contact with identified past victims or individuals that may fall within the same category of the offender's established victim pool.³⁸

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

³⁵ MHL §10.09(d).

³⁶ MHL §10.09(h).

³⁷ MHL §10.01(c).

³⁸ MHL §10.11(a)(1).

the psychiatrist, psychologist or other professional primarily treating the offender.³⁹ Offenders placed into the community on SIST are required to attend sex offender treatment programs and often have to participate in anger management, alcohol abuse, or substance abuse counseling. Each case is examined on an individual basis and the treatment plan is tailored to that individual's needs. Strict and intensive supervision is intended only for those sex offenders who can live in the community without placing the public at risk of further harm.

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

Sex offenders in the community on a regimen of SIST are subject to a minimum of 6 face-to-face supervision contacts and 6 collateral contacts with their parole officer each month.⁴⁰ This minimum of 12 contacts with the parole officer each month ensures the offender is closely monitored. Furthermore, the court that placed the sex offender on SIST receive a quarterly report that describes the offender's conduct while on SIST.⁴¹

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.⁴² After the person is taken into custody, the OAG may file a petition for confinement and/or a petition to modify

³⁹ *Id.*

⁴⁰ MHL §10.11(b)(1).

⁴¹ MHL §10.00(b)(2).

⁴² MHL §10.11(d)(1).

the SIST conditions.⁴³ If the OAG files a petition for confinement, a hearing is held to determine whether the respondent is a dangerous sex offender requiring confinement. If the court finds the OAG has met its burden, it will order the immediate commitment of the sex offender into a secure treatment facility. If the court finds the OAG has not met the threshold elements to establish 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.⁴⁴ 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.⁴⁵ 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 show the modifications are warranted.⁴⁶ However, when the sex offender brings a petition for termination, the State of New York has the burden to show by clear and convincing evidence that the respondent remains a sex offender requiring civil management. If the State of New York does not sustain its burden, the court will order respondent discharged from SIST and released into the community.⁴⁷ As of March 31, 2013, twelve (12) offenders who had been placed on SIST have had their SIST conditions terminated and have been discharged from civil management supervision back into the community.

⁴³ MHL §10.11(d)(2).

⁴⁴ MHL §10.11(d)(4).

⁴⁵ MHL §10.11(f).

⁴⁶ MHL §10.11(g).

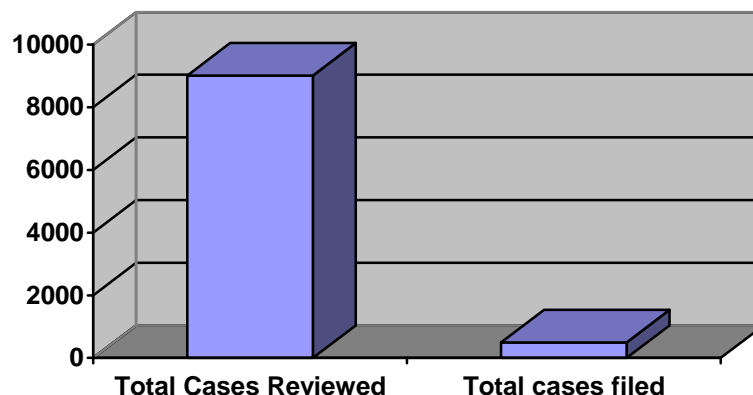
⁴⁷ MHL §10.11(h).

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

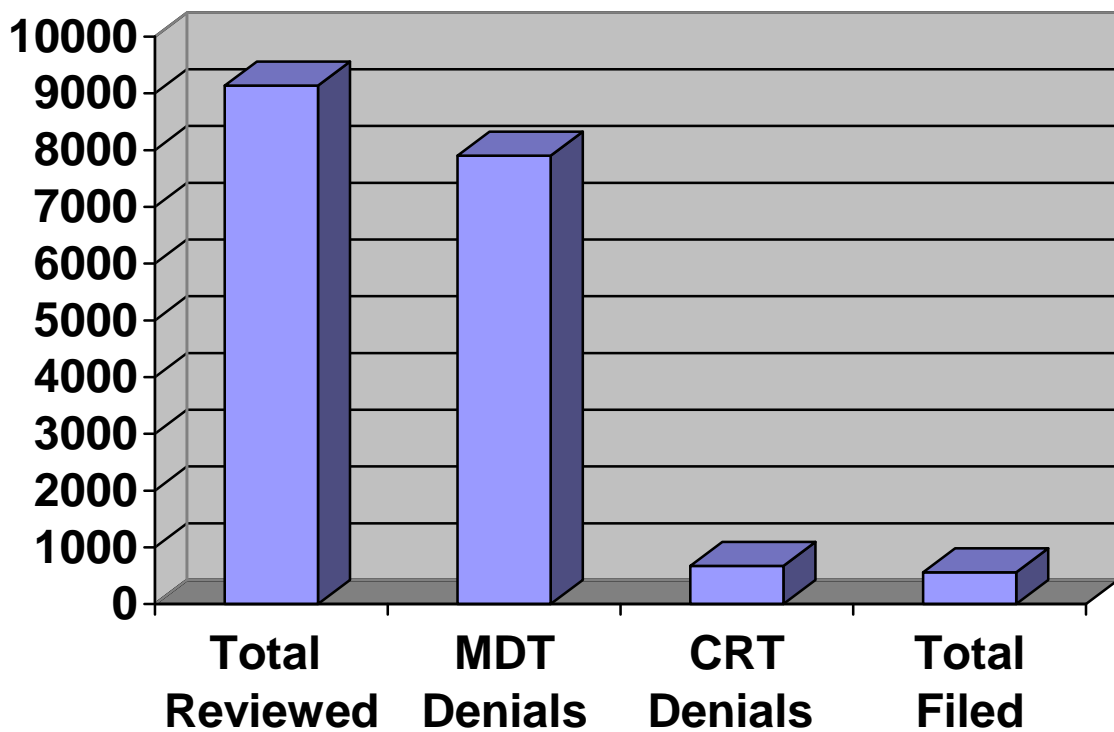
THE REALITY OF CIVIL MANAGEMENT AFTER SIX YEARS

A. Referrals and Cases Filed

In the six years since Mental Hygiene Law Article 10 became law, the New York State Office of Mental Health has reviewed 9,134 sex offenders to determine whether they are appropriate for referral to civil management. Of the cases reviewed, only 560 have been referred to the OAG for filing. This includes what is considered the "Harkavy" cases addressed in previous reports.



The following graph further breaks down the evaluation process, reflecting the different stages of evaluation and case determination. Of the 9,134 cases reviewed by OMH, the MDT closed 7,902 cases without further review, and after CRT review an additional 672 cases were determined not to warrant civil management.



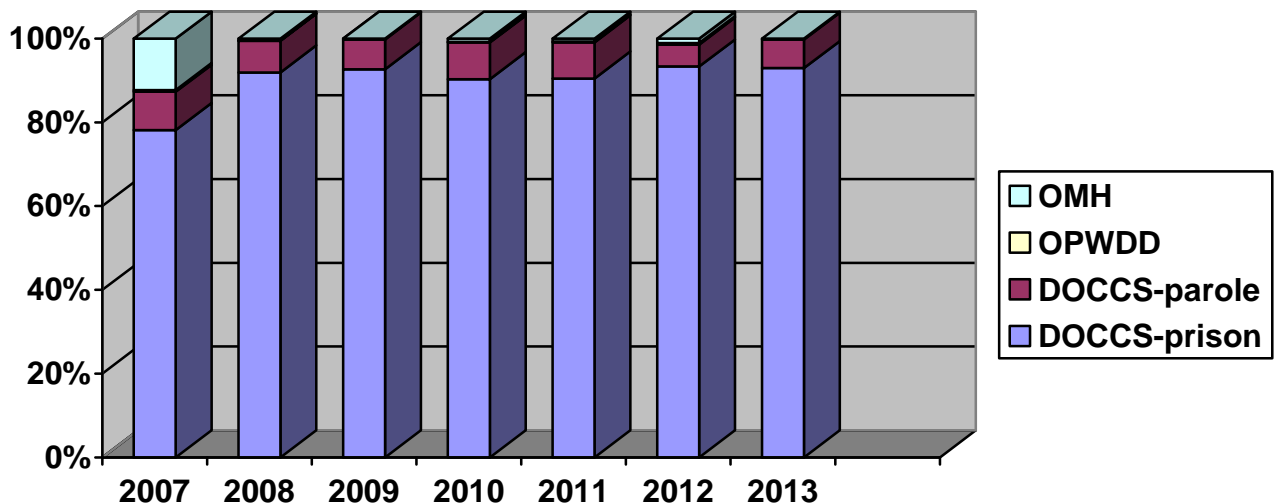
The chart and graph on the following page represent cases evaluated during the first six years of SOMTA.

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

	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>Totals</u>	YTD
DOCCS/Corrections:	794	1378	1471	1372	1395	1455	383	8248	
DOCCS/Community Supervision:	93	113	113	133	133	82	28	695	
OPWDD:	4	1	3	2	3	5	0	18	
OMH:	125	7	0	12	11	17	1	173	
Cases referred to OMH:	1016	1499	1587	1519	1542	1559	412	9134	
Average cases/month:	127	125	132	127	129	130	137	129	YTD

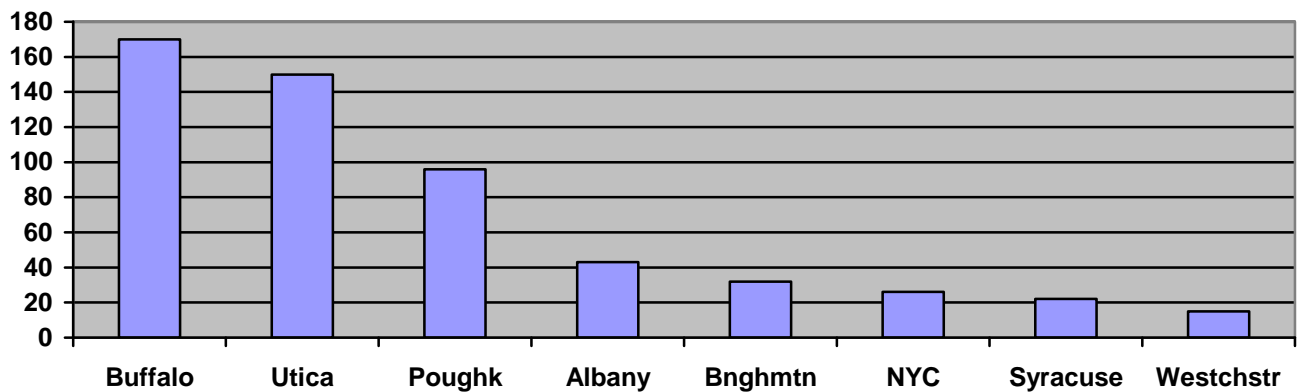
**OMH review, referral
to OAG**

	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>Totals</u>
Cases referred to OMH:	1016	1499	1587	1519	1542	1559	412	9134
Cases not referred to CRT:	747	1212	1391	1379	1432	1385	356	7902
Cases referred to CRT:	270	287	196	140	110	174	56	1233
Psychiatric exams:	195	188	104	111	71	125	50	844
Recommended for Civil Mgmt:	166	128	64	67	44	67	24	560
% of Cases referred to CRT	27%	19%	12%	9%	7%	11%	14%	13.5%
% of Cases recommended for CM	16%	9%	4%	4%	3%	4%	6%	6%

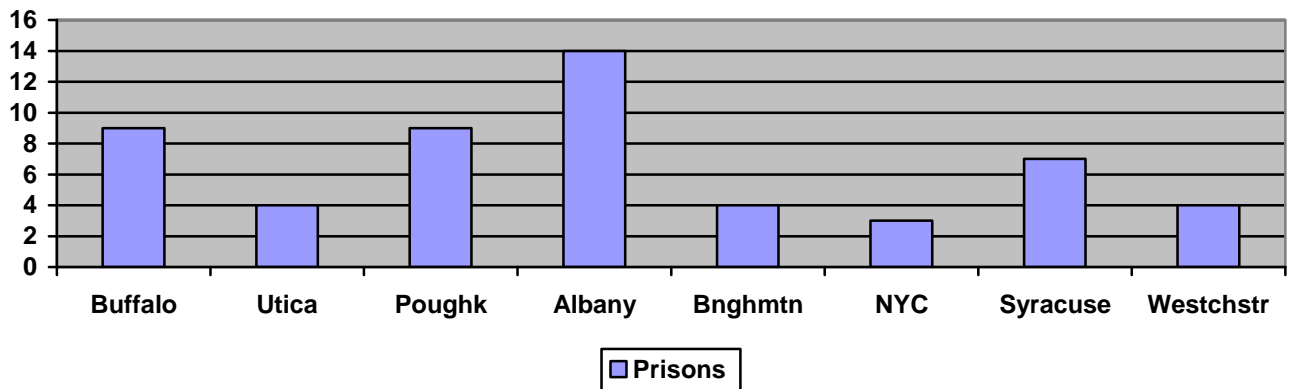


B. Filings

The graph below gives a breakdown of the geographical regions in which the MHL Article 10 cases have been filed. Since inception of SOMTA, the Buffalo regional office filed 170 petitions, Utica regional office filed 150, Poughkeepsie regional office filed 96, Albany office filed 43, Binghamton regional office filed 32, New York City office filed 26, Syracuse regional office filed 22 and lastly, the Westchester office filed 15 petitions.

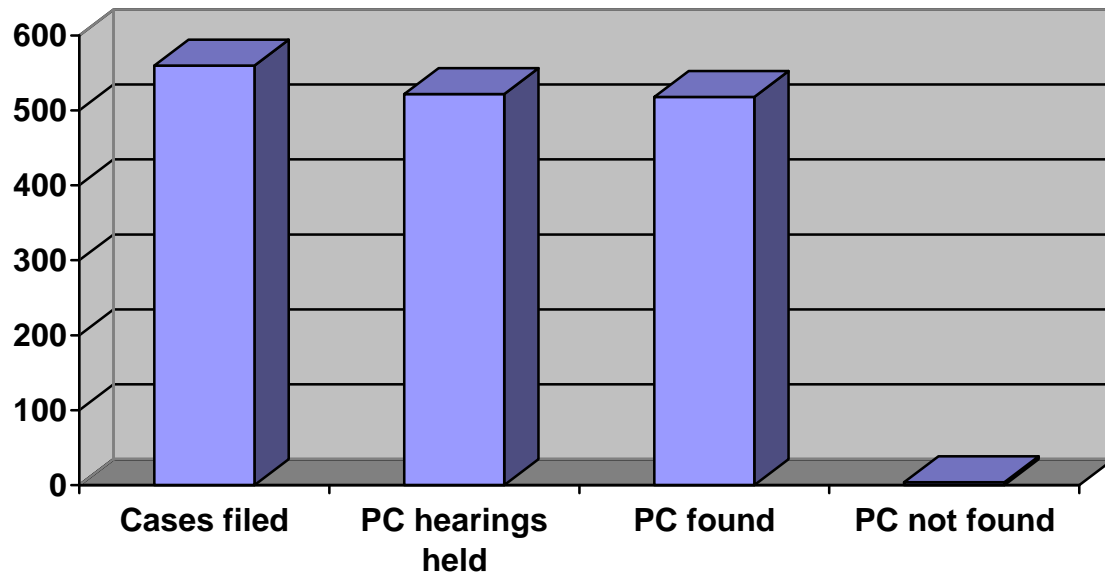


The majority of referrals for civil management are sex offenders who are still in prison nearing their release date. Petitions are filed in the county in which the correctional facility with custody of respondent is located. The following graph is a break down of the number of maximum and medium security prisons within the jurisdiction of the particular regional office.



C. Probable Cause Hearings

In the six years since SOMTA's inception, OMH referred a total of 560 sex offenders for civil management.⁴⁸ The OAG has filed 560 petitions and conducted 522 probable cause hearings. The courts found probable cause to believe the offender suffered from a mental abnormality and was in need of civil management in 518 of the hearings held to date.

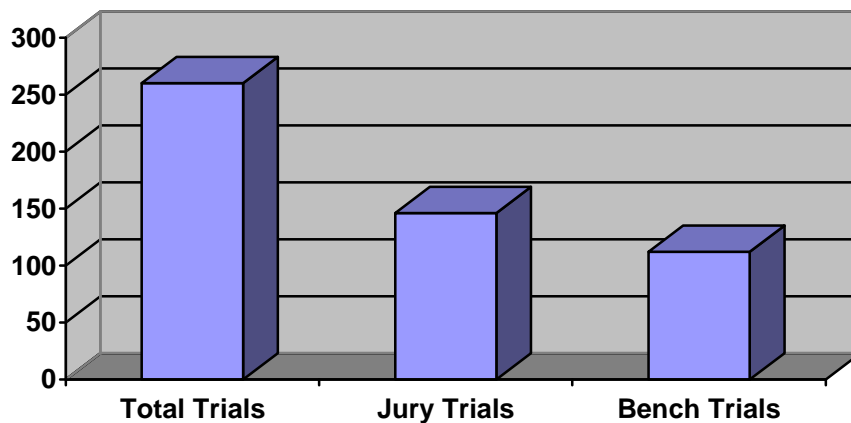


⁴⁸ These referrals include the Harkavy cases.

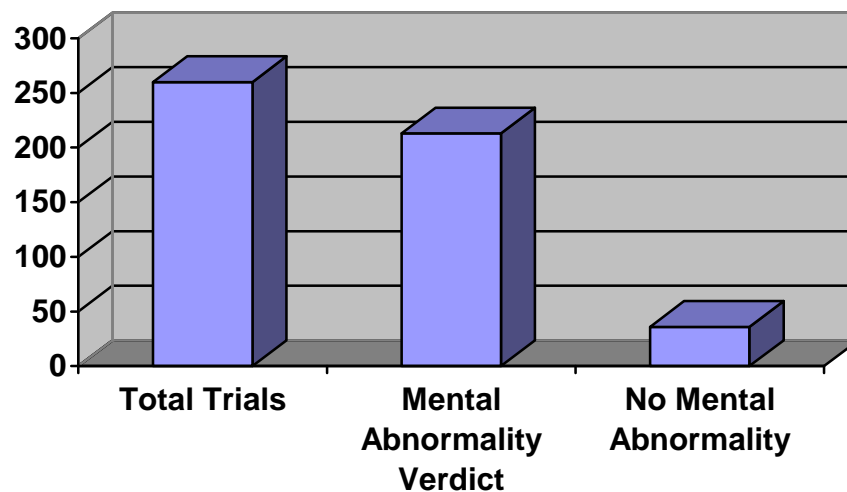
D. Mental Abnormality

1. Trials

There have been 258 civil management trials within the first six years of SOMTA. Of those trials, 146 were jury trials and 112 were bench trials after the offender waived his right to a jury.

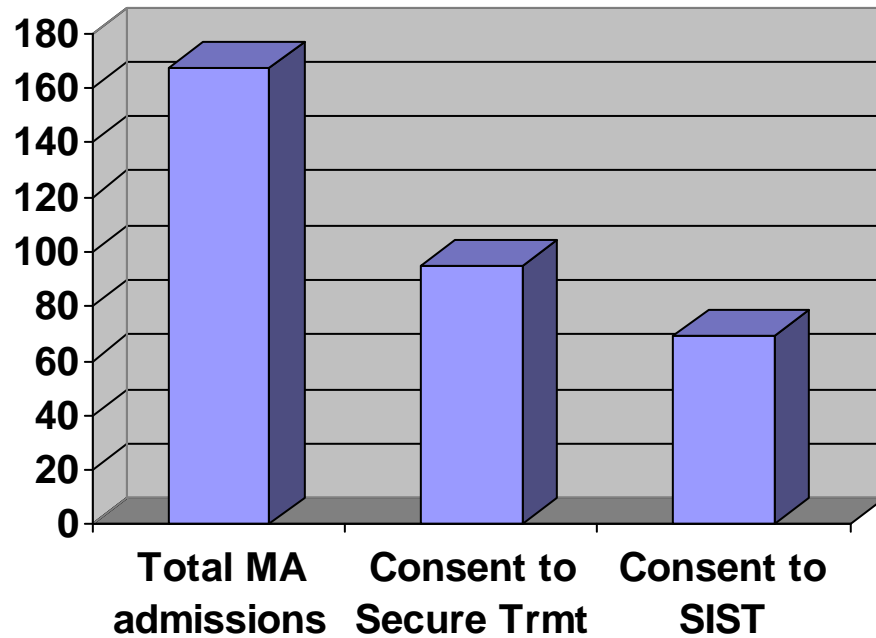


Of the 258 trials, the jury or judge rendered a verdict that 213 of those sex offenders suffered from a mental abnormality and 36 were adjudicated to have no mental abnormality and 9 are pending decision.



2. Admission to Mental Abnormality and Consent to Treatment

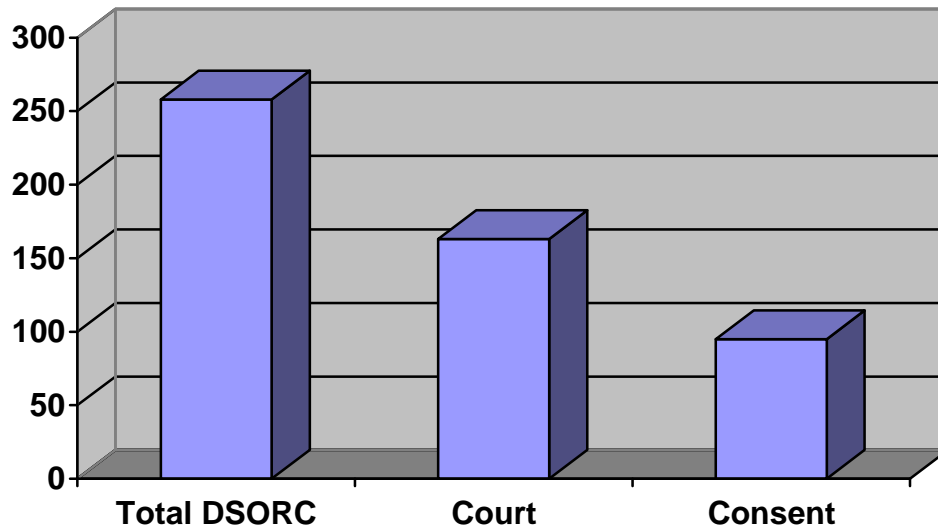
In addition to verdicts rendered after trial, 164 respondents, represented by counsel, admitted they suffer from a mental abnormality and consented to treatment. In 95 cases, the offender admitted he was a dangerous sex offender and consented to treatment in a secure OMH facility. In another 69 cases, the patient admitted he was a sex offender that required civil management and the court imposed a regimen of SIST.



E. Dispositions

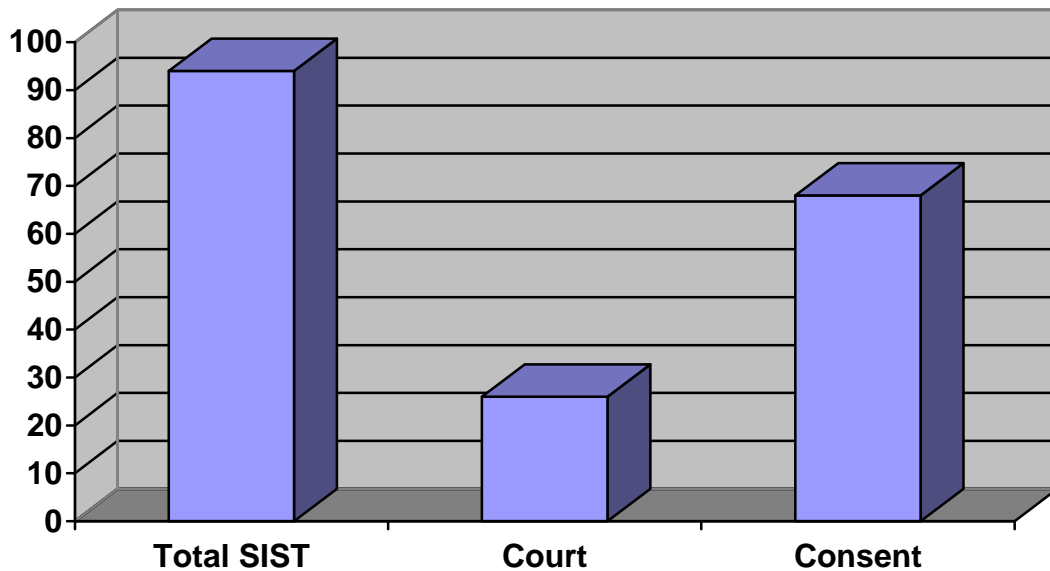
1. Dangerous Sex Offender Requiring Confinement (DSORC)

From April 13, 2007 to March 31, 2013, a total of 258 offenders have been found to be dangerous sex offenders requiring treatment in a secure OMH facility. Of that number, 95 respondents admitted they were dangerous sex offenders requiring treatment in a secure treatment facility, and 163 were adjudicated by the court to be dangerous sex offenders requiring confinement.



2. Strict and Intensive Supervision and Treatment (SIST)

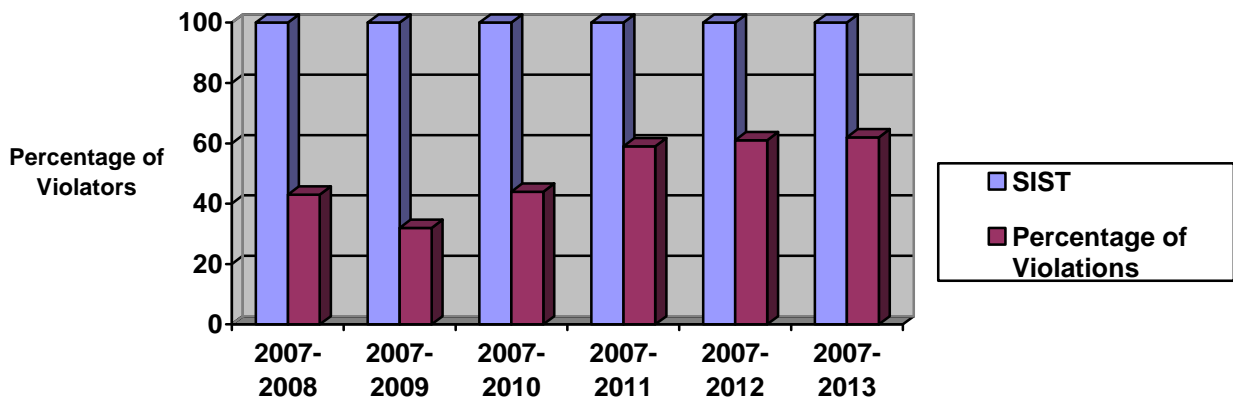
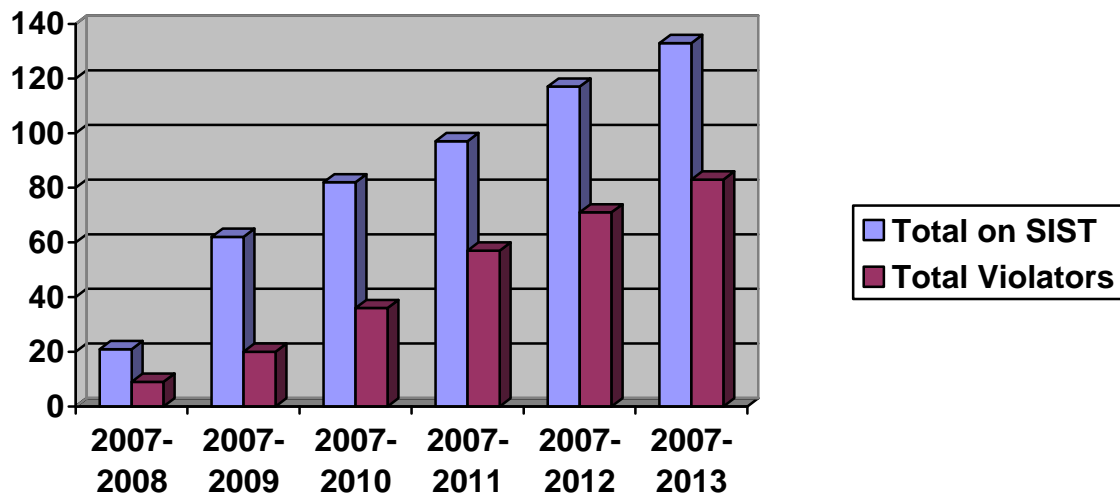
From April 13, 2007 to March 31, 2013 a total of 94 offenders were initially placed on a regimen of SIST after a finding that he or she suffers from a mental abnormality. Of that number, 69 admitted they were sex offenders requiring SIST and after a dispositional hearing 25 were adjudicated by the court to be sex offenders requiring SIST. The data suggests that if a dispositional hearing is conducted, more offenders are found to be dangerous sex offenders requiring confinement than are appropriate for SIST.



3. SIST Violations

The data below reflects the number of offenders placed on SIST and the number of those offenders who violated.⁴⁹

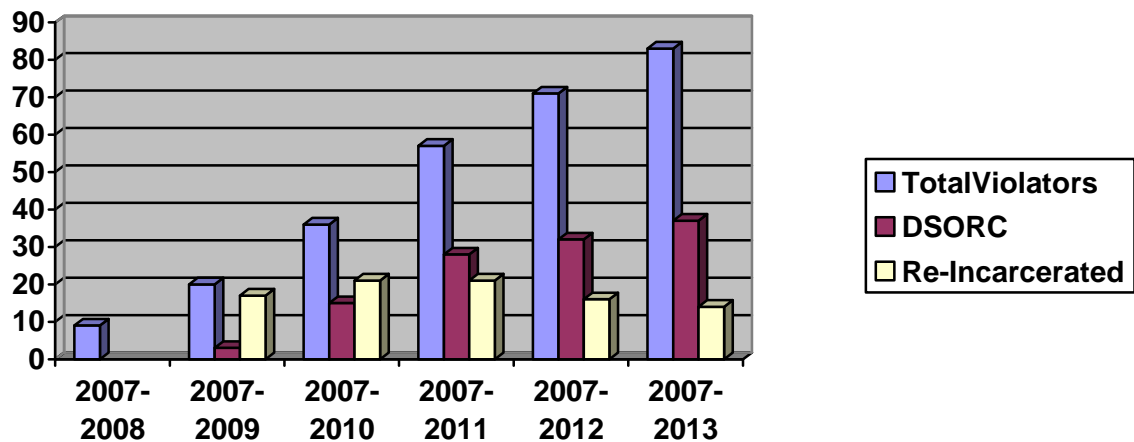
	2007-2008	2007-2009	2007-2010	2007-2011	2007-2012	2007-2013
Total on SIST	21	62	82	97	117	133
Total SIST Violators	9	20	36	57	71	83
% Violated	43%	32%	44%	59%	61%	62%



⁴⁹ This data is represented as cumulative for ease of comparison with Parole and DCJS data that is calculated by those agencies on a cumulative basis.

The chart and graph below reflect the disposition of the SIST violations. This data only reflects the violators who were removed from SIST because they were later determined to be dangerous sex offenders requiring confinement and were placed into a secure treatment facility, or they were re-incarcerated because the SIST violation also constituted a parole violation that was determined to warrant re-incarceration after an administrative parole hearing.⁵⁰

	2007-2008	2007-2009	2007-2010	2007-2011	2007-2012	2007-2013
Total Violators	9	20	36	57	71	83
DSORC		3	15	28	32	37
Re-Incarcerated		17	21	21	16	14



With each passing year, the SIST violation rate increases. By the end of 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 that violation rate was up to 44% and by the end of the fourth year, 59% of those on SIST violated their conditions. That percentage continued to

⁵⁰ This data is also presented on a cumulative basis for ease of comparison with DOCCS and DCJS as those agencies calculate this data on a cumulative basis.

increase in the fifth year when 71 of the 117 offenders that were on SIST were taken into custody as a result of SIST and/or parole violations. The violation rate was now up to 61%. By the sixth year, 133 respondent's were on SIST. At the end of that year, 83 had been taken into custody as a result of SIST violations with the violation rate now up to 62%.

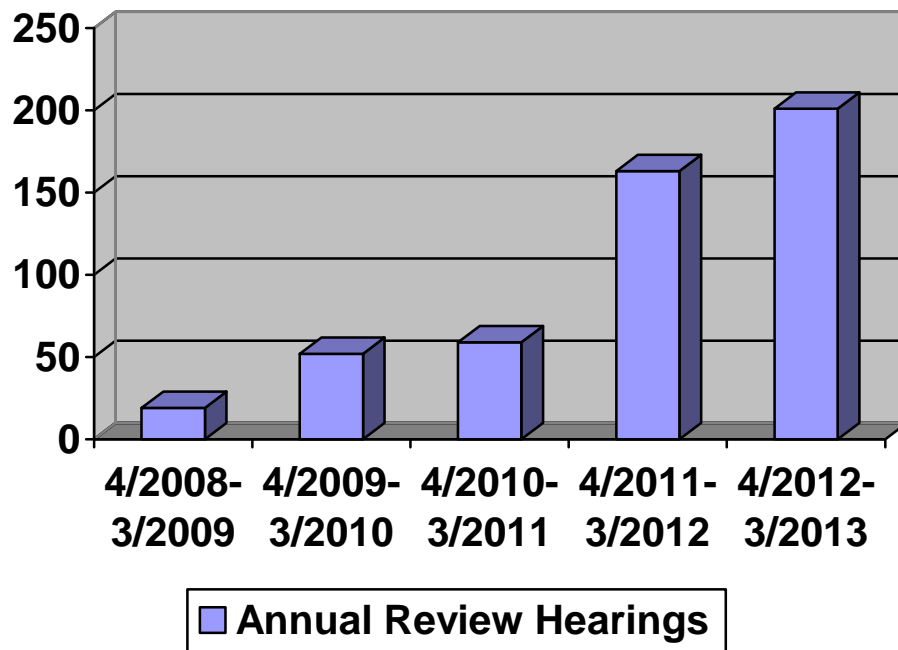
Over the six year period, 18 offenders were arrested for new crimes, with 6 of those 18 arrests being for new sex offenses. Furthermore, of the 83 SIST violators, an additional 65 offenders were not formally violated despite their having violated technical conditions of their SIST and/or parole conditions. In those cases, DOCCS sends a letter to the court advising it of the sex offender's behavior that constituted a technical violation.

Most of the violations occurred within the first year of being placed into the community on SIST. Fifty seven (57) of the 83 offenders violated SIST conditions within the first twelve months on SIST. This means that approximately 69% of sex offenders placed into the community on SIST violate their conditions within the first year.

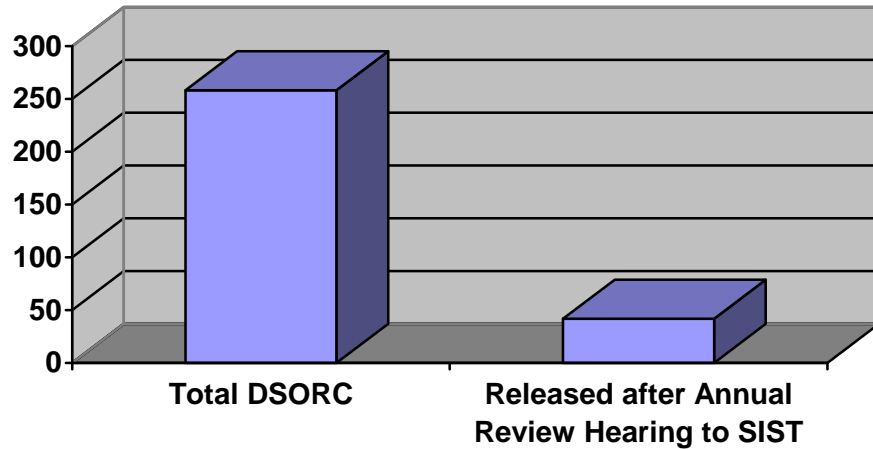
At this time, there has been no analysis to what percentage of the SIST violators were those placed into the community by the court after a dispositional hearing as opposed to those placed into the community by the court without a dispositional hearing based upon an offender's admission that he is a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

F. Annual Review Hearings

As represented in the chart below, the number of annual review hearings conducted each year is expected to continue to grow dramatically as offenders continue to be confined after trial, and as offenders who violate their SIST conditions are confined. There were 19 annual review hearings between April 2008-March 2009. Between April 2009-March 2010, there were 52 hearings and between April 2010-March 2011, 59 annual review hearings were held. Another 163 annual review hearings were held between April 2011-March 2012, and finally from April 2012-March 2013, there were 201 hearings.

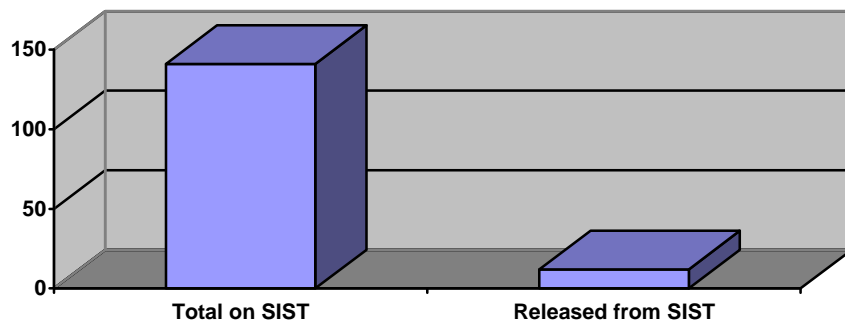


Of the 258 DSORC offenders, 42 have been released from the secure treatment facilities and re-integrated into the community under a regimen of SIST.



G. Bi-Annual SIST Modification or Termination Hearings

Of the offenders placed on SIST, 12 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).



Significant Legal Developments In Article 10 Practice

Between April 1, 2012, and March 31, 2013, a number of cases have been decided that have an impact on the litigation of Article 10 proceedings.

1. Federal

The defendants in MHLS v. Schneiderman, et al., appealed the April 7, 2011 order of the District Court, Judge Batts, which granted a permanent injunction on certain provisions of MHL Article 10. The Second Circuit reviewed the District Court's grant of the permanent injunction for abuse of discretion. The Second Circuit vacated the April 7, 2011 order and remanded the matter for reconsideration. MHLS v. Schneiderman, et. al., 472 Fed. Appx. 45; 2012 U.S. App. LEXIS 12520.

2. New York State Court of Appeals

The New York State Court of Appeals decided four MHL Article 10 cases between April 2012 and March 2013.⁵¹

a. Right to Counsel

The Court of Appeals held that the psychiatric examination authorized by MHL §10.05(e) is not a fundamentally "adversarial procedure, and was not one in which counsel was necessary to protect appellant against 'the coercive power of the State and its agents.' " The court further found the plain text of the statute barred respondent's right to counsel in the pre-petition psychiatric examination. Mental Hygiene Law §10.06(c) and (d) state that the right to counsel attaches when the MHL Article 10 petition is filed. The court also referenced the statutory language of MHL §10.08(g) which says "the respondent shall not be entitled to appointment of counsel prior to the time provided in MHL §10.06." Matter of State of NY v. John P. (Anonymous), 20 NY3d 941, 958 NYS2d 667.

⁵¹ The cases referenced are only a select few of the decisions rendered by NYS Court of Appeals.

b. Statements by Respondent Relevant

During a MHL §10.05(e) psychological examination, respondent admitted to the OMH examiner to having had sexual contact with three children in addition to the victims mentioned in official records. Respondent argued the statements should be barred from evidence. The Court of Appeals found the information was "obviously relevant and no statute prohibited its use." Id.

c. DSM Diagnosis Not Required to find Mental Abnormality

In the Matter of State of NY v. Shannon S., respondent argued that an individual cannot be found to suffer from a mental abnormality absent diagnosis of a mental disease or disorder listed in the DSM. The Court of Appeals made reference to the seminal federal cases of Kansas v. Hendricks, 521 U.S. 346; Ake v. Oklahoma, 470 U.S. 68, and Kansas v. Crane, 534 U.S. 407 that address the imperfect fit between questions of law and the DSM clinical diagnoses in civil confinement cases, but also looked to the plain language of MHL §10.03(i) and held that the definition of mental abnormality "does not reference or require that a diagnosis be limited to mental disorders enumerated within the DSM. Therefore contrary to respondent's argument, a mental abnormality "need not necessarily be one so identified in the DSM in order to meet the statutory requirement." Matter of State of NY v. Shannon S., 20 NY3d 99, 956 NYS2d 462, *cert. denied* (March 14, 2013) 2013 U.S. LEXIS 1937, 81 U.S.L.W. 3492.

d. Paraphilia-Not Otherwise Specified (NOS)

Paraphilia NOS "has been found to be a viable predicate mental disorder or defect that comports with minimal due process." Any issues surrounding the reliability of paraphilia NOS goes to the weight of the diagnosis and any debate over the viability of the diagnosis is subject to the adversarial process. Id.

e. DSORC

Respondent is not entitled to a jury trial at the dispositional phase of the proceedings that address the determination of confinement. Matter of State of NY v. Myron P., 20 NY3d 206, 958 NYS2d 71.

3. The New York State Appellate Division

Statewide, between April 2012 and March 2013, the appellate divisions have decided a total of 28 cases addressing MHL Article 10 issues. The breakdown is as follows: the First Department rendered 5 decisions; the Second Department, 7 decisions; the Third Department, 6 decisions and, the Fourth Department issued 12 decisions.⁵²

First Department Decisions

a. Passage of Time Does Not Negate or Disprove Diagnosis

Jury verdict that respondent suffers from mental abnormality was not against weight of the evidence. Expert conclusion was properly based upon not only respondent's criminal convictions in 1986 and 2003, but also on documents spanning the years from his first offense through incarceration. "The absence of proof that he was accused or convicted of similar crimes between the time of his 1986 offenses and the time of his 2003 offense, or in the years between the 2003 offense and trial, need not be treated as negating or disproving the diagnosis." Matter of State of NY v. William W., 103 AD3d 521.

b. Showing of Persistent Sexual Abuse Supports DSORC Determination

In the Steur case, respondent, who admitted he committed hundreds of acts of groping women's and teenage girls' breasts and buttocks, and did not dispute he was likely to commit three qualifying misdemeanors within a 10 year period argues the State failed to establish he is likely to be convicted of two predicate offenses and to commit a third within 10 years. The First Department held that "when the State seeks to prove that a respondent in a Mental Hygiene Law article 10 proceeding is likely to commit the felony of persistent sexual abuse, it need only establish, by clear and convincing evidence, that the respondent is likely to engage in conduct that would support a conviction." The crime of persistent sexual abuse is established by showing a defendant committed one of three specified misdemeanors and within the previous 10 years, was convicted two or more times of any of those misdemeanors or of any felony sex offense. The Appellate Division found it unlikely that "the Legislature intended to exempt individuals who commit serial sex offense misdemeanors from classification as dangerous sex offenders unless

⁵² The cases below are a select few of the decisions rendered by the NYS Appellate Division Courts.

and until they have been successfully prosecuted . . . " Matter of State of New York v. Steur, 102 AD3d 481.

Second Department Decisions

a. Detained Sex Offender

Mental Hygiene Law §10.07 does not mandate a jury determination on the issue of whether respondent is a 'detained sex offender.' Trial court granted petitioner's motion at close of evidence for judgment as a matter of law on the issue of whether respondent is a "detained sex offender." Appellant argued the trial court improperly removed that issue from the jury. The Second Department found that respondent's status as a sex offender was "properly deemed established upon proof of his convictions" of sex offenses, which were established through the admission of certified records and was "serving a sentence for . . . such offense . . ." The court held that the Supreme Court properly granted the State's motion pursuant to CPLR 4401 for judgment as a matter of law on the issue of whether appellant was a 'detained sex offender.' Matter of State of New York v. Geoffrey P., 100 AD3d 911, 954 NYD2d 60, *leave to appeal denied*, 2013 LEXIS 531; Matter of State of New York v. Robert F., 101 AD3d 1133, 958 NYS2d 156.

b. Constitutional Issues

Respondent asserts the term "mental abnormality" as defined in MHL §10.03(i) is unconstitutionally vague on its face and as applied to him because the phrase "condition, disease or disorder" is undefined and the diagnosis made by petitioner's expert of Paraphilia, NOS is not listed in the DSM. The court looked to longstanding federal and state case law setting forth the test for "vagueness under the due process clause," and the analysis of the factors to be considered to determine whether a statute is unconstitutionally vague 'on its face' or 'as applied.' Respondent carries the burden of showing the statute is impermissibly vague in all of its applications.

"A challenge to a statute as applied requires the court to consider whether the statute can be constitutionally applied to the party challenging it under the facts of the case. In contrast, a facial challenge requires the court to examine the words of the statute on a cold page and with out reference to the . . . conduct [of the party challenging the statute.]"

The court found that Mental Hygiene Law does not require a DSM diagnosis for a finding of mental abnormality and that "the terms 'condition, disease and disorder' are sufficiently definite to give a person of ordinary intelligence a reasonable opportunity to make the determination." It held that "since there exists at least one constitutional application of the statute, it is not invalid on its face," (citing to People v. Stuart, 100 NY2d at 428). Matter of State of New York v. Spencer D., 96 AD3d 768, 946 NYS2d 180.

Third Department Decisions

a. Testimony Regarding Programming and Staff is Relevant

Respondent argued that psychologist's testimony regarding staffing and programming at the psychiatric facility is irrelevant to the issue of whether he suffers from a mental abnormality. The Third Department found the testimony relevant because the psychologist properly considered respondent's lengthy treatment history, including his resistance to programs offered at the facility. The trial court also minimized any prejudice by instructions to the jury that it should not speculate as to the type of treatment respondent would receive should he be found to suffer from a mental abnormality. Matter of State v. Cerrick FF., 99 AD3d 1066, 952 NYS2d 653.

b. Admissibility of Dismissed Charges

Respondent objected to testimony of sexual offending behavior he was charged with but was ultimately dismissed because the victim refused to testify. He asserts the testimonial evidence is unreliable and should have been precluded. The Third Department disagreed finding that

[T]he facts surrounding the earlier rape were of a type that would normally be considered in assessing the nature of respondent's mental abnormality, and that both of the testifying experts found the evidence to be particularly relevant, given the factual similarities and temporal proximity between the prior rape and the crimes for which respondent was convicted. In light of the high probative value of the evidence and considering that the record is devoid of any suggestion that the charges were dismissed because the defendant did not commit the underlying crimes . . .

the trial court did not abuse its discretion in permitting their introduction. Id.

c. Expert Testimony as to Interview with Victim Admissible

On cross-examination, respondent's attorney elicited that the sexual charges were dismissed and that the victim now denies the actual rape was completed. Only after this testimony, did petitioner question the expert regarding the evidence supporting the conclusion that the victim had been raped, as well as the psychological reasons that could explain the victim's more recent denial. "[I]t was not error for the court to permit the un-refuted expert testimony regarding the interview with the prior victim as a means of rebutting the suggestion that the prior rape had not occurred." Id.

Fourth Department Decisions

a. Evidence of Prior Crime Admissible to Show Intent in Instant Offense

Supreme Court erred in refusing to instruct the jury that it could consider evidence of 1980 kidnappings on the issue of respondent's motive and intent in committing the 1984 attempted kidnappings and whether those crimes were "sexually motivated." Matter of State of New York v. Lester, 94 AD3d 1492, 942 NYS2d 855, *leave to appeal denied*, 96 AD3d 1703, 2012 N.Y. App. Div. LEXIS 5227.

b. Venue

Speculative and conclusory affidavits stating that the witnesses *may* be subpoenaed and that it would be inconvenient to travel the distance between their county of residence and the county of the underlying offense, does not constitute good cause for a venue change. Petitioner failed to set forth specific facts sufficient to demonstrate a transfer and instead stated that the witnesses *may* be called, *if necessary*. Matter of State of New York v. Carter, 100 AD3d 1438, 953 NYS2d 794 and Matter of State of New York v. Steinmetz, 101 AD3d 1726, 956 NYS2d 783.

c. Consideration of Least Restrictive Alternative Not Required

Fourth Department "reject[s] respondent's further contention that petitioner was required

to 'refute the possibility of a less restrictive placement' or that the court was required to specifically address the issue of a less restrict alternative," when revoking respondent's prior regimen of SIST and determining that respondent is a dangerous sex offender requiring confinement and committing him to a secure treatment facility. Matter of State of New York v. Gooding, 2013 N.Y. App. Div. LEXIS 1938, 2013 NY Slip Op 1945 (March 22, 2013), citing to Matter of State of New York v. Enrique T., 93 AD3d 158, *leave dismissed* 18 NY3d 976.

d. Civil Management Proceeding Held in Abeyance Due to Parole Violation

Respondent was found to be a dangerous sex offender requiring treatment in a secure facility. Three months into his treatment he violated conditions of parole which returned him to the custody of DOCCS. Respondent moved to dismiss the petition claiming he was no longer in the custody of OMH and claimed the supreme court did not have subject matter jurisdiction. The Fourth Department affirmed that since respondent was determined to be a dangerous sex offender requiring civil management, the court has subject matter jurisdiction of all subsequent MHL Article 10 proceedings. The appellate division further held that respondent remained subject to civil management during his incarceration but that his re-incarceration supplanted the civil commitment in a secure treatment facility although it did not affect his status as a dangerous sex offender requiring civil management. Lastly, the court held that any annual review proceedings would have no effect on the incarceration, and should be suspended pending respondent's release from incarceration. Matter of State of New York v. Lashway, 100 AD3d 1372, 953 NYS2d 434.

e. Respondent Not Entitled to Independent Examiner for SIST Violation

Respondent admitted he suffered from a mental abnormality and was placed into the community on SIST. A subsequent SIST revocation hearing was conducted after allegations that he violated certain conditions of SIST. After petitioner rested and respondent had already called two witnesses, he then requested an independent psychiatric expert to conduct an examination on his behalf. Supreme Court denied respondent's request and the appellate court held that respondent was not denied due process because his request for an independent examiner was denied. "An indigent respondent in a civil commitment proceeding does not have an absolute right to an independent psychiatric evaluation," citing to Goetz v. Crosson, 967 F2d 29. "A right to present

the testimony of an independent psychiatrist arises only where 'such testimony is necessary to a reliable assessment' of an indigent respondent's mental condition." Id., Matter of State of New York v. Johnson, 94 AD3d 1536, 942 NYS2d 912.

f. Respondent Must Turn Over Expert Report Even if Not Called as Witness

Respondent was not going to call his independent expert as a witness at trial, and contends his due process and equal protection rights would be violated if he were required to turn over his independent examiner's report to the court and Attorney General. Looking to the plain language of the statute, the appellate division rejected that argument finding that MHL §10.06(e) provides that "following [respondent's independent] evaluation, such psychiatric examiner shall report his or her findings in writing to the respondent, or counsel for the respondent, to the attorney general and to the court." The appellate court held that respondent did not meet his burden of establishing the statute was unconstitutional and further found that "the statute goes beyond the due process required in a civil confinement proceeding inasmuch as a respondent is entitled to the appointment of a psychiatric examiner simply upon the request and without a showing of necessity." Matter of State of New York v. Hunter, 100 AD3d 526, 953 NYS2d 795.

Examples of Offenders in Civil Management Litigation

The following are examples of cases that the OAG litigated under SOMTA during the past year. The sex offenders names are represented by initials to protect their identity.

State of NY v. R.L.: At the age of 15, R broke into the home of his much-older neighbor while she was asleep, hit her on the back of the head with an unknown blunt object, then anally sodomized her while she lay unconscious on her blood covered bed. One of the detectives later described the crime scene as "something out of Helter Skelter." Respondent was identified by DNA months later and at the criminal trial raised a psychiatric defense, claiming he committed the crime as a result of misprescribed psychiatric medications. At the civil management trial, elements of that medication defense reappeared, but he changed his story into one of unrequited love, claiming that he and the victim had had an ongoing sexual relationship that she broke off that day, and he assaulted her because he was angry. He claimed there was no sex involved in the assault, but that his semen was found in the victim because they had had sex earlier in the day.

State of NY v. W.R.: While in his 20s, respondent twice exposed himself to females in public, one of whom was a teenaged girl. While still in his 20s, he took a fifteen-year-old girl off the street in the middle of the night and raped her beside some railroad tracks. While on parole

for that rape, he committed a series of sex offenses against children. While at a Sears Department Store, he followed a ten-year-old girl and her mother, and said to the girl "look at this," as he reached his hand into his pants. On another occasion, he met, two girls and a boy, ages 7-9, who were picking berries in a field. Among other things, he fondled both of the girls, and asked the boy to pull down his pants.

State of N.Y. v. A. M.: Between August 1993 and November 1993, the 43 year old respondent lured several young boys under the age of 14 years old to his residence offering them television watching time and video games. Once the boys were in his apartment, he anally sodomized and otherwise subjected 4 boys to unlawful sexual contact. He pleaded guilty to the top count of the indictment which involved anal sodomy by forcible compulsion and according to the pre-sentence investigation report, he admitted it would be extremely difficult to change his behavior since he has been a pedophile the majority of his adult life.

State of N.Y. v. S.R.: 5'11", 200 pound respondent's sexual offending history spans a 30 year time frame. He has offended against several children, including his daughter and 7 year-old niece. When his daughter was between 2-4 years old, he tied her to a wall and raped her along with his friends. He asked a 10 year-old female child to come into his house and sexually assaulted her. On another occasion he sexually assaulted his 7 year-old niece and forced her to take off her clothing while he stood over her and masturbated. He sexually assaulted that child on other occasions, one of which he performed oral sex on her, forced his finger into her anus and told her to perform oral sex on him. He also has a history of raping prostitutes, and using 'glory holes' at porn shops.

State of N.Y. v. R.H.: Convicted of 3 rapes over a 3 month span in Utica, N.Y., his victims were a 14 year-old child, a 20 year-old young woman and a 57 year-old woman. While in prison, he frequently violated the rules and amassed over 150 disciplinary charges, including 42 of which were for lewd conduct or sex offenses. Approximately one week before his civil management trial, he exposed his erect penis to the group in the treatment program he was attending in prison. A jury determined he suffered from a mental abnormality and the court found him to be a dangerous sex offender requiring treatment in a secure facility. While in Central New York Psychiatric Center, his assaultive and sexually acting out behavior continued whereby he tried to stab a staff member with a pen and would urinate into a Styrofoam container for weeks while refusing to use the bathroom.

State of N.Y. v. L.B.: This is the oldest Harkavy II case in the civil management and treatment program. Respondent's sexual offending behavior began at the age of 14 when in two separate incidents, he broke into the residences of two female college students and raped them. He was also charged with sexual assaults at the ages of eighteen and nineteen. His instant offense occurred at the age of 29 when over a six month period he broke into the residence of three female college students on three separate occasions and vaginally, orally and anally raped them.

State of N.Y. v. W.W.: 36 year old respondent followed some very young female children into the ladies room in a park in Rochester. Witnesses notified the mother of one of girls

that a man followed the girls into the restroom. The child's mother ran into the restroom and saw respondent's head between her eight year-old daughter's legs. It was established he had sexually offended against the child. Respondent admitted oral and anal sodomy of an 8 year-old little boy on at least four (4) occasions and admitted that he engaged in similar sexual contact with children for approximately 10 years prior to his arrest.

State of N.Y. v. D.K.: While performing job duties as a child psychologist for children who were victims of sex abuse, the respondent re-victimized the children and sexually abused them using pornography and 'role play' behavior. He sexually offended against at least 10 children between the ages of 6-12. His varied sexual offending behavior against these children included oral and anal rape.

SOMTA'S Impact on Public Safety

After six years, 352 men are being civilly managed in either a secure treatment facility or under a regimen of enhanced community supervision on SIST. Had it not been 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.

Although New York's civil management program applies to only a very small percentage of overall offenders, it is hoped that despite its limitations, the process identifies the most dangerous of offenders. One will never know just how many potential unsuspecting men, women and children were 'saved' from being the victim of a sex crime, had these offenders not been placed into the civil management program. It appears, however, that civil management is making a difference in helping to protect communities from dangerous sex offenders.

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

CONCLUSION

In April 2007, New York State passed the Sex Offender Management and Treatment Act (SOMTA) to further the recognized goal of protecting the public, reducing recidivism, and ensuring offenders have access to proper treatment. Currently, the civil management system is functioning across New York State and the sex offenders are being treated in a secure treatment facility or under enhanced supervision in the community. Although it is too early to predict SOMTA's long-term impact, one thing is clear: If not for SOMTA, 352 mentally abnormal and recidivistic sex offenders would have been released into the community with little or no oversight or treatment.

Victim Resources

Recognizing and understanding the importance of keeping a victim apprised of the status of ongoing litigation in a civil management case, New York State Attorney General, Eric Schneiderman, has set up the following toll free number for victims of sex offenders in the civil management program. 1-877-462-4697.

The OAG also 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. www.health.ny.gov.

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.