At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District for MADISON County, at Binghamton, New York, on the 23rd day of December, 2014.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : MADISON COUNTY

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In the Matter of the Application of the
STATE OF NEW YORK,

DECISION AND ORDER

Petitioner,

Index No. 2014-1149
RJI No. 2014-0073-M

-vs-

JOSEPH GALLAGHER,
an inmate in the custody of the New York State
Department of Correctional Services,

Respondent,

for Civil Management Pursuant to
Mental Hygiene Law Article 10

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APPEARANCES:

COUNSEL FOR PETITIONER,

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Attorney General
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**EUGENE D. FAUGHNAN, J.S.C.**

This matter comes before the Court on a motion from Joseph Gallagher ("Respondent") dated December 2, 2014 to dismiss the Article 10 proceeding pursuant to CPLR § 4401, or in the alternative, to vacate his waiver of a jury trial. The Court heard oral argument on this motion on December 23, 2014 in Broome County, with the consent of the parties. The State of New York ("Petitioner") opposes the motion.

Respondent contends that in light of the recent Court of Appeals decision in *Matter of Donald DD, infra,* the Petitioner's application is deficient, because the finding of mental abnormality is premised upon the diagnosis of Antisocial Personality Disorder ("ASPD") and Other Specified Paraphilia ("OS Paraphilia").[1] He further argues that since the petition is deficient, it must be dismissed. In the alternative, Petitioner argues that his jury trial waiver should be vacated since the only diagnosis his expert provided was ASPD which has been determined to be legally insufficient to support a finding of dangerous sex offender. *Matter of Donald DD, infra.* Finally, Petitioner contends that the diagnosis of Paraphilia NOS was called into question in *Matter of Kenneth T*[2] and that if the jury trial waiver is vacated, a *Frye* hearing is required to assess the scientific basis of this diagnosis. *See Frye v. United States,* 293 F 1013 (DC Cir 1923).

Petitioner opposes Respondent's motion arguing that the petition is not deficient since, unlike *Donald DD*, Respondent was diagnosed with ASPD and Paraphilia NOS. Further, the *Donald DD* case deals with the sufficiency of evidence at trial; a step obviated by Respondent's waiver. Petitioner also asserts that the Respondent's waiver was knowing and voluntary, and as such should not be disturbed. Finally, Petitioner argues that even if the waiver is vacated, no *Frye* hearing would be required, since the science to be challenged would be that of psychology or psychiatry (which is neither novel or new) and not any particular diagnosis.

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[1]The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5) renames Paraphilia Not Otherwise Specified to "Other Specified Paraphilia".

[2]Matter of *Kenneth T* was the companion case of *Donald DD.*

The facts are not in dispute. On January 28, 2014, Petitioner filed an Order to Show Cause and Petition for Civil Management in Supreme Court, Oneida County. Thereafter, On January 29, 2014, an Amended Petition For Civil Management with exhibits was filed in Oneida County. On January 30, 2014, Respondent filed a Notice of Removal pursuant to MHL 10.06 (g). This matter was transferred Madison County pursuant to an order dated February 6, 2014.

A probable cause hearing was held on March 11, 2014 before the undersigned. The Petitioner's witness, Christine Rackley, PhD was the only witness. The parties stipulated that Respondent was a detained sex offender. Dr. Rackley opined that Respondent suffers from mental abnormality. As such, the Court concluded that probable cause was established that Respondent was a sex offender requiring civil management.

Respondent thereafter retained a psychiatric examiner, Erik N. Schlosser, PhD. Dr. Schlosser examined Respondent and concluded that Respondent suffered from ASPD and as such, suffers a mental abnormality.[3] A jury trial was scheduled to commence July 21, 2014. However, in light of Dr. Schlosser's opinion and for presumed tactical reasons, Respondent advised the Court and Petitioner that he would admit to having a mental abnormality and waive a jury trial.

On July 2, 2014, Respondent appeared in Madison County Supreme Court to allocute to his understanding of the jury trial waiver. The Court questioned the Respondent regarding the waiver. In addition, Respondent's counsel questioned him regarding each term of the proposed written waiver and confirmed his knowing and voluntary waiver of a jury trial. Respondent executed the Affidavit of Trial Waiver dated July 2, 2014 which was submitted to the Court. Based upon the oral representations of the Respondent and the Affidavit of Trial Waiver, the Court concluded that, by clear and convincing evidence, Respondent suffers from mental abnormality. Respondent specifically reserved the right to a dispositional hearing.

The Court commenced a dispositional hearing on November 14, 2014. Respondent advised that

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[3]In light of the *Donald DD* decision, in a report dated December 2, 2014, Dr Schlosser amended his opinion finding only the diagnosis of ASPD and no mental abnormality.

they would be making a motion to dismiss the Petition in light of the recent decision in *Matter of Donald DD.* Petitioner offered direct the testimony of Dr. Rackley, after which the hearing was suspended to allow Respondent to file his motion.

**Respondent's Motion to Dismiss**

The Court of Appeals has held that "ASPD diagnosis has so little relevance to the controlling legal criteria of *Mental Hygiene Law § 10.03 (i)* that it cannot be relied upon to show mental abnormality for article 10 purposes." *Matter of Donald DD*, 24 NY3d 174, 190 (2014). "ASPD alone is not a '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'" *Id.* at 190 (emphasis in original) *(citation omitted)*. There is nothing in the diagnosis of ASPD which distinguishes "the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." *Id.* at 190; *see also Kansas v Crane, 534 U.S. 407*, 413 (2002).

If the only diagnosis relied upon by the Petitioner was ASPD, then dismissal may be warranted. However, Petitioner also relies on the diagnosis of OS Paraphilia; specifically Hebephilia or sexual attraction to adolescent children. The OS Paraphilia diagnosis is not without its own legal challenges. The diagnosis has been viewed as "junk science devised for the purpose of locking up dangerous criminals". *Matter of Shannon S 20 NY3d 99, 110* (2012)(*dissent*). The Petitioner's own expert conceded that there is nothing "abnormal" about being attracted to adolescents. However, the majority in *Donald DD* did not overturn the holding in *Shannon S.* Rather, the majority found that the trial record in *Kenneth T* was insufficient to support the conclusion, by clear and convincing evidence, that Respondent had a condition "that predispose[d] him . . . to the commission of conduct constituting a sex offense" within the meaning of *Mental Hygiene Law § 10.03 (I)" Donald DD* at p.187. The Court made clear that its decision did not overrule its decision in *Shannon S.* Hence, OS Paraphilia may be relied upon to

show mental abnormality for Article 10 purposes. Whether the diagnosis is sufficient to support a finding of mental abnormality turns on the sufficiency of the evidence in the particular case.

In the present case, the Respondent waived the right to trial. As such, the sufficiency of the evidence of mental abnormality was conceded. [4] Nothing in the cited cases precludes reliance on OS Paraphilia alone, or in combination with ASPD, in reaching a finding of mental abnormality.

"Any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions." CPLR §4401. The Respondent also argues that *Donald DD* and the companion case represents a shift in the law which renders the instant petition void. As such, Respondent seeks dismissal arguing that Petitioner can no longer maintain its claim as a matter of law.

Respondent argues that Petitioner rested after the direct examination of Dr. Rackley, and therefore the Petitioner's proof has been submitted. Respondent suggests that based upon the evidence in the record, the Petitioner has failed to meet its burden. However, the record reveals that the Petitioner merely concluded the direct testimony of Dr. Rackley. It is unclear whether Petitioner will offer additional evidence in support of its petition. Therefore, the Court is unable to evaluate the sufficiency of the evidence at this stage.

The courts have consistently stated that "consonant with the common law's policy-laden assumptions, a change in decisional law usually will be applied retrospectively to all cases still in the normal litigating process" *Gurnee v Aetna*, 55 NY2d 184, 191 (1982), *citing Gager v White,* 53 NY2d 475, 483; see *People v Pepper,* 53 NY2d 213, 219-220; *People v Morales,* 37 NY2d 262, 267-269; *Kelly v Long Is. Light. Co.,* 31 NY2d 25, 29, n 3; *Knapp v Fasbender,* 1 NY2d

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[4]Although the sufficiency of the evidence of mental abnormality was conceded at the trial stage, this Court makes no finding, on this limited record, as to whether the evidence is sufficient at the dispositional stage pursuant to MHL §10.07(f).

212, 243. However, "where there has been such a sharp break in the continuity of law that its impact will wreak more havoc in society than society's interest in stability will tolerate" a court may direct that the new pronouncement operate prospectively alone. *Gager at 483-484.*

The Court in *Donald DD* made no specific direction regarding the retroactive effect of its decision. However, even accepting its applicability to cases still in the normal litigation process, such as the present case, nothing in the *Donald DD* or the companion case would support dismissal of the petition.

Unlike *Donald DD*, the finding of mental abnormality in this case is premised not just on ASPD but also OS Paraphilia. The Court in *Donald DD* specifically found that ASPD in conjunction with another diagnosis of mental abnormality can be used to support a claim of mental abnormality pursuant to MHL §10.03. With regard to OS Paraphilia, the Court found that *the evidence at trial in that case* was insufficient to support a finding of mental abnormality. However, as noted above, the Court of Appeals specifically declined to find that a diagnosis of OS Paraphilia, was insufficient, as a matter of law, to support a finding of mental abnormality.

For the reasons outlined herein, the Respondent's motion to dismiss is **DENIED**.

**Respondent's Motion for a Trial**

Respondent seeks to vacate his waiver of trial and proceed to a jury trial on the issue of mental abnormality. In essence, the Respondent suggests that had *Donald DD* been decided sooner, he would not have waived his right to jury trial.

Pursuant to MHL §10.08 (f), "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." "A waiver of the right to a jury trial, in a proceeding that may affect the party's liberty

interests, will be upheld if the court made an inquiry to establish that the waiving party understood the implications of such waiver and the waiver was knowingly, intelligently and voluntarily made" *State v Robert C*, 113 AD3d 937, 938 (3rd Dept. 2014); *see People v Smith*, 6 NY3d 827, 828 (2006).

In the present case, the Court questioned the Respondent regarding his decision to waive a jury trial. The Court inquired as to whether the Respondent understood that he had a right to a jury or bench trial. The Court confirmed that the Respondent understood that by waiving a jury or bench trial he would be admitting to being a detained sex offender who suffers from a mental abnormality. The Court also made clear that if there was a trial, the Petitioner would have to prove, by clear and convincing evidence, that he is a detained sex offender who suffers from mental abnormality. The Respondent assured the Court that he understood his rights and was agreeable to waiving his right to a trial.

The Respondent's attorney then reviewed the Affidavit of Waiver of Trial with the Respondent. The Respondent testified under oath his assent to each of the terms of the affidavit. The Respondent then signed the affidavit and it was entered upon consent.

The Court was convinced then, and is convinced now, that Respondent waived his right to trial knowingly and freely. Respondent understood that he was entitled to a trial at which the evidence against him could be challenged. At a trial, Respondent could have requested a *Frye* hearing regarding the OS Paraphilia diagnosis and challenged the evidence upon which that diagnosis was made. Respondent could have challenged the sufficiency of the ASPD diagnosis and whether that diagnosis alone could support a finding of mental abnormality.[5] However, Respondent knowingly and voluntarily elected to waive his right to trial and in doing so waived his right to challenge the finding of mental abnormality.

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[5]Respondent's expert, Dr. Schlosser only diagnosed ASPD and declined to diagnose OS Paraphelia in reaching his opinion of mental abnormality.

The Court finds that there is nothing in this record or the recent Court of Appeals decisions which persuades the Court that Respondent's waiver should be vacated. For the reasons set forth herein, the Respondent's motion to vacate his trial waiver is **DENIED.**

This constitutes the Decision and Order of the Court.

Dated: January 21, 2015
Binghamton, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice