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INTRODUCTION TO MENTAL HYGIENE LAW ARTICLE 10

JESSICA BOTTICELLI, ESQ. AND SADIE ZEA ISHEE, ESQ.

Sponsored by:
Appellate Division, First Department and the
Assigned Counsel Plan for the First Department

INTRODUCTION TO MHL ART. 10 FOR TRIAL ATTORNEYS

Outline Prepared by Sadie Zea Ishee, Esq.

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INTRODUCTION

The "sex offender civil commitment and management act" took effect on April 13, 2007. This outline will provide an overview of Mental Hygiene Law Article 10, the centerpiece of that act, which authorizes the post-prison civil commitment for sex offenders in New York.

I. NATIONAL AND HISTORICAL PERSPECTIVE:

In 1990, states began passing "sexually violent predator" [SVP] statutes, which authorize the post-prison civil commitment of sex offenders. 20 states and the federal system now have SVP laws. These laws have been upheld by the Supreme Court on three occasions:

Kansas v. Hendricks, 521 U.S. 346 (1997): Challenge to SVP law on substantive due process, ex post facto and double jeopardy grounds.

Substantive Due Process: The Kansas act authorized post-prison civil commitment of SVPs who "suffer from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." The Court found no substantive due process problem because it links dangerousness to a present mental condition– making it "of a kind" with other civil commitment statutes (authorizing the involuntary commitment of the mentally ill) that the Court had previously upheld. The Court rejected Hendricks' assertion that "mental abnormality or personality disorder" was not equivalent to "mental illness" for due process purposes; rather, "the term 'mental illness' is devoid of any talismanic significance." The key is that a mental condition makes it difficult for the individual to control his behavior.

Double Jeopardy and Ex Post Facto: The Court found no violation of either provision because the Kansas act was civil, not criminal in nature. Commitment is not punitive and goal of commitment is neither deterrent nor retributive.

Concurrence (Kennedy): Writes separately to emphasize that "[i]f the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function. . . . If civil commitment were to become a mechanism for retribution or general deterrence, or if it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it."

Dissent: Finds that the statute is in fact criminal in nature, despite being designated as civil, because treatment is delayed until prison term is complete.

Seling v. Young, 531 U.S. 250 (2001): As-applied challenge to SVP law on double jeopardy & ex post facto grounds

Petitioner alleged that the Washington SVP statute was punitive as applied, and thus violated double jeopardy and ex post facto clauses. Court holds that regardless of the nature of the conditions of confinement, an "as-applied" ex post facto or double jeopardy challenge is unworkable, because the question of whether a statute is civil or criminal is answered by the statute itself; it does not vary according to the individual raising the challenge.

Kansas v. Crane, 534 U.S. 407 (2002): Another substantive due process challenge.

Does the constitution require a finding that individual proposed for commitment is *completely* unable to control his sex offending behaviors? The Court says no, but does require "that there must be some proof of serious difficulty in controlling behavior" that "when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose mental illness, abnormality or disorder subjects him to civil

commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."

II. NEW YORK'S "SEX OFFENDER MANAGEMENT AND TREATMENT ACT," 2007 N.Y. LEGIS. 7 (S. 3318).

A. Goals and Objectives of the Act:

1. Legislature finds that "recidivistic sex offenders" pose a danger to society and need "comprehensive treatment and management" through a combination of criminal and civil processes. The legislature envisions addressing this problem through a combination of increased criminal penalties, post-prison civil commitment or intensive supervision, and in-prison and post-prison sex offender treatment. MHL 10.01. It is contemplated that the Act will both provide offenders with "meaningful treatment" and protect the public.

2. Confinement is only "one element in a range of responses to the need for treatment of sex offenders." Confinement is intended only for "extreme cases" involving the "most dangerous offenders.

B. Who is subject to Article 10? The "detained sex offender" issue.

1. Article 10 petitions may only be filed against "detained sex offenders." Person must be "in the care, custody, control or supervision" of a state agency "with respect to a sex offense or designated felony." MHL 10.03 (g).

   - Persons who are no longer subject to any form of state custody or supervision *cannot* be the subject of an Article 10 petition. *State v. Rashid*, 16 N.Y.3d 1 (2010); *but see State ex rel. Joseph II v. Superintendent*, 15 N.Y. 3d 126 (2010) (legality of custody is irrelevant so long as definition of "detained sex offender" is satisfied); *State v. Matter*, 78 A.D.3d 1694 (4th Dep't 2010).

2. Categories of "detained sex offenders" - MHL 10.03 (g):

   a. A person who stands convicted of a sex offense and is currently serving a sentence or subject to supervision by parole "for such offense or a related offense."

      "Related offenses include any offenses that are prosecuted as part of the same criminal action or proceeding, or which are the bases of the orders of commitment received by the department of correctional services in connection with an inmate's current term of incarceration." MHL 10.03 (L).

      Where an inmate is serving multiple sentences for crimes that include both sex offenses and non-sex offenses, Article 10's "related offenses" definition, *not* CPL Art. 70 or DOCS' sentence-calculation rules, determines whether the current period of confinement will subject an inmate to Article 10. *See State v. Rashid*, 16 N.Y.3d 1 (2010).

   b. CPL 730 defendant [charged with crime but determined to be incapacitated to stand trial] charged with a sex offense, who "did engage in the conduct constituting such offense."

   c. Attorney general must prove at trial, by clear and convincing evidence, that respondent "did engage in conduct constituting such offense." MHL 10.07 (d).

      -3rd Dep't has held that due process does not require that offender be competent for trial on question of whether he did engage in conduct constituting sex offense. *State v. Daniel O.O.*, 88 A.D.3d 212 (3rd Dept 2011).

   d. CPL 330.20 defendant [not responsible by reason of a mental disease or defect] charged with a sex offense but found not responsible with respect to that offense

e. Persons convicted of a "designated felony that was sexually motivated" committed prior to April 13, 2007 (*see* below § C)

f. Persons convicted of a sex offense who were directly admitted to psychiatric hospitals at the conclusion of their prison terms under MHL Article 9 or Corr. L. 402, after Sept. 1, 2005

This provision appears intended to target inmates who were transferred to psychiatric hospitals for post-prison sex offender treatment before Article 10 existed- *see State ex rel. Harkavy v. Consilvio*, 7 N.Y.3d 607 (2006).

g. Persons previously determined to be sex offenders requiring civil management under Art. 10

C. What is a "sex offense"?

1. Sex offense encompasses *only* (1) *felony* sex offenses defined in PL Article 130; (2) 1c patronizing a prostitute under PL 230.06; 2c incest under PL 255.26, or 1c incest under PL 255.27; any felony attempt or conspiracy to commit one of the foregoing offenses; or a "designated felony" that was "sexually motivated" and committed prior to April 13, 2007.

"The term 'sex offense' . . . under Article 10 is not a generic or general term subject to varying interpretations, it is an explicitly defined term which relates to the specific offenses listed in the definition and no other offenses." *State v. P.H.*, 22 Misc.3d 689, 706 (Sup. Ct. New York County 2008). Thus, most acts of voyeurism and/or exhibitionism would not qualify as "sex offenses." *See also State v. Adrien S.*, 114 A.D.3d 862 (2d Dep't 2014) (jury charge must include definition of "sex offense").

2. "Sexually Motivated Felonies": A person may be committed as a sex offender if he was convicted of a "designated felony" that was "sexually motivated" and committed prior to April 13, 2007.

"Designated felonies" are listed in MHL 10.03 (f). The long list includes, e.g., murder, burglary, arson, promoting prostitution, including attempts and conspiracies. Only listed crimes will qualify.

"Sexually motivated" means "the act or acts constituting a designated felony were committed in whole or in substantial part for the purpose of direct sexual gratification of the actor." MHL 10.03 (s). Examples: *State v. Farnsworth,* 75 A.D.3d 14, 18 (4th Dep't 2010) (respondent who had been convicted of burglary admitted that he burglarized homes with the intent to molest young children, although he never actually molested any); *State v. State v. Andre L.*, 84 A.D.3d 1248 (2nd Dep't 2011)*(*State's expert testified that "appellant left his home dressed in women's undergarments with the intention of exposing himself, and the robbery was an additional element that was part of the thrill involving sexual arousal."*).*

- Probable cause hearing must include finding of probable cause to believe that the commission of such offense was sexually motivated.

- Trial must include finding by jury, by clear and convincing evidence, that the designated felony was "sexually motivated." MHL 10.07 (c); *State v. Farnsworth*, 75 A.D.3d 14 (4th Dep't 2010); *State v. Nelson*, 89 A.D.3d 441 (1st Dep't 2011).

- Retroactive determination of "sexual motivation" does not violate *ex post facto* principles. *See State v. Nelson*, 89 A.D.3d 441 (1st Dep't 2011).

D. What is a "Mental Abnormality"?

To require civil management under MHL Article 10, a sex offender must be found to suffer from a "mental abnormality."

1. Definition: "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." MHL 10.03 (i).

- Generally expressed as two questions for the jury: (1) does the person have a condition that predisposes him to the commission of conduct constituting a sex offense; and (2) does the person have serious difficulty in controlling the sex offending conduct? *See* N.Y. PJI Civil 8:8.

2. Diagnosis: Does person have a diagnosis or condition that predisposes him to committing sex offenses?

   - Does *not* require a diagnosis listed in the DSM. *State v. Shannon S.*, 20 N.Y.3d 99, 106 (2012).

   - But diagnosis must be sufficient to "distinguish the sex offender whose mental abnormality subject[s] him to civil commitment from the typical recidivist convicted in an ordinary criminal case." *State v. Donald DD*, 24 N.Y.3d 174, 190 (2014). Antisocial personality disorder (ASPD) alone is not sufficient, because it "means little more than a deep-seated tendency to commit crimes" and "proves no sexual abnormality." *Id.*

   - On the other hand, diagnosis itself need not be sexual in nature. *State v. Dennis K.*, 27 N.Y.3d 718, 743 (2016). Also, some combination of disorders, including ASPD, may suffice—no individual diagnosis or condition must necessarily predispose in and of itself. *Id.* at 750.

   - Diagnosis must predispose offender to committing sex offenses *as defined in the statute*, i.e., felony sex offenses. A condition that predisposes one to commit acts that don't rise to the level of a felony sex offense (e.g., exhibitionism) would not suffice. *State v. P.H.*, 22 Misc.3d 689, 706 (Sup. Ct. New York County 2008).

3. Serious Difficulty: Is there proof that the offender has serious difficulty controlling his sex offending behavior?

- In *State v. Donald DD (Kenneth T)*, the Court also held that in addition to a qualifying "mental abnormality" diagnosis, the State must separately prove that respondent has serious difficulty controlling his sexual misconduct. 24 N.Y.3d at 187.

"Undoubtedly, sex offenders in general are not notable for their self-control. They are also, in general, not highly risk-averse. But beyond these truisms, it is rarely if ever possible to say, from the facts of a sex offense alone, whether the offender had great difficulty in controlling his urges or simply decided to gratify them, though he knew he was running a significant risk of arrest and imprisonment." Insufficient proof included fact that offender committed crime after being sanctioned for prior crime, that offender committed crime in a manner that allowed him to be identified, and that offender lacked a conscience. *Id.* at 188. Court held that a "detailed psychological portrait" would be required to satisfy this element. *Id.*

- But nearly identical testimony by the same expert was held to be sufficient in *State v. Floyd Y.*, 135 A.D.3d 70 (1st Dep't 2015), *lv. to appeal granted*, 27 N.Y.3d 902, where the respondent was diagnosed with pedophilia, rather than paraphilia not otherwise specified, because court held that pedophilia involves an inherent element of lack of control.

- In *Dennis K*, Court held that the "psychological portrait" was sufficient where it included testimony that respondent had referred to himself as a "sadistic power rapist" and enjoyed exerting control over others sexually, to the point of not enjoying consensual sex. 27 N.Y.3d at 734.

- In *Wright v. NYS Office of Mental Health*, 134 A.D.3d 1483 (4th Dept 2015), court looked to expert's whole testimony- including statements that she did not specifically relate to the "serious difficulty" question- to determine that the evidence of "serious difficulty" was sufficient. Specifically, expert had testified regarding respondent's specific offense cycle, the fact that he had offended

against many women for whom he was never sanctioned, and his arousal to nonconsensual sex.

- But in *State v. Frank P.*, 126 A.D.3d 150 (1st Dep't 2015), the fact that respondent had offended against many women was *not* sufficient to establish serious difficulty, where he had shown no evidence of difficulty controlling behavior throughout a long period of incarceration.

E. Pre-Petition Procedures:

1. Identification: Any agency having custody of a person that it believes *may be* a "sex offender requiring civil management" *must* alert Office of Mental Health (OMH) when that person is nearing the end of their prison term or other term of custody. MHL § 10.05 (b).

   - The agency with custody gives notice of the existence of such a person to OMH and the AG's office, but *not* to the offender himself. MHL § 10.05 (b), (c).

2. Initial Review: After receiving notice under § 10.05 (b), OMH conducts an initial review of all noticed offenders.

   - OMH may designate multidisciplinary staff to conduct this preliminary review. Staff reviews medical, clinical, criminal & institutional records, actuarial risk assessment tools, & any other available records. MHL 10.05 (d).

   - OMH makes a preliminary determination of which persons are believed to be subject to civil management, and refers those persons to a "case review team." MHL 10.05 (d).

3. Case Review: The "case review team" identifies which persons are believed to be subject to civil management and refers those persons to the attorney general's office. MHL 10.05 (e) - (g).

- Referral to the "case review team" triggers notice to the offender himself. MHL 10.05(e).

- Case review team must include 3 members, of which two must have expertise in treatment or identification of sex offenders- MHL 10.05 (a).

- Case review team reviews all relevant records and may also arrange for a psychiatric evaluation of the offender. MHL 10.05 (e). May obtain otherwise sealed records. *State v. Zimmer*, 63 A.D.3d 1563 (4th Dep't 2009).

- Any statements made during evaluation are explicitly admissible in future Art. 10 proceedings. MHL 10.08 (a). Conversely, failure to cooperate with the evaluation can result in an adverse jury charge. MHL § 10.07 (c). Offender is not entitled to counsel at this evaluation. *State v. John P.*, 20 N.Y.3d 941 (2012).

- If the case review team decides not to refer someone to the attorney general, no Art. 10 petition can be filed. The decision not to refer someone to the AG is unreviewable. MHL 10.05 (f).

- Case review team is asked to complete its reviews within 45 days, but failure to do so has no legal effect. MHL 10.05 (g).

F. Petition:

Upon referral by case review team, attorney general may file Article 10 petition.

- AG is asked to file a petition, or choose not to, within 30 days of referral from case review team, but failure to do so has no legal effect. MHL 10.06 (a).

- Petition must "allege facts of an evidentiary character tending to support the allegation that the respondent is a sex offender requiring civil management." MHL 10.06 (a).

- Filing of an Article 10 petition may provide grounds for a respondent to move to withdraw underlying sex offense plea, if plea made after SOMTA took effect and respondent was not advised of it by counsel. *State v. Hartnett*, 16 N.Y.3d 200, 207 (2011) (plea not automatically invalidated by counsel's failure to advise about SOMTA, but could provide grounds to move to vacate plea if defendant could show (1) he was likely subject to SOMTA; (2) he was not informed by counsel; and (3) if so informed, he would not have taken plea)

1. Appointment of Psychiatric Examiners:

   After the filing of a petition, AG may ask the court for permission to direct offender to submit to a psychiatric exam. Unlike the exams ordered by the case review team, an exam requested by the AG must be approved by a court, and counsel is appointed for the offender. The psychiatric examiner must submit his or her report to the AG, the court, and counsel for the offender. MHL 10.06 (d).

   At any time after petition is filed, respondent may engage a psychiatric examiner of his choosing (provided the examiner is licensed in NY state), to be paid for at state expense in the case of indigent respondents. The Court must issue an order appointing such an examiner. MHL 10.06 (e).

2. Appointment of counsel:

   Counsel must be appointed "promptly" upon the filing of a petition. Mental Hygiene Legal Service is presumptive counsel, but if Service cannot accept assignment, 18-b panel serves as back-up counsel. MHL 10.06 (c). Respondent is entitled to *effective assistance of counsel*. *State v. Campany*, 77 A.D.3d 92, 98 (4th Dep't 2010).

3. Venue:

   Venue is laid in county where offender is being held at the time petition is filed. But respondent may serve "notice of venue change" to county of conviction within 10 days of filing of petition, in which case venue must

be changed unless State moves for "retention of venue" and demonstrates good cause why venue should not be moved. MHL 10.06(b). Thereafter, either party may move for venue change for good cause at any time. MHL 10.08 (e).

- Convenience of State's witnesses cannot constitute "good cause" to override respondent's choice of venue (between county of confinement and county of conviction). *See State v. Zimmer*, 16 N.Y.3d 1563; *State v. J.I.*, 16 Misc.3d 990 (Sup Ct. Dutchess County 2007).

G. Probable Cause Hearing:

- Must be held within 30 days of the filing of the petition or 72 hours of offender otherwise being entitled to release. MHL 10.06 (g), (h).

- Court must find probable cause to believe that the individual is a "sex offender requiring civil management" but need not find probable cause to believe he is a "dangerous sex offender in need of confinement." 10.06 (k).

- A finding of probable cause results in the offender's mandatory detention pending trial. MHL 10.06 (k) (iii); *State v. Enrique T.*, 93 A.D.3d 128 (1st Dep't 2012).

- AG may appeal from a finding of no probable cause, but offender cannot appeal the probable cause determination. MHL 10.13 (b); *see also State v. Reeve*, 87 A.D.3d 1378 (4th Dep't 2011). Standard for finding probable cause is very low. *See State v. Anonymous*, 79 A.D.3d 758 (2nd Dep't 2010) (reversing trial court finding of no probable cause).

H. Pretrial Issues:

1. Discovery:

- Reports of psychiatric examiners must be exchanged between parties and provided to the court. MHL § 10.06 (d), (e).

- Attorney general must make all records in his possession available to respondent. MHL § 10.08 (d). Attorney general may request records pertaining to respondent from "any agency, office, department or other entity of the state." MHL § 10.08 (c). Attorney general may seek to have confidential records unsealed. *Id.*; *see also State v. John S.*, 23 N.Y.3d 326, 341 (2014).

2. Frye Hearings

- Dissenting in *State v. Shannon S.*, Judge Smith wrote that he had "grave doubts" whether diagnoses at issue in that case (paraphilia not otherwise specified, hebephilia) would have survived a *Frye* hearing, had one been requested. 20 N.Y.3d at 110. Subsequently, in *Donald DD* (*Kenneth T)*, majority highlighted the absence of any request for a Frye hearing on paraphilia NOS in upholding the sufficiency of that diagnosis to support mental abnormality finding. 24 N.Y.3d at 187. The absence of a request for *Frye* hearing was again highlighted in *Dennis K.*

- Since *Donald DD*, approximately 10 *Frye* hearings on various diagnoses have been held across the state. Many diagnoses attributed to respondents by State's experts have been found *not* to satisfy the *Frye* standard.

- *Frye* hearing should encompass these questions:

    - Is the diagnosis generally accepted in the relevant scientific community?

        - What is the relevant scientific community in this case? *See, e.g.*, *State v. Ralph P.*, 53 Misc.3d 496 (Sup. Ct. New York County) (finding "relevant scientific community" to be those who evaluate and treat sex offenders, not psychiatric community generally).

- Is the methodology utilized by the expert in assigning the diagnosis generally accepted in the relevant scientific community? *Parker v. Mobil Oil*, 7 N.Y.3d 434 (2006); *Cornell v. 360 West 51st St Realty*, 22 N.Y.3d 762 (2014); *Sean R. v. BMW*, 26 N.Y.3d 801 (2016).

I. Trial Issues:

1. Procedures

- Trials are generally conducted by the same court that conducted the PC hearing.

- Trial is supposed be held within 60 days of probable cause hearing. MHL§ 10.07 (a). Statute allows time frame to be extended by court with the respondent's consent. MHL § 10.08 (f).

- Trial is by jury unless jury is waived by the offender. § 10.06 (d). Although Article 10 trials are civil, the jury consists of 12 members. 10.07 (b), CPL 270.05. Each side has 10 peremptory challenges for regular jurors and 2 for alternates. 10.07 (b). Error in refusing to discharge juror may require new trial. *State v. Kalchthaler*, 82 A.D.3d 1672 (4th Dep't 2011).

- Discharge of prospective jurors outside presence of trial court implicates fundamental right to a jury trial and need not be preserved for appeal. *State v. Muench*, 68 A.D.3d 1677 (4th Dep't 2009) (remitting for reconstruction hearing to determine whether potential jurors were discharged pursuant to improper procedures). But discharge of juror outside presence of respondent is not error. *State v. Adkison*, 108 A.D.3d 1050, 1053 (4th Dep't 2013).

- Jury must determine whether offender is a "detained sex offender" who suffers from a "mental abnormality." § 10.07 (d). Jury does NOT determine whether offender is a "dangerous sex offender requiring confinement."

- Respondent's commission of the sex offense is "deemed established" and cannot be re-litigated. § 10.07 (c). Exceptions: in the case of CPL 730 defendants, jury must also determine whether respondent "did engage in the conduct constituting the [charged] offense." § 10.07 (d). In the case of alleged "sexual motivation" convictions that occurred before the Act's effective date, jury must also determine whether the offense was sexually motivated. § 10.07 (c).

- AG bears burden of proof by clear and convincing evidence. MHL § 10.07 (d).

- Jury must reach a unanimous verdict. § 10.07 (d). If jury cannot reach a unanimous verdict, a second trial must be held within 60 days. If second jury cannot reach a unanimous verdict, petition is dismissed. § 10.07 (e).

2. Evidence:

- CPLR generally governs (§10.07 (c), CPLR Art. 45)

- Psychiatric reports CANNOT be admitted unless preparer testifies, or there is a showing of unavailability or other good cause. § 10.08 (g).

- Any statements made by respondent in a psychiatric exam conducted under Art. 10 are admissible in Art. 10 proceedings. § 10.08 (a). - Degree of respondent's cooperation with psychiatric exams is also admissible evidence. § 10.07 (c).

- Hearsay information that serves as a basis for an expert's opinion may be discussed by experts only if the court finds that the hearsay allegations are supported by evidence of reliability and that the probative value significantly outweighs the prejudicial impact. Hearsay evidence regarding crimes for which respondent was acquitted or never indicted cannot be testified to by the experts, unless there is an independent basis for establishing reliability. *State v. Floyd Y.*, 22 N.Y.3d 95 (2013). Crimes for which respondent was

indicted but never prosecuted are a closer call and should be determined case-by-case. *Id.*

- Note that the fact that allegations are recorded in a presentence report does not constitute indicia of reliability. *State v. John S.*, 23 N.Y.3d 326, 347 (2014).

- All trial testimony or plea minutes from underlying criminal proceeding are admissible. § 10.08 (g).

- Respondent cannot call victim of sex offense as a witness except with good cause, upon court order. §10.08 (g). But State may call victim as witness. *State v. Shawn X.*, 69 A.D.3d 165 (3rd Dep't 2009).

- Respondent has the right to testify at trial, MHL 10.08 (g), but cannot be called to testify against himself if he does not wish to testify. *State v. Suggs*, 31 Misc.3d 1009 (Sup Ct. New York County 2011).

- Respondent also has the right to call other witnesses or present other evidence on his own behalf. MHL 10.08 (g); *State v. Enrique D.*, 22 N.Y.3d 941 (2013).

J. Dispositional Hearing:

After jury decides that offender suffers from a mental abnormality, the judge will decide if offender is a "dangerous sex offender requiring confinement" or a "sex offender requiring strict and intensive supervision and treatment" [SIST].

- "Dangerous sex offender requiring commitment" = 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." §10.03 (e) (emphasis added). "Sex offender requiring strict and intensive supervision" = detained sex offender suffering from a mental

abnormality "but is not a dangerous sex offender requiring commitment." § 10.03 (r).

- "The statute . . . clearly envisages a distinction between sex offenders who have difficulty controlling their sexual conduct and those who are unable to control it. The former are to be supervised and treated as 'outpatients' and only the latter may be confined." *State v. Michael M.*, 24 N.Y.3d 649 (2014).

- In making determination of SIST or confinement, the judge is required to "consider the conditions that would be imposed upon the respondent if subject to a regimen of strict and intensive supervision, and all available information about prospects for the respondent's possible re-entry into the community." § 10.07 (f).

- Court must make finding by clear and convincing evidence. Parties may offer additional evidence and/or argument on this issue. § 10.07 (f). A jury's finding of "mental abnormality" does not mandate a finding of "dangerous sex offender requiring confinement." *State v. Flagg*, 71 A.D.3d 1528 (4th Dep't 2010).

- No constitutional right to a jury determination on the dispositional question. *State v. Myron P.*, 20 N.Y.3d 206 (2012).

- If confinement is ordered, respondent is entitled to annual psychiatric and judicial review of whether he continues to have a mental abnormality and/or to need confinement. MHL § 10.09.

K. Strict and Intensive Supervision- Further Proceedings:

If the court finds that the offender is a "sex offender requiring strict and intensive supervision" rather than a "dangerous sex offender requiring confinement," an additional hearing on the terms of the strict and intensive supervision is held. § 10.11 (a) (2).

- Dept. of Corrections & Community Supervision (Parole) makes a recommendation of terms of strict and intensive supervision, developed in consultation w/ Office of Mental Health. Recommendation is forwarded to AG & offender & his counsel in advance of the hearing. § 10.11 (a) (1). Parole must ultimately implement the strict and intensive supervision order- § 10.11(c).

- At this hearing, any written reports of psychiatric evaluators are admissible without necessity of their testimony. § 10.08 (g).

- Supervision terms may include: electronic or GPS monitoring; polygraph monitoring; specification of residence or type of residence; prohibition on contact with past or potential victims; supervision by a parole officer; some course of sex offender treatment; etc. § 10.11 (a) (1). It must include at least 6 face-to-face AND 6 collateral contacts with parole officer per month. § 10.11 (b) (1).

- Conditions are so onerous that SIST is "effectively a form of detention." *State v. Enrique T.*, 93 A.D.3d 128 (1st Dep't 2012).

- If offender violates a condition of SIST, he may be brought back into custody for an evaluation of whether he is now a "dangerous sex offender requiring confinement." This involves another psychiatric evaluation and another hearing. MHL § 10.11.

- Conditions of SIST may not include inpatient confinement in another type of facility. *State v. Nelson D.*, 22 N.Y.3d 233 (2013).

- Respondent may petition to be removed from SIST, i.e., done with Article 10—or to modify his SIST conditions- after two years of supervision (and every two years thereafter). MHL § 10.11 (f).

L. Appeals:

Both offender and AG may appeal as of right from any final order entered under Art. 10. In addition, AG–but not offender–may appeal from the probable cause determination. § 10.13 (b).

- Offender who cannot afford counsel is entitled to court-appointed appellate counsel; 18-B counsel is appointed if Mental Hygiene Legal Service cannot accept appointment. § 10.13 (c).

- AG may seek a stay from any order that a person be released. §10.13 (a).

MHL ARTICLE 10 CASES
FOR TRIAL ATTORNEYS

Outline Prepared by:
Jessica M. Botticelli, Esq.

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Article 10 Cases

I. Reviewing an Article 10 Petition:

A. Jurisdiction:

Is this the right county? Does the petition originate in this county? Is client currently being held in this county? Was the crime committed in this county? If crime was not committed in this county, does client want to transfer venue to the location of the conviction? (This must be done in the first 10 days after petition is filed.)

Is this a transfer from another department? Did you get the venue transfer order?

B. Detained Sex Offender:

Is he a detained sex offender in that he is either:

1. Currently serving a sentence for a qualifying sex offense pursuant to MHL10.03(p)?

2. Currently serving a sentence for a designated felony pursuant to MHL10.03(f)? If this is a sexual motivation case the conviction must have been before 2007 and for a non-sex offense but there were sexual allegations.

- Was offender re-incarcerated after being released on parole? [If there was a parole release after 2007, then there had to be an earlier review for civil management under Article 10 and therefore a prior MDR/CRT report.]
- Is the underlying offense Persistent Sex Abuse (i.e., 3 misdemeanors in 10 years)?
- Was offender on parole or under OMH/OPWDD supervision when petition was filed?

C. Case Review Team Process:

Is the 10.05 (e) notice signed to indicate service?
What is the date of service in relation to the date of the psychiatric examination?
Is the 10.05 (g) notice complete? Is the "sexual motivation" question answered if required?

D. Psychiatric Examiner's Report:

Informed consent to psychiatric examination - are there any red flags? (Example: Examiner indicates that respondent did not understand questions, appeared confused, or spoke Spanish as his first language, etc.)
What are the diagnoses? See below "Issues to Litigate."
What Actuarial Instruments or other Psychological Tools were used (Static 99R, PCL-R, SVR 20, VRS SO)?
Does the examiner rely on any allegations or arrests that did not result in convictions?

II. Meeting the Client:

Client is usually located in one of three locations:

1. DOCCS
2. OMH Custody at:
   Central New York Psychiatric Center (CNYPC 315-765-3599)
   St. Lawrence Psychiatric Center (SLPC 315-541-2001)
   Manhattan Psychiatric Center (MPC 646-6726414)
3. Riker's Island or county jail (especially if SORA proceeding is in progress). Client may be transferred to Riker's or a local county jail a few days ahead of the first court appearance.

III. First Appearance in Court:

In the Bronx cases go to one of two Judges: Gross (Pt. 71), or Greenberg (Pt. 21).

In NY County cases go to either the judge who had the underlying criminal matter, if that judge is still on the bench, the judge assigned to the SORA hearing, or Judge Conviser (Pt. 95).

Ask to have name of caption changed to first name and last initial. The AAG usually does not take a position on this oral motion. In some cases, you may want to ask to have the records sealed. These cases often involve psychological records and testimony that is very sensitive.

Was the Probable Cause hearing already done?
If yes, transferring venue should get the minutes and send them to you with the order finding PC. If not, you will set the date for the PC hearing at this appearance. Set a date sufficiently ahead of PC for the discovery to be produced for you to have time to review it as it is often voluminous.

If otherwise eligible for release, PC hearing must be within 72 hours unless that is waived or the hearing is adjourned for good cause. If venue was changed, that is often deemed good cause for the delay. Otherwise, client is released pending PC pursuant to MHL 10.06(h).

IV. Discovery:

Usually produced on disk or by email - usually in pdf form.

Determine if the certification for business records is with the documents it purports to certify. It is often separated so you have no idea what documents are actually certified. Also note that the certification may not apply to every document in the bundle. For instance, a DOCCS certification cannot certify a pre-sentence report even though DOCCS may have provided the PSR to the AAG.

To FOIL or Subpoena documents yourself (or not)? More Information is not always better for your client. If you get records you are under no obligation to turn them over to the AAG unless you give them to your doctor for review.

If you FOIL/Subpoena DOCCS or OMH, they routinely contact the AAG and send the records to them. AAGs oppose most subpoenas that need to be signed by the judge.

You may want to look at court file on underlying case and at sealed cases which AAG may apply to have unsealed. This should be opposed. See Floyd Y. (COA 2013). There is an argument to be made that sealed cases, especially acquittals, should not be unsealed as the evidence is not reliable for introduction at trial. The statute says that state agencies can be ordered to unseal records. It does not say anything about county or city agencies although most judges will unseal non-state agency (DA or Police) records anyway.

RAP sheets - you will get a number of different copies. Make sure you look at all of them, because some have sealed information on them and others do not. It depends on which agency ordered it.

V. Before PC Hearing:

You need to discuss with your client where he wants to stay after Probable Cause is found.

A. DOCCS:

Upstate - Consent Form from DOCCS needs to be signed. Does your client want to come to court or waive appearances on subsequent Court dates?

Riker's - For clients going to court in NYC this may be a possibility depending on the Judge, some of whom will sign an order holding client at Riker's pending the trial pursuant to Correction Law 500-a(1)(f). The consent form from DOCCS still needs to be signed as technically the client is in DOCCS custody.

B. Local Correctional Facility:

Court can order client held at local jail during any article 10 proceeding under Correction Law 500-a(1)(f).

C. Secure Treatment Facility:

1. Central New York Psychiatric Center in Marcy, NY
   Most clients are held here especially clients with a diagnosis of Anti-Social Personality Disorder or Psychopathy. This facility is 4 hours from NYC and clients are shackled hands and feet with belt chain and black box for the entire trip to court and back and the only time they would be unshackled is in front of the judge and then only if the judge orders it (which some will not).

2. St. Lawrence Psychiatric Center in Ogdensburg, NY
   Most of the clients here are diagnosed with a severe mental illness or a developmental delay or disability.
   Clients who choose to come to court from SLPC may be transferred to MPC or Riker's some days ahead of the court appearance. They are more likely to go to MPC if they have some kind of mental illness. This facility is at least 8 hours from NYC.

3. Manhattan Psychiatric Center on Ward's Island, NY
   Not many clients are housed here. We cannot request it and the Judge cannot order it so tell your client it is not likely to happen.

CNYPC and SLPC both have the capability of doing court appearances by video. Your client can appear in this manner if he so chooses.

If your client is going to the STF, discuss with him what he should and should not say during sex offender treatment. Discuss the limits of confidentiality and that all of what he says there will be written down and used against him at the trial. He should not talk about any crimes for which he was not convicted as they become admissions during your trial. He should not discuss any victims that they don't already know about.

If client does not participate in sex offender treatment they will not earn privileges like the right to work and earn money. This will also generate notations in the records of their failure to participate which can be detrimental at trial.

VI. PC Hearing:

Explain to client that you will not win this hearing. There is a very low burden of proof and at this early stage the Judge is NOT going to find "no probable cause."

Use the hearing like a deposition. Why doctor used a specific diagnosis? How they defined that diagnosis. What they relied on to form an opinion. For example, if there are dismissed cases or acquittals - how much weight did they give those cases?

You could also waive it. There are some reasons to waive, for example if client wants to get out of DOCCS faster (Client cannot be transferred to a STF until after PC).

VII. Issues to Think About Litigating:

A. Diagnosis

What is sufficient? And what is generally accepted under a Frye analysis?

1. Anti-Social Personality Disorder with no other diagnosis is not enough for a mental abnormality. See Donald DD (COA 2014)

2. Other Specified Paraphilic Disorder (OSPD) (previously Paraphilia, Not Otherwise Specified (NOS)) with nearly any specifier.
   "non-consent" aka "paraphilic coercive disorder" aka "biastophilia"
   "hebephilia"
   "Gerontophilia"

3. Unspecified Paraphilic Disorder

4. Frotteuristic Disorder/Exhibitionistic Disorder - both of which tend to result in misdemeanor convictions unless client is able to be charged with Persistent Sex Abuse.

5. Psychopathy and/or use of the PCL-R.

6. Sexual Preoccupation aka Hyper-sexuality as a diagnosis sometime diagnosed under OSPD or Other Specified Conduct and Impulse Control Disorders.

B. **Proof of Sexual Motivation** for those client's not convicted of a sex offense before 2007.

C. **Proof of Serious Difficulty**.

VIII. Picking an Expert Witness:

Ask the doctor for a preliminary opinion based on the petition and CRT doctor's report before having them appointed by the court. Most doctors will give a preliminary opinion based on the petition. You only get one doctor and they are required to give a report to the court once you have them appointed.

If they find against you, the AAG could try and call them to testify against your client

You must advise client about speaking to your expert and the expert for the AAG. Client does not have to speak to AAG's expert however the jury will be told that client refused the interview. MHL 10.07(c).

IX. Trials:

A. Jury Trial v. Non-Jury Trial:

This is your client's right to decide.

Bench trial? There may be a legal issue that a jury might not understand.

Jury trial? There are more opportunities to convince someone that there is no mental abnormality. Two hung juries means the petition is dismissed. Clients sometimes are embarrassed about their crimes and don't want a jury to hear the crime details. This is not a great reason to waive a jury.

B. Client Testifying:

This is often not a good idea. The AAG uses it as an opportunity to go over the sex offenses yet another time. Also client cannot really contribute to the discussion of whether he has a mental abnormality. It does not help if they deny committing their crimes.

If client does testify, it helps if they can show remorse. It helps if they have done some sex offender treatment and can demonstrate a working knowledge of the program terms and concepts.

X. Waiving Trial in Exchange for Strict and Intensive Supervision and Treatment:

Client may request to waive trial and get SIST. You should insist on having the SIST investigation done before waiving the Mental Abnormality trial. If the client is not accepted by parole and OMH for SIST then you have not waived your client's right to contest mental

abnormality.

SIST is not usually offered. Most investigations come back rejecting SIST as a possibility. The AAGs do not consent to SIST - at best they will not oppose it if the report done by DOCCS (parole) and OMH agree to it.

To get SIST the client must consent to a SIST investigation/report being done and then the Judge must order DOCCS and OMH to do the investigation.

It is recommended that you do NOT use the consent and order supplied by the AAG. It does not limit how the information learned during the investigation can be used. It is suggested that a limitation be placed in the consent and order saying the information cannot be used against your client at trial or disposition. Some AAGs object to this.

The consent and order say that the report will be given in whole to the AAG and the Court and that you and the client will only get the "non-confidential portions" of the report. It is recommended that you also change this part of the consent and order to read that you get the report in its entirety. The section that is labeled "confidential" is the part that says why SIST is being denied. The failure to provide this section would result in an ex parte communication with the court such that if the AAG wants to prevent you from seeing that part, they should be required to file for a protective order.

XI. Dispositional Hearing:

If Jury or Judge finds client has a mental abnormality, then the judge alone will determine if client is a dangerous sex offender requiring confinement.

This hearing is held after the trial and incorporates all testimony from the trial. If client is confined they will be sent to a STF at either CNYPC or SLPC. They will then be entitled to annual reviews to determine if they should be released on to SIST.

XII. Strict and Intensive Supervision and Treatment:

SIST is for 2 years. At the end of that 2 years, the client can petition to have SIST terminated or to have certain conditions removed or amended.

While on SIST clients will have almost 70 conditions that will have to follow. Those conditions include: wearing a GPS ankle bracelet (which needs to be charged twice a day); a very early curfew (often 7 p.m.); no driving or riding in cars; no entering parks, shopping malls, or other places where children may be; no living within a certain distance of parks or schools; attend sex offender treatment minimum twice weekly; attend other programming as required (drug or alcohol treatment, anger management etc.); no possessing a computer; no using the internet; and many others.

Most clients violate SIST in some way usually with a technical violation. Very few have committed a new sex offense although some have committed new non-sexual crimes.

McKinney's Consolidated Laws of New York Annotated
Mental Hygiene Law
Chapter 27. Of the Consolidated Laws
Title B. Mental Health Act
Article 10. Sex Offenders Requiring Civil Commitment or Supervision

McKinney's Mental Hygiene Law Ch. 27, T. B, Art. 10, Refs & Annos
Currentness

McKinney's Mental Hygiene Law Ch. 27, T. B, Art. 10, Refs & Annos, NY MENT HYG Ch. 27, T. B, Art. 10, Refs & Annos
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McKinney's Consolidated Laws of New York Annotated
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Title B. Mental Health Act
Article 10. Sex Offenders Requiring Civil Commitment or Supervision (Refs & Annos)

McKinney's Mental Hygiene Law § 10.01

§ 10.01 Legislative findings

Effective: April 13, 2007
Currentness

The legislature finds as follows:

(a) That recidivistic sex offenders pose a danger to society that should be addressed through comprehensive programs of treatment and management. Civil and criminal processes have distinct but overlapping goals, and both should be part of an integrated approach that is based on evolving scientific understanding, flexible enough to respond to current needs of individual offenders, and sufficient to provide meaningful treatment and to protect the public.

(b) That some sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses. These offenders may require long-term specialized treatment modalities to address their risk to reoffend. They should receive such treatment while they are incarcerated as a result of the criminal process, and should continue to receive treatment when that incarceration comes to an end. In extreme cases, confinement of the most dangerous offenders will need to be extended by civil process in order to provide them such treatment and to protect the public from their recidivistic conduct.

(c) That for other sex offenders, it can be effective and appropriate to provide treatment in a regimen of strict and intensive outpatient supervision. Accordingly, civil commitment should be only one element in a range of responses to the need for treatment of sex offenders. The goal of a comprehensive system should be to protect the public, reduce recidivism, and ensure offenders have access to proper treatment.

(d) That some of the goals of civil commitment - protection of society, supervision of offenders, and management of their behavior - are appropriate goals of the criminal process as well. For some recidivistic sex offenders, appropriate criminal sentences, including long-term post-release supervision, may be the most appropriate way to achieve those goals.

(e) That the system for responding to recidivistic sex offenders with civil measures must be designed for treatment and protection. It should be based on the most accurate scientific understanding available, including the use of current, validated risk assessment instruments. Ideally, effective risk assessment should begin to occur prior to sentencing in the criminal process, and it should guide the process of civil commitment.

(f) That the system should offer meaningful forms of treatment to sex offenders in all criminal and civil phases, including during incarceration, civil commitment, and outpatient supervision.

(g) That sex offenders in need of civil commitment are a different population from traditional mental health patients, who have different treatment needs and particular vulnerabilities. Accordingly, civil commitment of sex offenders should be implemented in ways that do not endanger, stigmatize, or divert needed treatment resources away from such traditional mental health patients.

Credits

(Added L.2007, c. 7, § 2, eff. April 13, 2007.)

Notes of Decisions (39)

McKinney's Mental Hygiene Law § 10.01, NY MENT HYG § 10.01
Current through L.2016, chapters 1 to 328.

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McKinney's Mental Hygiene Law § 10.03

§ 10.03 Definitions

Effective: January 19, 2016
Currentness

As used in this article, the following terms shall have the following meanings:

(a) "Agency with jurisdiction" as to a person means that agency which, during the period in question, would be the agency responsible for supervising or releasing such person, and can include the department of corrections and community supervision, the office of mental health, and the office for people with developmental disabilities.

(b) "Commissioner" means the commissioner of mental health or the commissioner of developmental disabilities.

(c) "Correctional facility" means a correctional facility as that term is defined in section two of the correction law.

(d) "Counsel for respondent" means any counsel that has been retained or appointed for respondent, or if no other counsel has been retained or appointed, or prior counsel cannot be located with reasonable efforts, then the mental hygiene legal service.

(e) "Dangerous sex offender requiring confinement" means a person who is 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.

(f) "Designated felony" means any felony offense defined by any of the following provisions of the penal law: assault in the second degree as defined in section 120.05, assault in the first degree as defined in section 120.10, gang assault in the second degree as defined in section 120.06, gang assault in the first degree as defined in section 120.07, stalking in the first degree as defined in section 120.60, strangulation in the second degree as defined in section 121.12, strangulation in the first degree as defined in section 121.13, manslaughter in the second degree as defined in subdivision one of section 125.15, manslaughter in the first degree as defined in section 125.20, murder in the second degree as defined in section 125.25, aggravated murder as defined in section 125.26, murder in the first degree as defined in section 125.27, kidnapping in the second degree as defined in section 135.20, kidnapping in the first degree as defined in section 135.25, burglary in the third degree as defined in section 140.20, burglary in the second degree as defined in section 140.25, burglary in the first

degree as defined in section 140.30, arson in the second degree as defined in section 150.15, arson in the first degree as defined in section 150.20, robbery in the third degree as defined in section 160.05, robbery in the second degree as defined in section 160.10, robbery in the first degree as defined in section 160.15, promoting prostitution in the second degree as defined in section 230.30, promoting prostitution in the first degree as defined in section 230.32, compelling prostitution as defined in section 230.33, disseminating indecent material to minors in the first degree as defined in section 235.22, use of a child in a sexual performance as defined in section 263.05, promoting an obscene sexual performance by a child as defined in section 263.10, promoting a sexual performance by a child as defined in section 263.15, or any felony attempt or conspiracy to commit any of the foregoing offenses.

(g) "Detained sex offender" means a person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony, in that the person is either:

(1) A person who stands convicted of a sex offense as defined in subdivision (p) of this section, and is currently serving a sentence for, or subject to supervision by the division of parole, whether on parole or on post-release supervision, for such offense or for a related offense;

(2) A person charged with a sex offense who has been determined to be an incapacitated person with respect to that offense and has been committed pursuant to article seven hundred thirty of the criminal procedure law, but did engage in the conduct constituting such offense;

(3) A person charged with a sex offense who has been found not responsible by reason of mental disease or defect for the commission of that offense;

(4) A person who stands convicted of a designated felony that was sexually motivated and committed prior to the effective date of this article;

(5) A person convicted of a sex offense who is, or was at any time after September first, two thousand five, a patient in a hospital operated by the office of mental health, and who was admitted directly to such facility pursuant to article nine of this title or section four hundred two of the correction law upon release or conditional release from a correctional facility, provided that the provisions of this article shall not be deemed to shorten or lengthen the time for which such person may be held pursuant to such article or section respectively; or

(6) A person who has been determined to be a sex offender requiring civil management pursuant to this article.

(h) "Licensed psychologist" means a person who is registered as a psychologist under article one hundred fifty-three of the education law.

(i) "Mental abnormality" means 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.

(j) "Psychiatric examiner" means a qualified psychiatrist or a licensed psychologist who has been designated to examine a person pursuant to this article; such designee may, but need not, be an employee of the office of mental health or the office for people with developmental disabilities.

(k) "Qualified psychiatrist" means a physician licensed to practice medicine in New York state who: (1) is a diplomate of the American board of psychiatry and neurology or is eligible to be certified by that board; or (2) is certified by the American osteopathic board of neurology and psychiatry or is eligible to be certified by that board.

(l) "Related offenses" include any offenses that are prosecuted as part of the same criminal action or proceeding, or which are part of the same criminal transaction, or which are the bases of the orders of commitment received by the department of correctional services in connection with an inmate's current term of incarceration.

(m) "Release" and "released" means release, conditional release or discharge from confinement, from community supervision by the department of corrections and community supervision, or from an order of observation, commitment, recommitment or retention.

(n) "Respondent" means a person referred to a case review team for evaluation, a person as to whom a sex offender civil management petition has been recommended by a case review team and not yet filed, or filed by the attorney general and not dismissed, or sustained by procedures under this article.

(o) "Secure treatment facility" means a facility or a portion of a facility, designated by the commissioner, that may include a facility located on the grounds of a correctional facility, that is staffed with personnel from the office of mental health or the office for people with developmental disabilities for the purposes of providing care and treatment to persons confined under this article, and persons defined in paragraph five of subdivision (g) of this section. Personnel from these same agencies may provide security services, provided that such staff are adequately trained in security methods and so equipped as to minimize the risk or danger of escape.

(p) "Sex offense" means an act or acts constituting: (1) any felony defined in article one hundred thirty of the penal law, including a sexually motivated felony; (2) patronizing a person for prostitution in the first degree as defined in section 230.06 of the penal law, aggravated patronizing a minor for prostitution in the first degree as defined in section 230.13 of the penal law, aggravated patronizing a minor for prostitution in the second degree as defined in section 230.12 of the penal law, aggravated patronizing a minor for prostitution in the third degree as defined in section 230.11 of the penal law, incest in the second degree as defined in section 255.26 of the penal law, or incest in the first degree as defined in section 255.27 of the penal law; (3) a felony attempt or conspiracy to commit any of the foregoing offenses set forth in this subdivision; or (4) a designated felony, as defined in subdivision (f) of this section, if sexually motivated and committed prior to the effective date of this article.

(q) "Sex offender requiring civil management" means a detained sex offender who suffers from a mental abnormality. A sex offender requiring civil management can, as determined by procedures set forth in this article, be either (1) a dangerous sex offender requiring confinement or (2) a sex offender requiring strict and intensive supervision.

(r) "Sex offender requiring strict and intensive supervision" means a detained sex offender who suffers from a mental abnormality but is not a dangerous sex offender requiring confinement.

(s) "Sexually motivated" means that the act or acts constituting a designated felony were committed in whole or in substantial part for the purpose of direct sexual gratification of the actor.

Credits

(Added L.2007, c. 7, § 2, eff. April 13, 2007. Amended L.2010, c. 168, § 6, eff. July 13, 2010; L.2010, c. 405, § 10, eff. Nov. 11, 2010; L.2011, c. 62, pt. C, subpt. B, § 118-a, eff. March 31, 2011; L.2015, c. 368, § 34, eff. Jan. 19, 2016.)

Notes of Decisions (180)

McKinney's Mental Hygiene Law § 10.03, NY MENT HYG § 10.03
Current through L.2016, chapters 1 to 328.

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McKinney's Mental Hygiene Law § 10.05

§ 10.05 Notice and case review

Effective: August 31, 2012
Currentness

(a) The commissioner of mental health, in consultation with the commissioner of the department of corrections and community supervision and the commissioner of developmental disabilities, shall establish a case review panel consisting of at least fifteen members, any three of whom may sit as a team to review a particular case. At least two members of each team shall be professionals in the field of mental health or the field of developmental disabilities, as appropriate, with experience in the treatment, diagnosis, risk assessment or management of sex offenders. To the extent practicable, the workload of the case review panel should be evenly distributed among its members. Members of the case review panel and psychiatric examiners should be free to exercise independent professional judgment without pressure or retaliation for the exercise of that judgment from any source.

(b) When it appears to an agency with jurisdiction that a person who may be a detained sex offender is nearing an anticipated release from confinement, the agency shall give notice of that fact to the attorney general and to the commissioner of mental health. When it appears to the department of corrections and community supervision that a person who may be a detained sex offender is nearing an anticipated release from community supervision, the agency may give such notice. The agency with jurisdiction shall seek to give such notice at least one hundred twenty days prior to the person's anticipated release, but failure to give notice within such time period shall not affect the validity of such notice or any subsequent action, including the filing of a sex offender civil management petition.

(c) The notice to the attorney general and the commissioner of mental health shall, to the extent possible, contain the following:

(1) The person's name, aliases, and other identifying information such as date of birth, sex, physical characteristics, and anticipated future residence;

(2) A photograph and a set of fingerprints;

(3) A description of the act or acts that constitute the sex offense and a description of the person's criminal history, including the person's most recent sentence and any supervisory terms that it includes;

(4) The presentence reports prepared pursuant to article three hundred ninety of the criminal procedure law and other available materials concerning the person's sex offense; and

(5) A description of the person's institutional history, including his or her participation in any sex offender treatment program; and

(6) Records of parole release interviews prepared pursuant to subparagraph (ii) of paragraph (a) of subdivision six of section two hundred fifty-nine-i of the executive law.

(d) The commissioner shall be authorized to designate multidisciplinary staff, including clinical and other professional personnel, to provide a preliminary review of the need for detained sex offenders to be evaluated under the procedures of this section. When the commissioner receives notice pursuant to subdivision (b) of this section, such staff shall review and assess relevant medical, clinical, criminal, and institutional records, actuarial risk assessment instruments and other records and reports, including records of parole release interviews where applicable, and records and reports provided by the district attorney of the county where the person was convicted, or in the case of persons determined to be incapacitated or not responsible by reason of mental disease or defect, the county where the person was charged. Upon such review and assessment, the staff shall determine whether the person who is the subject of the notice should be referred to a case review team for evaluation.

(e) If the person is referred to a case review team for evaluation, notice of such referral shall be provided to the respondent. Upon such referral, the case review team shall review relevant records, including those described in subdivisions (c) and (d) of this section, and may arrange for a psychiatric examination of the respondent. Based on the review and assessment of such information, the case review team shall consider whether the respondent is a sex offender requiring civil management.

(f) If the case review team determines that the respondent is not a sex offender requiring civil management, it shall so notify the respondent and the attorney general, and the attorney general shall not file a sex offender civil management petition.

(g) If the case review team finds that the respondent is a sex offender requiring civil management, it shall so notify the respondent and the attorney general, in writing. The written notice must be accompanied by a written report from a psychiatric examiner that includes a finding as to whether the respondent has a mental abnormality. Where the notice indicates that a respondent stands convicted of or was charged with a designated felony, it shall also include the case review team's finding as to whether the act was sexually motivated. The case review team shall provide its written notice to the attorney general and the respondent within forty-five days of the commissioner receiving the notice of anticipated release. However, failure to do so within that time period shall not affect the validity of such notice or finding or any subsequent action, including the attorney general's filing of a sex offender civil management petition subsequent to receiving the finding of the case review team.

Credits

(Added L.2007, c. 7, § 2, eff. April 13, 2007. Amended L.2010, c. 168, § 7, eff. July 13, 2010; L.2011, c. 62, pt. C, subpt. B, § 118-b, eff. March 31, 2011; L.2012, c. 363, §§ 2, 3, eff. Aug. 31, 2012.)

Notes of Decisions (22)

McKinney's Mental Hygiene Law § 10.05, NY MENT HYG § 10.05
Current through L.2016, chapters 1 to 328.

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McKinney's Mental Hygiene Law § 10.06

§ 10.06 Petition and hearing

Effective: March 30, 2012
Currentness

(a) If the case review team finds that a respondent is a sex offender requiring civil management, then the attorney general may file a sex offender civil management petition in the supreme court or county court of the county where the respondent is located. In determining whether to file such a petition, the attorney general shall consider information about any continuing supervision to which the respondent will be subject as a result of criminal conviction, and shall take such supervision into account when assessing the need for further management as provided by this article. If the attorney general elects to file a sex offender civil management petition, he or she shall serve a copy of the petition upon the respondent. The petition shall contain a statement or statements alleging facts of an evidentiary character tending to support the allegation that the respondent is a sex offender requiring civil management. The attorney general shall seek to file the petition within thirty days after receiving notice of the case review team's finding, but failure to do so within that period shall not affect the validity of the petition.

(b) Within ten days after the attorney general files a sex offender civil management petition, the respondent may file in the same court a notice of removal to the county of the underlying criminal sex offense charges. The attorney general may, in the court in which the petition is pending, move for a retention of venue. Such motion shall be made within five days after the attorney general is served with a notice of removal, which time may be extended for good cause shown. The court shall grant the motion if the attorney general shows good cause for such retention. If the attorney general does not timely move for a retention of venue, or does so move and the motion is denied, then the proceedings shall be transferred to the county of the underlying criminal sex offense charges. If the respondent does not timely file a notice of removal, or the attorney general moves for retention of venue and such motion is granted, then the proceedings shall continue where the petition was filed.

(c) Promptly upon the filing of a sex offender civil management petition, or upon a request to the court by the attorney general for an order pursuant to subdivision (d) of this section that a respondent submit to an evaluation by a psychiatric examiner, whichever occurs earlier, the court shall appoint counsel in any case where the respondent is financially unable to obtain counsel. The court shall appoint the mental hygiene legal service if possible. In the event that the court determines that the mental hygiene legal service cannot accept appointment, the court shall appoint an attorney eligible for appointment pursuant to article eighteen-B of the county law, or an entity, if any, that has contracted for the delivery of legal representation services under subdivision (c) of section 10.15 of this article. Counsel for the respondent shall be provided with copies of the written notice made by the case review team, the petition and the written reports of the psychiatric examiners.

(d) At any time after receiving notice pursuant to subdivision (b) of section 10.05 of this article, and prior to trial, the attorney general may request the court in which the sex offender civil management petition could be filed, or is pending, to order the respondent to submit to an evaluation by a psychiatric examiner. Upon such a request, the court shall order that the respondent submit to an evaluation by a psychiatric examiner chosen by the attorney general and, if the respondent is not represented by counsel, the court shall appoint counsel for the respondent. Following the evaluation, such psychiatric examiner shall report his or her findings in writing to the attorney general, to counsel for the respondent, and to the court.

(e) At any time after the filing of a sex offender civil management petition, and prior to trial, the respondent may request the court in which the petition is pending to order that he or she be evaluated by a psychiatric examiner. Upon such a request, the court shall order an evaluation by a psychiatric examiner. If the respondent is financially unable to obtain an examiner, the court shall appoint an examiner of the respondent's choice to be paid within the limits prescribed by law. Following the 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.

(f) Notwithstanding any other provision of this article, if it appears that the respondent may be released prior to the time the case review team makes a determination, and the attorney general determines that the protection of public safety so requires, the attorney general may file a securing petition at any time after receipt of written notice pursuant to subdivision (b) of section 10.05 of this article. In such circumstance, there shall be no probable cause hearing until such time as the case review team may find that the respondent is a sex offender requiring civil management. If the case review team determines that the respondent is not a sex offender requiring civil management, the attorney general shall so advise the court and the securing petition shall be dismissed.

(g) Within thirty days after the sex offender civil management petition is filed, or within such longer period as to which the respondent may consent, the supreme court or county court before which the petition is pending shall conduct a hearing without a jury to determine whether there is probable cause to believe that the respondent is a sex offender requiring civil management.

(h) If the respondent was released subsequent to notice under subdivision (b) of section 10.05 of this article, and is therefore at liberty when the petition is filed, the court shall order the respondent's return to confinement, observation, commitment, recommitment or retention, as applicable, for purposes of the probable cause hearing. When a court issues such an order, the hearing shall commence no later than seventy-two hours from the date of the respondent's return. If the respondent is not at liberty when the petition is filed, but becomes eligible to be released prior to the probable cause hearing, the court shall order the stay of such release pending the probable cause hearing. When a court issues such an order, the hearing shall commence no later than seventy-two hours from the date of the respondent's anticipated release date. In either case, the release of the respondent shall be in accordance with other provisions of law if the hearing does not commence within such period of seventy-two hours, unless: (i) the failure to commence the hearing was due to the respondent's request, action or condition, or occurred with his or her consent; or (ii) the court is satisfied that the attorney general has shown good cause why the hearing could not so commence. Any failure to commence the probable cause hearing within the time periods specified shall not result in the dismissal of the petition and shall not affect the validity of the hearing or the probable cause determination.

(i) The provisions of subdivision (g) of section 10.08 of this article shall be applicable to the hearing. The hearing should be completed in one session but, in the interest of justice, may be adjourned by the court.

(j) The respondent's commission of a sex offense shall be deemed established and shall not be relitigated at the probable cause hearing, whenever it appears that: (i) the respondent stands convicted of such offense; (ii) the respondent previously has been found not responsible by reason of mental disease or defect for the commission of such offense or for an act or acts constituting such offense; or (iii) the respondent was indicted for such offense by a grand jury but found to be incompetent to stand trial for such offense. Whenever the petition alleges the respondent's commission of a designated felony prior to the effective date of this article, the issue of whether there is probable cause to believe that the commission of such offense was sexually motivated shall be determined by the court.

(k) At the conclusion of the hearing, the court shall determine whether there is probable cause to believe that the respondent is a sex offender requiring civil management. If the court determines that probable cause has not been established, the court shall issue an order dismissing the petition, and the respondent's release shall be in accordance with other applicable provisions of law. If the court determines that probable cause has been established: (i) the court shall order that the respondent be committed to a secure treatment facility designated by the commissioner for care, treatment and control upon his or her release, provided, however, that a respondent who otherwise would be required to be transferred to a secure treatment facility may, upon a written consent signed by the respondent and his or her counsel, consent to remain in the custody of the department of corrections and community supervision pending the outcome of the proceedings under this article, and that such consent may be revoked in writing at any time; (ii) the court shall set a date for trial in accordance with subdivision (a) of section 10.07 of this article; and (iii) the respondent shall not be released pending the completion of such trial.

(l)(1) If a respondent who is transferred to a secure treatment facility pursuant to subdivision (k) of this section, has not yet reached his or her maximum expiration date on the underlying determinate or indeterminate sentence of imprisonment, is significantly disruptive of the treatment program at such secure treatment facility, the person in charge of treatment programs at such facility may initiate a proceeding to obtain an order that the respondent shall be transferred to the custody of the department of corrections and community supervision for such conduct.

(2) Such a proceeding shall be initiated by a written notice served upon the respondent, and provided by mail to his or her counsel (or by electronic mail or facsimile to a destination identified by such counsel for such purpose). Such notice shall identify in detail the dates, times and nature of the alleged misconduct pursuant to paragraph one of this subdivision, the possible sanctions, and the date, time and location of the hearing.

(3) A hearing on the allegations shall be held no less than ten days nor more than sixty days after such notice is served on the respondent and provided to his or her counsel. The hearing shall be conducted by the director of the secure treatment facility, or his or her designee. The respondent may be represented by counsel. Evidence shall be introduced through witnesses and documents, if any, and both the person in charge of the treatment program presenting the case and the respondent may call and cross-examine witnesses and present documentary evidence relevant to the question of whether the respondent has been significantly disruptive of the treatment program. The presiding officer may accept such evidence without applying formal state or federal rules of evidence. The hearing shall be recorded or a stenographic record of the proceeding shall be kept. When hearing the matter and, if the allegations are sustained, the presiding officer shall consider the respondent's mental health condition and its effect, if any, on his or her conduct.

(4) At the conclusion of the hearing, if the presiding officer is satisfied that there is a preponderance of evidence that the respondent has been significantly disruptive of the treatment program at the secure treatment facility, the presiding officer shall so find. In such event, the presiding officer may order the respondent's transfer back to the custody of the department of corrections and community supervision for a period of up to six months, provided however, that when

such respondent reaches the maximum expiration date of his or her underlying sentence he or she shall be returned to a secure treatment facility unless he or she consents in writing as provided in subdivision (k) of this section to remaining in the custody of the department of corrections and community supervision and provided further that he or she shall be returned to a secure treatment facility if the final order issued pursuant to subdivision (f) of section 10.07 of this article requires placement in a secure treatment facility.

(5) At the conclusion of the hearing, the presiding officer shall prepare a written statement, to be made available to the respondent and his or her counsel, indicating the evidence relied on, the reasons for the determination and specifying the procedures and time frame for administrative appeal to the commissioner. The determination may be appealed to the commissioner in accordance with procedures established in writing by the department. The respondent shall be given at least ten days after notice of the determination has been served and the transcript or recording of the proceeding (with appropriate access equipment) has been provided to perfect the appeal. The respondent may be represented by counsel on the administrative appeal.

Credits

(Added L.2007, c. 7, § 2, eff. April 13, 2007. Amended L.2009, c. 58, pt. H, § 1, eff. April 7, 2009, deemed eff. April 1, 2009; L.2011, c. 62, pt. C, subpt. B, § 118-c, eff. March 31, 2011; L.2012, c. 56, pt. P, § 1, eff. March 30, 2012.)

Notes of Decisions (77)

McKinney's Mental Hygiene Law § 10.06, NY MENT HYG § 10.06
Current through L.2016, chapters 1 to 328.

End of Document

McKinney's Consolidated Laws of New York Annotated
Mental Hygiene Law (Refs & Annos)
Chapter 27. Of the Consolidated Laws (Refs & Annos)
Title B. Mental Health Act
Article 10. Sex Offenders Requiring Civil Commitment or Supervision (Refs & Annos)

McKinney's Mental Hygiene Law § 10.07

§ 10.07 Trial

Effective: April 13, 2007
Currentness

(a) Within sixty days after the court determines, pursuant to subdivision (k) of section 10.06 of this article, that there is probable cause to believe that the respondent is a sex offender requiring civil management, the court shall conduct a jury trial to determine whether the respondent is a detained sex offender who suffers from a mental abnormality. The trial shall be held before the same court that conducted the probable cause hearing unless either the attorney general or counsel for the respondent has moved for a change of venue and the motion has been granted by the court.

(b) The provisions of article forty-one of the civil practice law and rules shall apply to the formation and conduct of jury trial under this section, except that the provisions of the following sections of the criminal procedure law shall govern to the extent that the provisions of article forty-one of the civil practice law and rules are inconsistent therewith: sections 270.05, 270.10, 270.15, 270.20, subdivision one of section 270.25, and subdivision one of section 270.35 (except for the provisions thereof requiring consent for the replacement of a discharged juror with an alternate). Each side shall have ten peremptory challenges for the regular jurors and two for each alternate juror to be selected. The right to a trial by jury may be waived by the respondent, and upon such waiver, the court shall conduct a trial in accordance with article forty-two of the civil practice law and rules, excluding provisions for decision-making by referees.

(c) The provisions of subdivision (g) of section 10.08 of this article and article forty-five of the civil practice law and rules shall be applicable to trials conducted pursuant to this section. The jury may hear evidence of the degree to which the respondent cooperated with the psychiatric examination. If the court finds that the respondent refused to submit to a psychiatric examination pursuant to this article, upon request it shall so instruct the jury. The respondent's commission of a sex offense shall be deemed established and shall not be relitigated at the trial, whenever it is shown that: (i) the respondent stands convicted of such offense; or (ii) the respondent previously has been found not responsible by reason of mental disease or defect for the commission of such offense or for an act or acts constituting such offense. Whenever the petition alleges the respondent's commission of a designated felony prior to the effective date of this article, the issue of whether such offense was sexually motivated shall be determined by the jury.

(d) The jury, or the court if a jury trial is waived, shall determine by clear and convincing evidence whether the respondent is a detained sex offender who suffers from a mental abnormality. The burden of proof shall be on the attorney general. A determination, if made by the jury, must be by unanimous verdict. In charging the jury, the court's instructions shall include the admonishment that the jury may not find solely on the basis of the respondent's commission of a

sex offense that the respondent is a detained sex offender who suffers from a mental abnormality. In the case of a respondent committed pursuant to article seven hundred thirty of the criminal procedure law for a sex offense, the attorney general shall have the burden of proving by clear and convincing evidence that the respondent did engage in the conduct constituting such offense.

(e) If the jury unanimously, or the court if a jury trial is waived, determines that the attorney general has not sustained his or her burden of establishing that the respondent is a detained sex offender who suffers from a mental abnormality, the court shall dismiss the petition and the respondent shall be released if and as warranted by other provisions of law. If the jury is unable to render a unanimous verdict, the court shall continue any commitment order previously issued and schedule a second trial to be held within sixty days in accordance with the provisions of subdivision (a) of this section. If the jury in such second trial is unable to render a unanimous verdict as to whether the respondent is a detained sex offender who suffers from a mental abnormality, the court shall dismiss the petition.

(f) If the jury, or the court if a jury trial is waived, determines that the respondent is a detained sex offender who suffers from a mental abnormality, then the court shall consider whether the respondent is a dangerous sex offender requiring confinement or a sex offender requiring strict and intensive supervision. The parties may offer additional evidence, and the court shall hear argument, as to that issue. If the court finds by clear and convincing evidence that the respondent has a mental abnormality involving such a strong predisposition to commit sex offenses, and such an inability to control behavior, that the respondent is likely to be a danger to others and to commit sex offenses if not confined to a secure treatment facility, then the court shall find the respondent to be a dangerous sex offender requiring confinement. In such case, the respondent shall be committed to a secure treatment facility for care, treatment, and control until such time as he or she no longer requires confinement. If the court does not find that the respondent is a dangerous sex offender requiring confinement, then the court shall make a finding of disposition that the respondent is a sex offender requiring strict and intensive supervision, and the respondent shall be subject to a regimen of strict and intensive supervision and treatment in accordance with section 10.11 of this article. In making a finding of disposition, the court shall consider the conditions that would be imposed upon the respondent if subject to a regimen of strict and intensive supervision, and all available information about the prospects for the respondent's possible re-entry into the community.

Credits

(Added L.2007, c. 7, § 2, eff. April 13, 2007.)

Notes of Decisions (148)

McKinney's Mental Hygiene Law § 10.07, NY MENT HYG § 10.07
Current through L.2016, chapters 1 to 328.

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McKinney's Consolidated Laws of New York Annotated
Mental Hygiene Law (Refs & Annos)
Chapter 27. Of the Consolidated Laws (Refs & Annos)
Title B. Mental Health Act
Article 10. Sex Offenders Requiring Civil Commitment or Supervision (Refs & Annos)

McKinney's Mental Hygiene Law § 10.08

§ 10.08 Procedures under this article

Effective: March 30, 2012
Currentness

(a) When a respondent submits to an examination pursuant to an order issued in accordance with this article, any statement made by the respondent for the purpose of the examination shall be kept confidential in accordance with the provisions of section 33.13 of this chapter and shall be inadmissible in evidence against him or her in any criminal action or proceeding, provided that such statements may be used in proceedings under this article.

(b) A psychiatric examiner chosen by the attorney general shall have reasonable access to the respondent for the purpose of such examination, as well as to the respondent's relevant medical, clinical, criminal or other records and reports. A psychiatric examiner chosen by or appointed on behalf of the respondent shall have reasonable access to the respondent's relevant medical, clinical or criminal records and reports, except that such psychiatric examiner shall not have access without court order and for good cause shown to the name of, address of, or any other identifying information about the victim or victims. To the extent possible, such identifying information should be redacted so as to provide the examiner with access to the balance of the document. In conducting examinations under this article, psychiatric examiners may employ any method that is accepted by the medical profession for the examination of persons alleged to be suffering from a mental disability or mental abnormality.

(c) Notwithstanding any other provision of law, the commissioner, the case review panel and the attorney general shall be entitled to request from any agency, office, department or other entity of the state, and such entity shall be authorized to provide upon such request, any and all records and reports relating to the respondent's commission or alleged commission of a sex offense, the institutional adjustment and any treatment received by such respondent, and any medical, clinical or other information relevant to a determination of whether the respondent is a sex offender requiring civil management. Otherwise confidential materials obtained for purposes of proceedings pursuant to this article shall not be further disseminated or otherwise used except for such purposes. Nothing in this article shall be construed to restrict any right of a respondent to obtain his or her own records pursuant to other provisions of law.

(d) The attorney general shall make records in his or her possession and relevant to the respondent available for inspection or copying by counsel for the respondent for purposes of hearing, trial, and appeal provided, however, that counsel shall not have access to the name of, address of, or any other identifying information about the victim or victims, or to any investigative or other reports that relate to matters beyond the scope of the proceedings and are confidential or privileged from disclosure. To the extent possible, such identifying information should be redacted so as to provide counsel with access to the balance of the document.

(e) At any hearing or trial pursuant to the provisions of this article, the court may change the venue of the trial to any county for good cause, which may include considerations relating to the convenience of the parties or witnesses or the condition of the respondent.

(e-1) Records or reports provided to the respondent in accordance with this article shall be disclosed in the circumstances and in the same manner as records and reports disclosed pursuant to the provisions of section 33.16 of this chapter.

(f) Time periods specified by provisions of this article for actions by state agencies are goals that the agencies shall try to meet, but failure to act within such periods shall not invalidate later agency action except as explicitly provided by the provision in question. The court may extend any time period at the request, or on the consent, of the respondent. No provision of this article shall be interpreted so as to prevent a respondent, after opportunity to consult with counsel for respondent, from consenting to the relief which could be sought by an agency with jurisdiction by means of a court proceeding under this article.

(g) In preparing for or conducting any hearing or trial pursuant to the provisions of this article, and in preparing any petition under the provisions of this article, the respondent shall have the right to have counsel represent him or her, provided that the respondent shall not be entitled to appointment of counsel prior to the time provided in section 10.06 of this article. The attorney general shall represent the state. Any relevant written reports of psychiatric examiners shall be admissible, regardless of whether the author of the report is called to testify, so long as they are certified pursuant to subdivision (c) of rule forty-five hundred eighteen of the civil practice law and rules, in any proceeding or hearing held pursuant to subdivision (g) or (h) of section 10.06 of this article, paragraph two of subdivision (a), or paragraph four of subdivision (d), or subdivision (e), (g) or (h) of section 10.11 of this article. In all other proceedings or hearings held pursuant to this article, such admissibility shall require a showing of the author's unavailability to testify, or other good cause. All plea minutes and prior trial testimony from the underlying criminal proceeding, and records from previous proceedings under this article, shall be admissible. Each witness, whether called by the attorney general or the respondent, must, unless he or she would be authorized to give unsworn evidence at a trial, testify under oath, and may be cross-examined. The respondent may, as a matter of right, testify in his or her own behalf, call and examine other witnesses, and produce other evidence in his or her behalf. The respondent may not, however, cause a subpoena to be served on the person against whom the sex offense was committed or alleged to have been committed by the respondent, except upon order of the court for good cause shown. Either party may request closure of the courtroom, or sealing of papers, for good cause shown.

(h) The procedures and standards set forth in this article governing the imposition of conditions upon the respondent are intended to be the minimum required to provide for the protection of the public and treatment of the respondent. Nothing in this article shall be construed to require the availability or imposition of forms of treatment or supervision other than those for which this article specifically provides.

(i)(1) At a proceeding conducted pursuant to subdivision (g) or (h) of section 10.06 of this article, a psychiatric examiner called to testify may be permitted, upon good cause shown, to testify by electronic appearance in the court by means of an independent audio-visual system, as that phrase is defined in subdivision one of section 182.10 of the criminal procedure law. It shall constitute good cause to permit such an electronic appearance that such proposed witness is currently employed by the state at a secure treatment facility or another work location unless there are compelling circumstances requiring the witness' personal presence at the court proceeding.

(2) A copy of any clinical record or other document that the party calling such psychiatric examiner intends to present to the witness or introduce during the direct testimony of such psychiatric examiner by electronic appearance shall be provided to opposing counsel and, in a manner consistent with section 33.16 of this chapter, the respondent: (i) five days or more before the date such person is called to testify by electronic appearance at a proceeding conducted pursuant to subdivision (g) of section 10.06 of this article, and (ii) twenty-four hours or more before the date such person is called to testify by electronic appearance at a proceeding conducted pursuant to subdivision (h) of such section 10.06.

(3) Except as provided in paragraph four of this subdivision, copies of clinical records and documents not made available to opposing counsel and, where applicable, the respondent as required by paragraph two of this subdivision shall not be permitted to be presented to the witness on direct examination or introduced in evidence without the consent of opposing counsel provided, however, that where good cause is shown why such clinical record or other document was not provided sufficiently in advance as required by this subdivision, the court shall allow such clinical record or other document to be provided by appropriate means, including but not limited to facsimile or electronic means, and then used or considered in the same manner as if timely advance disclosure had been made.

(4) The court shall order that copies of clinical records and other documents relevant for cross-examination, re-direct examination or re-cross examination of such witness testifying by electronic means, not otherwise provided pursuant to this subdivision, be provided to opposing counsel and, in a manner consistent with section 33.16 of this chapter, the respondent, by appropriate means, including but not limited to facsimile or other electronic means.

(5) For purposes of this subdivision, an "electronic appearance" means an appearance at which a participant is not present in the court, but in which all of the participants are able to see and hear the simultaneous reproductions of the voices and images of the judge, counsel, respondent and any other appropriate participant. When a witness makes an electronic appearance pursuant to this subdivision, the court stenographer shall record any statements in the same manner as if the witness had made a personal appearance.

Credits

(Added L.2007, c. 7, § 2, eff. April 13, 2007. Amended L.2012, c. 56, pt. P, § 2, eff. March 30, 2012.)

Notes of Decisions (41)

McKinney's Mental Hygiene Law § 10.08, NY MENT HYG § 10.08
Current through L.2016, chapters 1 to 328.

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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Mental Hygiene Law (Refs & Annos)
Chapter 27. Of the Consolidated Laws (Refs & Annos)
Title B. Mental Health Act
Article 10. Sex Offenders Requiring Civil Commitment or Supervision (Refs & Annos)

McKinney's Mental Hygiene Law § 10.09

§ 10.09 Annual examinations and petitions for discharge

Effective: March 30, 2012
Currentness

(a) The commissioner shall provide the respondent and counsel for respondent with an annual written notice of the right to petition the court for discharge. The notice shall contain a form for the waiver of the right to petition for discharge.

(b) The commissioner shall also assure that each respondent committed under this article shall have an examination for evaluation of his or her mental condition made at least once every year (calculated from the date on which the supreme or county court judge last ordered or confirmed the need for continued confinement pursuant to this article or the date on which the respondent waived the right to petition for discharge pursuant to this section, whichever is later, as applicable) conducted by a psychiatric examiner who shall report to the commissioner his or her written findings as to whether the respondent is currently a dangerous sex offender requiring confinement. At such time, the respondent also shall have the right to be evaluated by an independent psychiatric examiner. If the respondent is financially unable to obtain an examiner, the court shall appoint an examiner of the respondent's choice to be paid within the limits prescribed by law. Following such evaluation, each psychiatric examiner shall report his or her findings in writing to the commissioner and to counsel for respondent. The commissioner shall review relevant records and reports, along with the findings of the psychiatric examiners, and shall make a determination in writing as to whether the respondent is currently a dangerous sex offender requiring confinement.

(c) The commissioner shall annually forward the notice and waiver form, along with a report including the commissioner's written determination and the findings of the psychiatric examination, to the supreme or county court where the respondent is located.

(d) The court shall hold an evidentiary hearing as to retention of the respondent within forty-five days if it appears from one of the annual submissions to the court under subdivision (c) of this section (i) that the respondent has petitioned, or has not affirmatively waived the right to petition, for discharge, or (ii) that even if the respondent has waived the right to petition, and the commissioner has determined that the respondent remains a dangerous sex offender requiring confinement, the court finds on the basis of the materials described in subdivision (b) of this section that there is a substantial issue as to whether the respondent remains a dangerous sex offender requiring confinement. At an evidentiary hearing on that issue under this subdivision, the attorney general shall have the burden of proof.

(e) If, at any time, the commissioner determines that the respondent no longer is a dangerous sex offender requiring confinement, the commissioner shall petition the court for discharge of the respondent or for the imposition of a

regimen of strict and intensive supervision and treatment. The petition shall be served upon the attorney general and the respondent, and filed in the supreme or county court where the person is located. The court, upon review of the petition, shall either order the requested relief or order that an evidentiary hearing be held.

(f) The respondent may at any time petition the court for discharge and/or release to the community under a regimen of strict and intensive supervision and treatment. Upon review of the respondent's petition, other than in connection with annual reviews as described in subdivisions (a), (b) and (d) of this section, the court may order that an evidentiary hearing be held, or may deny an evidentiary hearing and deny the petition upon a finding that the petition is frivolous or does not provide sufficient basis for reexamination prior to the next annual review. If the court orders an evidentiary hearing under this subdivision, the attorney general shall have the burden of proof as to whether the respondent is currently a dangerous sex offender requiring confinement.

(g) In connection with any evidentiary hearing held pursuant to subdivision (d), (e), or (f) of this section, upon the request of either party or upon its own motion, the court may direct the submission of evidence, and may order a psychiatric evaluation if the court finds that any available examination reports are not current or otherwise not sufficient.

(h) At the conclusion of an evidentiary hearing, if the court finds by clear and convincing evidence that the respondent is currently a dangerous sex offender requiring confinement, the court shall continue the respondent's confinement. Otherwise the court, unless it finds that the respondent no longer suffers from a mental abnormality, shall issue an order providing for the discharge of the respondent to a regimen of strict and intensive supervision and treatment pursuant to section 10.11 of this article.

Credits

(Added L.2007, c. 7, § 2, eff. April 13, 2007. Amended L.2012, c. 56, pt. P, § 3, eff. March 30, 2012.)

Notes of Decisions (16)

McKinney's Mental Hygiene Law § 10.09, NY MENT HYG § 10.09
Current through L.2016, chapters 1 to 328.

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McKinney's Consolidated Laws of New York Annotated
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Chapter 27. Of the Consolidated Laws (Refs & Annos)
Title B. Mental Health Act
Article 10. Sex Offenders Requiring Civil Commitment or Supervision (Refs & Annos)

McKinney's Mental Hygiene Law § 10.10

§ 10.10 Treatment and confinement

Effective: March 31, 2011
Currentness

(a) If the respondent is found to be a dangerous sex offender requiring confinement and committed to a secure treatment facility, that facility shall provide care, treatment, and control of the respondent until such time that a court discharges the respondent in accordance with the provisions of this article.

(b) The commissioner shall, for persons committed pursuant to this article, develop and implement a treatment plan in accordance with the provisions of section 29.13 of this chapter. The commissioner shall give due regard to any relevant standards, guidelines, and best practices recommended by the office of sex offender management.

(c) The commissioner, or the commissioner of the department of corrections and community supervision, or other government entity responsible for the care and custody of respondents, shall be authorized to employ appropriate safety and security measures, as he or she deems necessary to ensure the safety of the public, during court proceedings and in the transport of persons committed or undergoing any proceedings under this article. Such commissioner shall provide training in the use of safe and appropriate security interventions to employees responsible for transporting persons under this article.

(d) The commissioner shall have the discretion to enter into agreements with the department of corrections and community supervision for the provision of security services relating to this article.

(e) Persons in the custody of the commissioner pursuant to this article shall be kept separate from other persons in the care, custody and control of the commissioner, and shall be segregated from such other persons, provided, however, that persons committed or subject to proceedings under this article need not be segregated from other sex offenders committed or subject to proceedings under this article, article nine of this title, or section four hundred two of the correction law. If any dangerous sex offenders requiring confinement are committed to a secure treatment facility located on the grounds of a correctional facility, they shall be kept separate from persons in custody as a result of criminal cases, and shall be segregated from such persons. Occasional instances of supervised, incidental contact between persons required by this subdivision to be segregated shall not be considered a violation of such segregation requirements.

(f) In accordance with security procedures developed by the commissioner, a person committed under this article may be granted an escorted privilege by the director of the secure treatment facility in which he or she is receiving care and treatment but only for the purposes of allowing the person to receive medical or dental care or treatment not available at the facility, to visit a family member who is seriously ill or to attend the funeral of a family member. A person granted an

escorted privilege shall be under the constant supervision of one or more facility employees who have been designated by the commissioner or other specially trained personnel approved by the commissioner to provide care and supervision of such persons.

(g) If a person is in the custody of the commissioner pursuant to an order issued under this article, and such person escapes from custody, notice of such escape shall be given as soon as the facility staff learns of such escape, and shall include such information as will adequately identify the escaped individual, any person or persons believed to be in danger, and the nature of the danger. Such notice shall be given by any means reasonably calculated to give prompt actual notice, and shall be given to:

(1) the district attorney of the county where the person was convicted, adjudicated, or charged; the attorney general; and counsel for respondent or the mental hygiene legal service;

(2) the superintendent of the state police;

(3) the sheriff of the county where the escape occurred;

(4) the police department having jurisdiction of the area where the escape occurred;

(5) any victim or victims who submitted the notification form described in subdivision four of section 380.50 of the criminal procedure law;

(6) any person the facility staff reasonably believes could be in danger;

(7) any law enforcement agency and any person the facility staff believes would be able to apprise such victim or victims that the person escaped from the facility; and

(8) any other person the committing court may designate.

(h) The person may be apprehended, restrained, transported, and returned to the facility from which he or she escaped by any police officer or peace officer, and it shall be the duty of such officer to assist any representative of the commissioner to take the person into custody upon the request of such representative.

(i) The commissioner shall submit to the governor and the legislature no later than December first of each year, a report on the implementation of this article. Such report shall include, but not be limited to, the census of each existing treatment facility, the number of persons reviewed by the case review teams for proceedings under this article, the number of persons committed pursuant to this article, their crimes of conviction, and projected future capacity needs.

Credits

(Added L.2007, c. 7, § 2, eff. April 13, 2007. Amended L.2011, c. 62, pt. C, subpt. B, § 118-d, eff. March 31, 2011.)

McKinney's Mental Hygiene Law § 10.10, NY MENT HYG § 10.10
Current through L.2016, chapters 1 to 328.

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Proposed Legislation

McKinney's Consolidated Laws of New York Annotated
Mental Hygiene Law (Refs & Annos)
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Title B. Mental Health Act
Article 10. Sex Offenders Requiring Civil Commitment or Supervision (Refs & Annos)

McKinney's Mental Hygiene Law § 10.11

§ 10.11 Regimen of strict and intensive supervision and treatment

Effective: March 31, 2011
Currentness

(a)(1) Before ordering the release of a person to a regimen of strict and intensive supervision and treatment pursuant to this article, the court shall order that the department of corrections and community supervision recommend supervision requirements to the court. These supervision requirements, which shall be developed in consultation with the commissioner, may include but need not be limited to, electronic monitoring or global positioning satellite tracking for an appropriate period of time, polygraph monitoring, specification of residence or type or residence, prohibition of contact with identified past or potential victims, strict and intensive supervision by a parole officer, and any other lawful and necessary conditions that may be imposed by a court. In addition, after consultation with the psychiatrist, psychologist or other professional primarily treating the respondent, the commissioner shall recommend a specific course of treatment. A copy of the recommended requirements for supervision and treatment shall be given to the attorney general and the respondent and his or her counsel a reasonable time before the court issues its written order pursuant to this section.

(2) Before issuing its written order, the court shall afford the parties an opportunity to be heard, and shall consider any additional submissions by the respondent and the attorney general concerning the proposed conditions of the regimen of strict and intensive supervision and treatment. The court shall issue an order specifying the conditions of the regimen of strict and intensive supervision and treatment, which shall include specified supervision requirements and compliance with a specified course of treatment. A written statement of the conditions of the regimen of strict and intensive supervision and treatment shall be given to the respondent and to his or her counsel, any designated service providers or treating professionals, the commissioner, the attorney general and the supervising parole officer. The court shall require the department of corrections and community supervision to take appropriate actions to implement the supervision plan and assure compliance with the conditions of the regimen of strict and intensive supervision and treatment. A regimen of strict and intensive supervision does not toll the running of any form of supervision in criminal cases, including but not limited to post-release supervision and parole.

(b)(1) Persons ordered into a regimen of strict and intensive supervision and treatment pursuant to this article shall be subject to a minimum of six face-to-face supervision contacts and six collateral contacts per month. Such minimum contact requirements shall continue unless subsequently modified by the court or the department of corrections and community supervision.

(2) Any agency, organization, professional or service provider designated to provide treatment to the person shall, unless otherwise directed by the court, submit every four months to the court, the commissioner, the attorney general and

the supervising parole officer a report describing the person's conduct while under a regimen of strict and intensive supervision and treatment.

(c) An order for a regimen of strict and intensive supervision and treatment places the person in the custody and control of the department of corrections and community supervision. A person ordered to undergo a regimen of strict and intensive supervision and treatment pursuant to this article is subject to lawful conditions set by the court and the department of corrections and community supervision.

(d)(1) A person's regimen of strict and intensive supervision and treatment may be revoked if such a person violates a condition of strict and intensive supervision. If a parole officer has reasonable cause to believe that the person has violated a condition of the regimen of strict and intensive supervision and treatment or, if there is an oral or written evaluation or report by a treating professional indicating that the person may be a dangerous sex offender requiring confinement, a parole officer authorized in the same manner as provided in subparagraph (i) of paragraph (a) of subdivision three of section two hundred fifty-nine-i of the executive law may take the person into custody and transport the person for lodging in a secure treatment facility or a local correctional facility for an evaluation by a psychiatric examiner, which evaluation shall be conducted within five days. A parole officer may take the person, under custody, to a psychiatric center for prompt evaluation, and at the end of the examination, return the person to the place of lodging. A parole officer, as authorized by this paragraph, may direct a peace officer, acting pursuant to his or her special duties, or a police officer who is a member of an authorized police department or force or of a sheriff's department, to take the person into custody and transport the person as provided in this paragraph. It shall be the duty of such peace officer or police officer to take into custody and transport any such person upon receiving such direction. The department of corrections and community supervision shall promptly notify the attorney general and the mental hygiene legal service, when a person is taken into custody pursuant to this paragraph. No provision of this section shall preclude the board of parole from proceeding with a revocation hearing as authorized by subdivision three of section two hundred fifty-nine-i of the executive law.

(2) After the person is taken into custody for the evaluation, the attorney general may file: (i) a petition for confinement pursuant to paragraph four of this subdivision and/or (ii) a petition pursuant to subdivision (e) of this section to modify the conditions of a regimen of strict and intensive supervision and treatment. Either petition shall be filed in the court that issued the order imposing the regimen of strict and intensive supervision and treatment. The attorney general shall seek to file the petition within five days after the person is taken into custody for evaluation. If no petition is filed within that time, the respondent shall be released immediately, subject to the terms of the previous order imposing the regimen of strict and intensive supervision, but failure to file a petition within such time shall not affect the validity of such petition or any subsequent action.

(3) A petition filed under paragraph two of this subdivision shall be served promptly on the respondent and the mental hygiene legal service. The court shall appoint legal counsel in accordance with subdivision (c) of section 10.06 of this article. Counsel for respondent shall be provided with a copy of the written report, if any, of the psychiatric examiner who conducted the evaluation pursuant to this section.

(4) A petition for confinement shall contain the parole officer's sworn allegations demonstrating reasonable cause to believe that the respondent violated a condition of his or her strict and intensive supervision, and shall be accompanied by any written evaluations or reports by a treating professional indicating that the respondent may be a dangerous sex offender requiring confinement. If a petition is filed within the five-day period seeking the respondent's confinement, then the court shall promptly review the petition and, based on the allegations in the petition and any accompanying papers, determine whether there is probable cause to believe that the respondent is a dangerous sex offender requiring

confinement. Upon the finding of probable cause, the respondent may be retained in a local correctional facility or a secure treatment facility pending the conclusion of the proceeding. In the absence of such a finding, the respondent shall be released, but the court may impose revised conditions of supervision and treatment pending completion of the hearing. Within thirty days after a petition for confinement is filed under paragraph two of this subdivision, the court shall conduct a hearing to determine whether the respondent is a dangerous sex offender requiring confinement. Any failure to commence the hearing within the time period specified shall not result in the dismissal of the petition and shall not affect the validity of the hearing or the determination. The court shall make its determination of whether the respondent is a dangerous sex offender requiring confinement in accordance with the standards set forth in subdivision (f) of section 10.07 of this article. If the court finds that the attorney general has not met the burden of showing by clear and convincing evidence that the respondent is a dangerous sex offender requiring confinement, but finds that the respondent continues to be a sex offender requiring strict and intensive supervision, the court shall order the person to be released under the previous order imposing a regimen of strict and intensive supervision and treatment, unless it modifies the order imposing a regimen of strict and intensive supervision and treatment pursuant to subdivision (f) of this section. If the court determines that the attorney general has met the burden of showing by clear and convincing evidence that the respondent is a dangerous sex offender requiring confinement, the court shall order that the respondent be committed to a secure treatment facility immediately. The respondent shall not be released pending the completion of the hearing.

(e) If the attorney general files only a petition for modification under paragraph two of subdivision (d) of this section, the respondent shall be released but the court may impose revised conditions of supervision and treatment pending completion of the hearing. Within five days after filing of the petition for modification, the court shall conduct a hearing to determine whether the respondent's conditions of treatment and supervision should be modified. The attorney general shall have the burden of showing that the modifications sought are warranted, and the court shall order such modifications to the extent that it finds that the attorney general has met that burden.

(f) The court may modify or terminate the conditions of the regimen of strict and intensive supervision and treatment on the petition of the supervising parole officer, the commissioner or the attorney general. Such petition shall be served on the respondent and the respondent's counsel. A person subject to a regimen of strict and intensive supervision and treatment pursuant to this article may petition every two years for modification or termination, commencing no sooner than two years after the regimen of strict and intensive supervision and treatment commenced, with service of such petition on the attorney general, the department of corrections and community supervision, and the commissioner. Upon receipt of a petition for modification or termination pursuant to this section, the court may require the department of corrections and community supervision and the commissioner to provide a report concerning the person's conduct while subject to a regimen of strict and intensive supervision and treatment. If more than one petition is filed, the petitions may be considered in a single hearing.

(g) Upon receipt of a petition for modification pursuant to this section, the court may hold a hearing on such petition. The party seeking modification shall have the burden of showing that those modifications are warranted, and the court shall order such modifications to the extent that it finds that the party has met that burden.

(h) Upon receipt of a petition for termination pursuant to this section, the court may hold a hearing on such petition. When the petition is filed by the respondent, the attorney general shall have the burden of showing by clear and convincing evidence that the respondent is currently a sex offender requiring civil management. If the court finds that the attorney general has not sustained that burden, it shall order the respondent's discharge from the regimen of strict and intensive supervision and treatment. Otherwise the court shall continue the regimen of strict and intensive supervision and treatment but may revise conditions of supervision and treatment as warranted.

Credits

(Added L.2007, c. 7, § 2, eff. April 13, 2007. Amended L.2011, c. 62, pt. C, subpt. B, § 118-e, eff. March 31, 2011.)

Notes of Decisions (12)

McKinney's Mental Hygiene Law § 10.11, NY MENT HYG § 10.11
Current through L.2016, chapters 1 to 328.

End of Document

McKinney's Consolidated Laws of New York Annotated
Mental Hygiene Law (Refs & Annos)
Chapter 27. Of the Consolidated Laws (Refs & Annos)
Title B. Mental Health Act
Article 10. Sex Offenders Requiring Civil Commitment or Supervision (Refs & Annos)

McKinney's Mental Hygiene Law § 10.13

§ 10.13 Appeals

Effective: April 13, 2007
Currentness

(a) The attorney general may, in the appellate division of the supreme court, seek a stay of any order under this article releasing a person under this article.

(b) The attorney general may appeal as of right from an order entered pursuant to subdivision (k) of section 10.06 of this article dismissing the petition following a determination that probable cause to believe that the respondent is a sex offender requiring civil management has not been established. No appeal may be taken from an order entered pursuant to subdivision (k) of section 10.06 of this article determining that probable cause has been established to believe the respondent is a sex offender requiring civil management. Both the respondent and the attorney general may appeal from any final order entered pursuant to this article. The provisions of articles fifty-five, fifty-six, and fifty-seven of the civil practice law and rules shall govern appeals taken from orders entered pursuant to this article.

(c) In connection with any appeal, a respondent who is or becomes financially unable to obtain counsel shall have the right to have appellate counsel appointed on his or her behalf. Such counsel shall be appointed by the court to which an appeal is taken. If possible, the court shall appoint the mental hygiene legal service. In the event that the court determines that the mental hygiene legal service cannot accept appointment, the court shall appoint an attorney eligible for appointment pursuant to article eighteen-B of the county law, or an entity, if any, that has contracted for the delivery of legal representation services under subdivision (c) of section 10.15 of this article.

Credits
(Added L.2007, c. 7, § 2, eff. April 13, 2007.)

Notes of Decisions (5)

McKinney's Mental Hygiene Law § 10.13, NY MENT HYG § 10.13
Current through L.2016, chapters 1 to 328.

End of Document

McKinney's Consolidated Laws of New York Annotated
Mental Hygiene Law (Refs & Annos)
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Title B. Mental Health Act
Article 10. Sex Offenders Requiring Civil Commitment or Supervision (Refs & Annos)

McKinney's Mental Hygiene Law § 10.15

§ 10.15 Compensation, fees and expenses

Effective: April 13, 2007
Currentness

(a) Any compensation, fee or expense paid pursuant to the provisions of this article and article eighteen-B of the county law shall be a state charge payable on vouchers approved by the court which fixed the same, after audit by and on the warrant of the comptroller. Any compensation, fee or expense paid to such counsel so appointed shall be paid out of funds appropriated to the administrative office for the courts. Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source. The appropriate court shall review and determine the reasonableness of the claims, including the number of hours expended out of court by counsel and psychiatric examiners. When a court appoints counsel pursuant to article eighteen-B of the county law, such counsel shall be compensated in accordance with the provisions of that article. Notwithstanding any other provision of law, psychiatric examiners who are appointed by a court under this article, and who perform such examinations other than as government employees, shall be compensated at an hourly rate to be set by the administrative board of the judicial conference.

(b) Members of the case review panel established by subdivision (a) of section 10.05 of this article shall be entitled to reimbursement for expenses reasonably incurred for the performance of duties under this article.

(c) The state may contract with entities for the provision of legal representation services to respondents in proceedings under this article, within the amounts appropriated therefor.

Credits
(Added L.2007, c. 7, § 2, eff. April 13, 2007.)

McKinney's Mental Hygiene Law § 10.15, NY MENT HYG § 10.15
Current through L.2016, chapters 1 to 328.

End of Document

McKinney's Consolidated Laws of New York Annotated
Mental Hygiene Law (Refs & Annos)
Chapter 27. Of the Consolidated Laws (Refs & Annos)
Title B. Mental Health Act
Article 10. Sex Offenders Requiring Civil Commitment or Supervision (Refs & Annos)

McKinney's Mental Hygiene Law § 10.17

§ 10.17 Release of information authorized

Effective: April 13, 2007
Currentness

The commissioner is authorized to release information in accordance with subparagraph (vii) of paragraph nine of subdivision (c) of section 33.13 of this chapter to appropriate persons and entities when necessary to protect the public concerning a specific sex offender requiring civil management under this article, and to release information in accordance with subparagraph (viii) of paragraph nine of subdivision (c) of section 33.13 of this chapter to the attorney general and case review panel when such persons or entities request such information in the exercise of their statutory functions, powers, and duties under this article.

Credits
(Added L.2007, c. 7, § 2, eff. April 13, 2007.)

McKinney's Mental Hygiene Law § 10.17, NY MENT HYG § 10.17
Current through L.2016, chapters 1 to 328.

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