C. INVOLUNTARY RETENTION OF DANGEROUS SEX OFFENDERS REQUIRING CONFINEMENT

PJI 8:8. Mental Hygiene Law–Involuntary Retention of Dangerous Sex Offenders Requiring Confinement

As you have heard, CD is an individual who has committed a sex offense. (His, her) period of [*state as appropriate***: confinement, parole supervision] will soon expire. The Attorney General seeks to have CD detained or supervised for an additional time on the ground that (he, she) is a sex offender who now suffers from a mental abnormality. The fact that CD previously committed a sex offense is not, standing alone, a sufficient basis for you to find that CD is a sex offender who now suffers from a mental abnormality.**

A mental abnormality, for the purpose of this proceeding, is a congenital or acquired condition that predisposes CD to commit sex offenses and, further, that results in (his/her) having serious difficulty in controlling such conduct. In this case, the Attorney General claims that CD has a mental abnormality that both predisposes (him, her) to commit sex offenses [*where the Attorney General claims or the evidence supports that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***] and results in (his/her) having serious difficulty in controlling such conduct. To prevail on this claim, the Attorney General must prove by clear and convincing evidence that CD now suffers from a mental abnormality in that (he, she) has a congenital or acquired condition that predisposes (him, her) to commit sex offenses [***where the Attorney General claims or the evidence supports that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***] and in that (his, her) condition results in (his, her) having serious difficulty in controlling such conduct.**

Clear and convincing evidence is evidence that satisfies you that there is a high degree of probability that CD suffers from a mental abnormality as I have defined that term for you. It is not enough to find that it is more likely than not that CD suffers from such a mental abnormality. The Attorney General must convince you that it is highly probable that CD suffers from such a mental abnormality.

In deciding whether CD suffers from such a mental abnormality, you should consider all evidence offered by both sides. [*Where the court finds that the respondent refused to cooperate with the psychiatric examiner, it shall, upon request, state:* **You may also consider the fact that CD did not cooperate with the (psychiatrist[s], psychologist[s]) who tried to examine (him, her).]**

I am going to give you a verdict sheet that contains the following two questions:

Does CD now suffer from a mental abnormality in that (he, she) has a congenital or acquired condition that

> **(1) predisposes (him, her) to commit sex offenses [***where the Attorney General claims or the evidence supports that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***]; and**
>
> **(2) results in (his, her) having serious difficulty in controlling such conduct?**

The two questions both require "yes" or "no" answers. All of you must agree on the answer to each part of the question answered. When you have all agreed on an answer, each of you will sign in the appropriate place to indicate your agreement. If your answer to either of these questions "no," then you will place your answer on the verdict sheet, proceed no further and report to the court.

Comment

Caveat 1: The foregoing charge should not be used in cases where the Attorney General claims that the respondent committed a "sexually motivated" "designated felony" before April 13, 2007, see § 10.03(g)(4), (p)(4). In those situations, PJI 8:8.1, infra, should be charged instead. Likewise, in cases where the respondent was charged with a sex offense but was found unfit to proceed and was committed to a psychiatric facility rather than tried, see CPL Art. 730; PJI 8:8.2, infra, rather than the above charge should be given.

Caveat 2: The jury should not be told, either by the lawyers or the court, that the court has previously found "probable cause to believe that the respondent is a sex

offender requiring civil management," see Mental Hygiene Law § 10.06(g). Further, the jury should not be told about any of the following pretrial determinations: (1) the determination by the "multidisciplinary committee" designated by the Commissioner of Mental Health or the Commissioner of Mental Retardation and Developmental Disabilities that the respondent was a person who should be referred to a case review team for evaluation, see § 10.05(d); (2) the finding of the "case review team" that the respondent is a "sex offender requiring civil management," see § 10.05(e); (3) the finding of the psychiatric examiner, if any, that the respondent has a "mental abnormality," see § 10.05(g); (4) the finding of the "case review team," if any, that the respondent was convicted of a "designated felony" before April 13, 2007 that was "sexually motivated," see § 10.05(g); and (5) the determination by the Attorney General, if any, that "the protection of public safety" required that the respondent be detained pursuant to a "securing petition" in advance of a probable cause hearing, see § 10.06(f). Finally, while the identity of any victims of CD's offenses may not be disclosed to the respondent's psychiatric examiner absent a showing of good cause, see § 10.08(b), and the respondent may not subpoena the victim or alleged victim without a court order issued for good cause shown, see § 10.08(g), the victim's identity and/or testimony may well become relevant at a MHL Article 10 trial. Thus, there are situations in which the victim's identity may need to be disclosed and the victim may need to appear at the trial.

Caveat 3: The charge defines "mental abnormality," in part, as a "congenital or acquired condition that predisposes [the respondent] to commit sex offenses," but it does not list the specific crimes that are classified as "sex offenses" in MHL § 10.03(p). The statutory definition of "sex offense" was omitted because it refers to the relevant Penal Law provisions and rendition to the jury of all of the numerous possible listed crimes could lead to prejudice or confusion. However, there may be cases in which the evidence of the respondent's predisposition to commit sex offenses includes examples of sexual misconduct not rising to the level of the felonies enumerated in § 10.03(p) (e.g., third-degree incest, see Penal Law § 130.25, or forcible touching, see id § 130.52). While such evidence may be relevant, it also may create a risk that the jury will infer, mistakenly, that the respondent has a "mental abnormality" solely because the respondent has a condition that creates a predisposition to engage in the non-enumerated sexual misconduct. Where such a risk exists, the court should make clear that a finding of "mental abnormality" can be made only if the evidence establishes that the respondent has a condition that predisposes him or her to commit one or more of the serious "sex offenses" delineated in § 10.03(p).

Based on Mental Hygiene Law §10.03, 10.07.

I. In General

A. Background

Article 10 of the Mental Hygiene Law, which became effective on April 13, 2007, represents a legislative effort to address the dangers to society posed by recidivist sex offenders through a comprehensive system of required treatment and, in some cases, involuntary civil commitment, see Mental Hygiene Law (MHL) § 10.01; L 2007, ch 7, § 52. Before the statute's enactment, the State attempted to use the involuntary civil commitment procedures delineated in MHL Article 9 to transfer previously convicted, potential recidivist sex offenders directly from prison to mental health facilities. However, these efforts were rebuffed by the Court of Appeals, which held that the individuals in question were entitled to notice and pre-commitment hearings in Supreme Court to evaluate the need for their continued commitment, State ex rel. Harkavy v Consilvio, 7 NY3d 607, 825 NYS2d 702, 859 NE2d 508 ("Harkavy I"); see State ex rel. Harkavy v Consilvio, __ NY3d __, __ NYS2d __, __ NE2d __, 2007 WL 1594049 ("Harkavy II"). The Court recognized that the existing alternative statutory provision for committing prisoners to psychiatric facilities, Correction Law § 402, was not specifically designed to address sex offenders with mental illnesses that made them predisposed to offend, Harkavy I, supra; see Harkavy II, supra. Nevertheless, "in the absence of a clear legislative directive in regard to inmates nearing their release from incarceration," the Court held that the procedural steps outlined in Correction Law § 402 should be used to commit potential recidivist sex offenders who were nearing completion of or had just completed their prison sentences, Harkavy I, supra. The legislative void identified in Harkavy I was filled by the enactment of MHL Article 10, see Harkavy II, supra.

The Court of Appeals has not yet expressed a view on the propriety of the standards and procedures delineated in MHL Article 10, see State ex rel. Harkavy v Consilvio, __ NY3d __, __ NYS2d __, __ NE2d __, 2007 WL 1594049. However, the United States Supreme Court has held that civil commitment statutes may be upheld against substantive due process challenges where the state is required to show an element of dangerousness coupled with a showing of mental illness or mental abnormality, Heller v Doe, 509 US 312, 113 S Ct 2637. Additionally, the Supreme Court has rejected a substantive due-process challenge to a similar state statute authorizing post-incarceration custodial commitment of individuals convicted of "sexually violent" crimes who suffer from "mental

abnormalit[ies]" and have been deemed likely to re-offend, Kansas v Hendricks, 521 US 346, 117 S Ct 2072. Although the statute challenged in Hendricks (unlike New York's statute) required proof "beyond a reasonable doubt" that the individual was a "sexually violent predator," the Supreme Court concluded that the confinement it authorized was civil rather than criminal in nature and, consequently, its application to individuals whose "sexually violent" crimes occurred before the statute's enactment did not violate the federal constitutional prohibition against ex post facto laws. Moreover, the additional confinement did not offend federal double-jeopardy principles, id. The Supreme Court further indicated in Hendricks that involuntary commitment statutes containing "proper procedures and evidentiary standards" may be upheld if they require proof of the individual's danger to self or others and such proof is "coupled . . . with the proof of some additional factor, such as 'mental illness or 'mental incapacity,'" see Kansas v Crane, 534 US 407, 122 S Ct 867.

With respect to the "mental illness" or "mental incapacity" element, the Supreme Court held in Kansas v Hendricks, 521 US 346, 117 S Ct 2072, that the state's definition of the "mental abnormality," i.e., "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others," KSA § 59-29a02(b), satisfied the requirements of substantive due process. In a subsequent review of the same statute, the Supreme Court stated that a civil confinement statute will be upheld if the "mental abnormality" element requires proof of the individual's "serious difficulty in controlling behavior," Kansas v Crane, 534 US 407, 122 S Ct 867. The Crane Court construed Kansas's "mental abnormality" element to include such a requirement. Significantly, New York's MHL Article 10 defines a "mental abnormality," as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct," MHL § 10.03(i).

B. Overview of Statutory Scheme

Entitled the Sex Offender Management and Treatment Act, the statute is based on a legislative finding that "some sex offenders have mental abnormalities that predispose them to engage in repeated sex offenses," MHL § 10.01(b). Consequently, the Legislature prescribed a detailed set of procedures, standards and modalities for long-term treatment and supervision of such offenders,

including, "in extreme cases," extended civil confinement after expiration of the offender's term of incarceration, id. A comprehensive discussion of the statute, particularly its administrative mandates and its provisions amending the Executive Law, the Penal Law, the Criminal Procedure Law, the Correction Law, the Family Court Act, the Judiciary Law and the County Law, is beyond the scope of this Comment.

Briefly, the statute provides for continued custodial detention or close post-release supervision for convicted sex offenders who are deemed likely to re-offend, i.e., those found to be "sex offenders requiring civil management," MHL § 10.03(q). The statute divides this classification into two sub-groups. Sex offenders who are deemed most likely to reoffend are treated as "dangerous sex offenders requiring confinement," see § 10.03(e). Offenders who do not fall into this category but are nevertheless deemed to suffer from a "mental abnormality" entailing "serious difficulty" in controlling their own conduct, see § 10.03(i), may be released into the community, but only with "strict and intensive supervision," see § 10.03(r).

Under the statutory scheme, a person made subject to a proceeding under MHL Article 10 is entitled to a twelve-person jury trial on the question whether he or she is a sex offender who "suffers from a mental abnormality," § 10.07(b), (d); CPL 270.05. If the jury finds that the offender does fall within that category, the further determination whether the offender is one "requiring confinement" or is instead one requiring "strict and intensive supervision" must be made by the court, MHL § 10.07(f). The preliminary and post-trial procedures, as well as the mandated procedures for trials, are discussed below.

II. Statutory Definitions

A. Detained Sex Offender

1. In General

MHL Article 10 applies to "detained sex offenders." "Detained sex offenders" are defined in the statute as "person[s] who [are] in the care, custody, control or supervision of an agency with jurisdiction, with respect to a sex offense [i.e., one of the crimes listed in § 10.03(p)] or a designated felony [i.e., one of the crimes listed in § 10.03(f)]," § 10.03(g). More particularly, the statute lists the following groups of individuals as "detained sex offenders": (1) persons convicted of a sex offense who are currently serving sentences or are subject to parole supervision for

those offenses or "related" offenses (i.e., offenses that were prosecuted as part of the same criminal action, were part of the same criminal transaction or were part of the bases of the orders of commitment received by the corrections department in connection with the person's current incarceration); (2) persons who have engaged in and been charged with sex offenses, have been determined to be "incapacitated . . . with respect to that offense" and have been committed to custody pursuant to Article 730 of the Criminal Procedure Law; (3) persons charged with sex offenses who have been found not responsible for such offenses by reason of mental disease or defect; (4) persons convicted of designated felonies that were committed prior to the effective date of the statute and that were "sexually motivated " (i.e., felonies "committed in whole or substantial part for the purpose of direct sexual gratification of the actor"); (5) persons convicted of sex offenses who are (or were at any time after September 1, 2005) patients in a hospital operated by the Office of Mental Health or were admitted pursuant to MHL Article 9 or Correction Law § 402; and (6) persons determined to be sex offenders requiring civil management pursuant to MHL Article 10, see § 10.03(g)(1)-(6), (l), (s).

2. Sexually Motivated Designated Felonies Committed Before April 13, 2007

In most cases, there will be no question that the respondent's crime was a "sex offense," since MHL § 10.03(p) defines that term to include crimes corresponding to certain specific felonies set forth in the Penal Law (Penal Law §§ 130.25, 130.30, 130.35, 130.40, 130.45, 130.50, 130.53, 130.65, 130.65-a, 130.66, 130.67, 130.70, 130.75, 130.80, 130.85, 130.90, 130.91, 130.95, 130.96, 230.06, 255.26, 255.27, as well as felony-level conspiracies, see Penal Law Art. 105, and attempts to commit the listed crimes, see id §§ 110.00, 110.05). However, the statute adds a new category of "sex offenses," which will require a determination by the trier of fact, i.e., "sexually motivated" "designated feloni[es]" committed prior to April 13, 2007, see MHL § 10.03(p)(4).

MHL § 10.03(f) lists the crimes to be treated as "designated felon[ies]." A "designated felony" constitutes a "sex offense" if it was "sexually motivated." "'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," id § 10.03(s).

In cases where the Attorney General claims that the respondent committed a "designated felony" that was sexually motivated and occurred before April 13, 2007, the following charge should be given instead of PJI 8:8. This charge should

not be given in cases involving alleged "sexually motivated" "designated felonies" committed after that date. In those cases, the respondent will have previously been tried and sentenced under the new Penal Law provisions that were adopted along with MHL Article 10, see Penal Law §§ 10.00(18), 30.00(2), 60.13, 70.80(1)(b), 70.80(3), 70.80(7), 130.91, 130.92, and will thus be a "sex offender" as a matter of law, see § 10.03(g)(1), (p)(1).

PJI 8:8.1

As you have heard, CD has committed the crime of [*state designated felony specified in petition***], and the Attorney General claims that the conduct was sexually motivated. CD's period of (confinement, parole supervision) will soon expire. The Attorney General seeks to have CD detained or supervised for an additional time on the ground that (he, she) is a sex offender who now suffers from a mental abnormality.**

A crime is "sexually motivated" when the acts were committed in whole or substantial part for the purpose of direct sexual gratification of the offender. A "mental abnormality," for purposes of this proceeding, is a congenital or acquired condition that predisposes CD to commit sex offenses and, further, that results in (his, her) having serious difficulty in controlling such conduct.

The Attorney General must prove, by clear and convincing evidence (1) that CD's crime of [*state designated felony specified in petition***] was sexually motivated in that it was committed in whole or substantial part for the purpose of (his, her) direct sexual gratification and (2) that (he, she) now suffers from a mental abnormality in that (he, she) has a congenital or acquired condition that both predisposes (him, her) to commit sex offenses [***where the Attorney General claims or the evidence supports that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***] and results in (his, her) having serious difficulty in controlling such conduct. Even if you find that CD's crime of [***state designated felony specified in petition***] was sexually motivated, that fact is not, standing alone, a sufficient basis for you to find that CD is a sex offender who now suffers from a mental abnormality.**

Clear and convincing evidence is evidence that satisfies you that there is a high degree of probability that CD's crime of [*state designated*

felony specified in petition] **was sexually motivated and that CD now suffers from a mental abnormality as I have defined those terms for you. It is not enough to find that it is more likely than not that CD's crime of [***state designated felony specified in petition***] was sexually motivated or that it is more likely than not that CD is now suffering from a mental abnormality. The Attorney General must convince you that it is highly probable (1) that CD's crime of [***state designated felony specified in petition***] was sexually motivated in that it was committed in whole or substantial part for the purpose of (his, her) direct sexual gratification, and (2) that CD now suffers from a mental abnormality in that (he, she) has a congenital or acquired condition that both predisposes (him, her) to commit sex offenses [***where the Attorney General claims or the evidence supports that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***] and results in (his, her) having serious difficulty in controlling such conduct.**

In deciding whether CD suffers from a mental abnormality, you should consider all evidence offered by both sides. [*Where the court finds that the respondent refused to cooperate with the psychiatric examiner, it shall, upon request, state:* **You may also consider the fact that CD did not cooperate with the (psychiatrist[s], psychologist[s]) who tried to examine (him, her).]**

I am going to give you a verdict sheet that contains the following questions:

(1) Was CD's crime of [*state designated felony specified in petition***] sexually motivated in that it was committed in whole or substantial part for the purpose of (his, her) direct sexual gratification?**

(2) Does CD now suffer from a mental abnormality in that (he, she) has a congenital or acquired condition that

> **(1) predisposes (him, her) to commit sex offenses [***where the Attorney General claims or the evidence supports that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***]; and**
>
> **(2) results in (his, her) having serious difficulty in controlling such conduct?**

The questions require "yes" or "no" answers. All of you must agree on the answer to each question answered. When you have all agreed on the answer to a question, each of you will sign in the appropriate place to indicate your agreement. If your answer to any question is "no," then you will place your answer on the verdict sheet, proceed no further and report to the court.

3. Sex Offenders Who Were Not Convicted But Were Previously Committed Under CPL Article 730

There is a second category of "detained sex offenders" that requires a determination by the factfinder. Under MHL § 10.03(g)(2), the term "detained sex offender" includes "[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 [CPL Article 730], but did engage in the conduct constituting such offense." In cases arising under this provision, the Attorney General's burden of proving that the respondent suffers from a "mental abnormality" is augmented by the additional burden of proving all of the elements of the substantive Penal Law offense with which the respondent was originally charged. Where applicable, the Attorney General may also have to overcome any available defenses and affirmative defenses that the respondent may advance. Although the standard of proof in a criminal trial would be proof beyond a reasonable doubt, the statute provides for the use of the "clear and convincing evidence" standard of proof, MHL § 10.07(d).

In cases involving respondents detained pursuant to CPL Article 730, the following charge should be given instead of PJI 8:8. Notably, where the prior charged offense is an allegedly "sexually motivated" "designated felony," see MHL § 10.03(f), (g) (4), the Attorney General must, in addition to proving that the respondent "engage[d] in conduct constituting the offense" and is currently suffering from a "mental abnormality," prove that the previous conduct was "sexually motivated" as that term is defined in MHL § 10.03(s). In that event, the following charge must be adapted to include that additional element, see PJI 8:8.1.

The pattern instruction set forth below does not include charges on the substantive elements of the various crimes with which the respondent may have been charged before his or her commitment. Such charges, which involve the substantive criminal law, are beyond the scope of this discussion. For purposes of this chapter, it should suffice to note that the elements of the offenses are set forth

in the relevant provisions of the Penal Law and the case law interpreting those provisions, both of which should be consulted in constructing the court's charge. Appropriate charges may be found in Criminal Jury Instructions (CJI2d), an on-line publication by the New York Office of Court Administration, Committee on Criminal Jury Instructions.

PJI 8:8.2

As you have heard, CD was previously charged with committing the offense(s) of [*state sex offense(s) specified in petition***]. (He, she) has not been tried on (that, those) charge(s) because (he, she) was found to be unable to stand trial as a result of an incapacity and was instead committed to a state psychiatric facility. The Attorney General seeks to have CD further detained or supervised for an additional time on the ground that (he, she) committed a sex offense and is a sex offender who suffers from a mental abnormality. The fact that CD was previously found to be incapacitated and was committed to a psychiatric facility is not, standing alone, a sufficient basis for you to find that CD is a sex offender who now suffers from a mental abnormality.**

The Attorney General must prove by clear and convincing evidence that CD engaged in conduct constituting the offense(s) of [*state sex offense(s) specified in petition***]. To meet this burden, the Attorney General must prove, by clear and convincing evidence, that [***state elements of sex offense(s) specified in petition***].**

Clear and convincing evidence is evidence that satisfies you that there is a high degree of probability that CD engaged in conduct constituting each and every element of the offense(s) of [*state sex offense(s) specified in petition***], that is, that (he, she) [***state elements of sex offense(s) specified in petition***]. It is not enough to find that it is more likely than not that CD engaged in conduct constituting some or all of the elements of the offense(s) of [***state sex offense(s) specified in petition***]. The Attorney General must prove that it is highly probable that CD engaged in conduct constituting each and every element of the offense(s) of [***state "sex offense(s)" specified in petition***].**

If the Attorney General has not proved by clear and convincing evidence that CD previously engaged in conduct constituting each and

every element of the offense(s) of [*state sex offense(s) specified in petition***], you should proceed no further and report to the court. On the other hand, if you find that the Attorney General has proved by clear and convincing evidence that CD previously engaged in conduct constituting each and every element of the offense(s) of [***state sex offense(s) specified in petition***], you must go on to consider whether CD is now suffering from a "mental abnormality."**

A mental abnormality, for purposes of this proceeding, is a congenital or acquired condition that predisposes CD to commit sex offenses and, further, that results in (his, her) having serious difficulty in controlling such conduct. The Attorney General must prove, by clear and convincing evidence, that CD now suffers from a mental abnormality in that (he, she) has a congenital or acquired condition that predisposes (him, her) to commit sex offenses [*where the Attorney General claims or the evidence supports that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***] and in that (his, her) condition results in (his, her) having serious difficulty in controlling such conduct.**

Once again, clear and convincing evidence is evidence which satisfies you that there is a high degree of probability that CD now suffers from a mental abnormality. It is not enough to find that it is more likely than not that CD now suffers from a mental abnormality. The Attorney General must prove that it is highly probable that CD now suffers from a mental abnormality in that (he, she) has a congenital or acquired condition that both predisposes (him, her) to commit sex offenses [*where the Attorney General claims or the evidence supports that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***] and results in (his, her) having serious difficulty in controlling such conduct.**

In deciding whether CD suffers from a mental abnormality, you should consider all evidence offered by both sides. [*Where the court finds that the respondent refused to cooperate with the psychiatric examiner, it shall, upon request, state:* **You may also consider the fact that CD did not cooperate with the (psychiatrist[s], psychologist[s]) who tried to examine (him, her).]**

I am going to give you a verdict sheet that contains the following

questions:

(1) Did CD commit the offense of [*state sex offense(s) specified in petition***], in that (he, she) [***state elements sex offense(s) specified in petition***]?**

(2) Does CD now suffer from a mental abnormality in that (he, she) has a congenital or acquired condition that

> **(1) predisposes (him, her) to commit sex offenses [***where the Attorney General claims or the evidence supports that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***]; and**
>
> **(2) results in (his, her) having serious difficulty in controlling such conduct?** `

The questions require "yes" or "no" answers. All of you must agree on the answer to each question answered. When you have all agreed on the answer to a question, each of you will sign in the appropriate place to indicate your agreement. If your answer to any question is "no," then you will place your answer on the verdict sheet, proceed no further and report to the court.

[*Where the offense specified in the petition is a designated felony that was allegedly sexually motivated, substitute the following:* **I am going to furnish you with a verdict sheet that contains the following questions:**

(1) Did CD commit the crime of (*state designated offense[s] specified in petition***), in that (he, she) (***state elements of designated offense[s] specified in petition***)?**

(2) If CD committed the crime of (*state designated offense(s) specified in petition***), was CD's conduct sexually motivated in that it was committed in whole or substantial part for the purpose of (his, her) direct sexual gratification?**

(3) Does CD now suffer from a mental abnormality in that (he, she) has a congenital or acquired condition that

(1) predisposes (him, her) to commit sex offenses [*where the Attorney General claims or the evidence supports that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***]; and**

(2) results in (his, her) having serious difficulty in controlling such conduct?

The questions require "yes" or "no" answers. All of you must agree on the answer to each question answered. When you have all agreed on the answer to a question, each of you will sign in the appropriate place to indicate your agreement. If your answer to any question is "no," then you will place your answer on the verdict sheet, proceed no further and report to the court.

B. Mental Abnormality

Under the statute, "a detained sex offender who suffers from a mental abnormality" is classified as a "sex offender requiring civil management," § 10.03(q). A "mental abnormality" is defined as "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct," § 10.03(i). This definition is similar to the definition for "mental abnormality" used in a similar Kansas statute, KSA § 59-29a02(b), and found in Kansas v Hendricks, 521 US 346, 117 S Ct 2072, to satisfy substantive due-process requirements, see Matter of State v Junco, __ NYS2d __, 2007 WL 1345694.

C. "Dangerous Sex Offender Requiring Confinement" and Dangerous Sex Offender Requiring Strict and Intensive Supervision"

A "detained sex offender who suffers from a mental abnormality" may be either a "dangerous sex offender requiring confinement" or a "sex offender requiring strict and intense supervision," § 10.03(q). A "dangerous sex offender requiring confinement" 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," § 10.03(e). A "sex offender requiring strict and intensive supervision" is "a detained sex

offender who suffers from a mental abnormality but is not a dangerous sex offender requiring confinement," § 10.03(r).

III. Preliminary Procedures for Identifying "Sex Offenders Requiring Civil Management"

A. Pre-release Evaluation

When "a detained sex offender" as defined in MHL § 10.03(g) is nearing an anticipated release from custody, the "agency with jurisdiction" (i.e., the agency responsible for supervising the individual or releasing the individual from custody, see § 10.03[a]) must (or "may" if the "agency with jurisdiction" is the Division of Parole) give notice to the Attorney General and the Commissioner of Mental Health, § 10.05(b). Although such notice should be given at least 120 days before the anticipated release, the failure to give notice within such time period does not affect the validity of any subsequent proceedings based on the notice, § 10.05(b), 10.08(f).

Once notice is given, a multidisciplinary committee designated by the Commissioner of Mental Health or the Commissioner of Mental Retardation and Developmental Disabilities must review the detained sex offender's history and status and determine whether the individual should be referred to a "case review team" for evaluation, § 10.05(d). If the committee determines that such a referral should be made, the "respondent," i.e., the person who is the subject of the referral, must be notified, § 10.05(e). Under section 10.05(g), if the case review team determines that the respondent is a "sex offender requiring civil management," it must provide written notice to both the Attorney General and the respondent, along with a written report from a psychiatric examiner that includes a finding as to whether the respondent has a "mental abnormality," see § 10.03(i) and, where the respondent was convicted of (or charged with) a "designated felony," see § 10.03(f), whether the act was "sexually motivated," see § 10.03(s). If there is a risk that the respondent will be released from custody before the case review team completes its assessment and the Attorney General determines that "the protection of public safety so requires," the Attorney General may file a "securing petition" to ensure that the respondent is held until the assessment is completed, § 10.06(f).

If the case review team issues a notice that the respondent is a "sex offender requiring civil management," the Attorney General then has the authority to request a court-ordered psychiatric examination and/or to file a "sex offender civil

management petition" in the Supreme Court or County Court in the County in which the respondent is located, § 10.06(a), (d). The petition, which is to be served on the respondent, must contain a statement of "facts of an evidentiary character tending to support the allegation that the respondent is a sex offender requiring civil management," § 10.06(a). Once a petition is filed or a request for a court-ordered psychiatric examination is made by the Attorney General, the respondent is entitled to counsel, including appointed counsel if necessary, § 10.06(c). The respondent also has a right to request a court-ordered psychiatric examination, §10.06(e), 10.08(g).

B. Probable Cause Hearing

Within 30 days after a "sex offender civil management petition" has been filed, the court must hold a nonjury hearing to determine whether there is "probable cause to believe that the respondent is a sex offender requiring civil management," § 10.06(g). If the respondent is at liberty or about to be released from custody, the court must order the respondent's return or continued retention "for purposes of the probable cause hearing," which should then be held within 72 hours of the return or retention, § 10.06(h). However, as is true of the other time periods in the statute, a failure to adhere to this deadline does not affect the validity of the subsequent proceeding, § 10.06(h); see § 10.08(f). In Matter of State v Junco, __ NYS2d __, 2007 WL 1345694, the court rejected an argument by the Attorney General that the probable cause hearing required by section 10.06(g) was intended to be "summary" in nature. Thus, it may be expected that both the Attorney General and the respondent's attorney will introduce evidence and make arguments supporting their respective positions.

The respondent's commission of a "sex offense" must be "deemed established" at the probable cause hearing, even where the respondent (a) was found not guilty of such an offense by reason of mental disease or defect or (b) was indicted but not tried for such an offense because of a finding of incapacity pursuant to CPL Article 730, see MHL § 10.06(j). Where the Attorney General claims that the respondent was previously convicted of a "designated felony" committed before April 13, 2007, the court must determine whether there is probable cause to believe that the conduct was "sexually motivated" as that term is defined in MHL § 10.03(s), see § 10.06(j).

Relevant reports written by psychiatric examiners are admissible in probable cause hearings regardless of whether the author is called to testify, as long as the reports are certified pursuant to CPLR 4518(c), see § 10.08(g). The California

Court of Appeals has held that victim statements that are included in prior probation reports are admissible to establish probable cause, even though the statements are hearsay, People v Superior Court [Howard], 40 Cal. App. 4th 136, 82 Cal Rptr 2d 481, If the court finds the requisite probable cause, it must commit the respondent to a secure treatment facility, § 10.03(o), and set a date for trial to be held within 60 days, § 10.07(a).

IV. Trial

A. Jury Selection

Pursuant to CPL 270.05 and MHL § 10.07(b), there must be a twelve-person jury selected in the court's presence, see CPL 270.15(b). The jury trial should ordinarily be conducted by the same court that made the probable cause determination, MHL § 10.07(a). Where the right to a trial by jury has not been waived, jury formation and the conduct of trial are governed by the provisions of Article 41 of the CPLR, except to the extent that those provisions are inconsistent with CPL 270.05 (authorizing swearing of alternates and mandating juries consisting of 12 jurors sworn in the same order as drawn [except for jurors excused for cause or peremptorily]), 270.10 (delineating procedures for challenging entire panel of prospective jurors), 270.15 (delineating procedures for examining and challenging prospective jurors), 270.20 (listing grounds for challenges "for cause" and addressing additional procedural issues relating to such challenges), 270.25(1) (authorizing peremptory challenges) and 270.35(1) (delineating procedures for discharging sworn jurors and designating alternates), MHL § 10.07(b). In the case of an inconsistency, the Criminal Procedure Law provisions govern (except with respect to the provisions of CPL 270.35[1] requiring consent for the replacement of a discharged juror with an alternate), § 10.07(b). Each side is to have ten peremptory challenges for jurors and two for each alternate selected, § 10.07(b).

Inasmuch as the Legislature prescribed the use of the foregoing Criminal Procedure Law provisions governing jury selection, the case law interpreting and applying those provisions also may be applicable in trials arising under MHL Article 10. In presiding over jury selection, the court should be mindful of the body of case law governing the issues that typically arise in criminal trials, including the accused's right to be present at sidebar discussions with prospective jurors, see People v Antommarchi, 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33; see also People v Velasquez, 1 NY3d 44, 769 NYS2d 156, 801 NE2d 376 (discussing waiver of right to be present), and the standards for determining the propriety of the parties' challenges for cause, see People v Chambers, 97 N.Y.2d

417, 740 NYS2d 291, 766 NE2d 953; People v Johnson, 94 NY2d 600, 709 NYS2d 134, 730 NE2d 932; People v Maragh, 94 NY2d 569, 708 NYS2d 44, 729 NE2d 701; People v Torpey, 63 NY2d 361, 482 NYS2d 448. While it is unclear whether and to what extent the principles discussed in this body of case law are applicable in MHL Article 10 proceedings, awareness of the relevant decisional law will be helpful in highlighting and evaluating the questions that may be raised in a civil proceeding involving an individual's liberty interests.

The court should obtain a list of witnesses in advance so that it can ascertain whether any of them are known by the prospective jurors, see People v Monahan, 103 AD2d 833, 478 NYS2d 71; People v Boyd, 74 AD2d 647, 425 NYS2d 134, aff'd 53 NY2d 912, 440 NYS2d 631, 423 NE2d 54. Additionally, before beginning the jury selection process, it would be advisable for the court to hold a preliminary conference with the attorneys to review any issues that should or should not be mentioned during voir dire.

After the prospective jurors are sworn, the following remarks should be made to the jury pursuant to CPL 270.15(2):

PJI: 8:8.3

Good (Morning, Afternoon) ladies and gentlemen. We are about to select a jury for a trial. Let me first introduce you to the parties.

One of the parties is the Attorney General of the State of New York who is represented here by (Mr., Ms.) _____, who is seated [*identify location***].**

The other party is (Mr., Ms.) _____ who is seated [*identify location***] and who will often be referred to as the respondent.**

The respondent is represented by (his, her) lawyer, (Mr., Ms.) _____, who is seated [*identify location***] .**

.

CD [*state as appropriate:* **has been convicted of (***specify sex offense***) and is currently serving a sentence for that offense; has been convicted of (***specify sex offense***) and is subject to parole supervision for that offense; was charged with (***specify sex offense***), but was found not responsible for that offense by reason of a mental disease or defect; was**

convicted of (*specify sex offense*) **and has been a patient at a hospital operated by the Office of Mental Health after having been admitted to the facility directly upon (his, her) (release, conditional release) from state confinement].**

[*Where the Attorney General claims that respondent committed a sexually motivated designated felony before April 13, 2007, state:* **CD has been convicted of (***state designated offense(s) specified in petition***), and the Attorney General claims that CD's crime was "sexually motivated" in that it was committed in whole or substantial part for the purpose of CD's direct sexual gratification.]**

[*Where respondent was previously determined to be an incapacitated person pursuant to CPL Article 730 in connection with a sex offense with which he or she was charged but not convicted, state:* **CD was previously charged with conduct constituting [***specify sex offense***], but (he, she) was not put on trial for that offense because (he, she) was determined to be an incapacitated person and was committed to a psychiatric facility pursuant to law.]**

The purpose of this trial is to decide whether CD [*state where appropriate:* **was sexually motivated when (he, she) committed the crime of (***state designated offense(s) specified in petition***) in that (he, she) acted in whole or substantial part for the purpose of (his, her) own direct sexual gratification; committed the offense of (***state sex offense for which the respondent was indicted but not tried because of a finding of incapacitation pursuant to CPL Article 730*) **and whether CD] now suffers from a mental abnormality in that (he, she) has a congenital or acquired condition that both predisposes (him, her) to commit sex offenses [***where the Attorney General claims that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***] and results in (his, her) having serious difficulty in controlling such conduct.**

If, at the end of the trial, you find that CD [*state where appropriate:* **was sexually motivated when (he, she) committed (***state designated offense(s) specified in petition***); engaged in conduct constituting (***specify sex offense with which respondent was previously charged***) but was not tried because (he, she) was determined to be incapacitated and you**

further find that CD] now suffers from a mental abnormality, then the Court will determine the appropriate treatment, which will include either strict and intensive supervision or continued confinement in a secure treatment facility until such time as it is determined that such confinement is no longer necessary.

The process of jury selection is about to begin. The purpose of the process is to explore whether you can sit as a juror and whether you can be fair in reaching a decision in this case.

If you are selected as a juror, it will be your responsibility to evaluate fairly the testimony and other evidence presented, and to decide what the believable and accurate facts are.

After you have fairly determined the facts, you must apply the law to those facts. I will explain that law to you at the end of the case, and you must apply that law, regardless of whether or not you agree with it.

To be a fair juror, you must listen carefully to all the testimony and other evidence, and not make a final decision until I have given the case to you to decide.

You must make that decision, without fear, favor, bias, prejudice, or sympathy for either party or any witness, and render a decision based on a fair and honest evaluation of the testimony and other evidence, and the application of the law as I explain it.

My role is to help assure a fair and orderly trial in accordance with the law. I do that by presiding over the trial, deciding questions of law that arise between the parties, and by explaining the law to the jury.

I will give a full explanation of the law to you at the conclusion of the trial. There are some principles of law, however, that I wish to explain to you now.

First, the fact that the CD (committed, was charged with committing) [*specify sex offense*]**, a sex offense, is not, standing alone, a sufficient basis for you to find that (he, she) suffers from a mental abnormality.** **[***Where the Attorney General claims that CD committed a sexually*

motivated designated felony before April 13, 2007, substitute: **First, even if you find, as the Attorney General claims. that CD was sexually motivated when (he, she) committed (***state designated offense(s) specified in petition***), that finding is not, standing alone, a sufficient basis for you to find that (he, she) suffers from a mental abnormality.]**

Second, the burden of proving that the respondent is a detained sex offender who now suffers from a mental abnormality is on the Attorney General, and the Attorney General must prove that to you by clear and convincing evidence.

Clear and convincing evidence is evidence that satisfies you that there is a high degree of probability that respondent is a detained sex offender and now suffers from a mental abnormality.

The jury's decision must be unanimous; that is, each and every juror must agree.

Remember also that I am responsible for explaining the law to you. So, if a lawyer makes a reference to the law, and that reference turns out be different from what I say the law is, it will be your sworn duty as jurors to follow my instructions on the law.

In a few minutes, we will begin jury selection. I want you to understand that each side has a certain number of challenges called peremptory challenges that may be used to excuse prospective jurors for any reason. If one of the lawyers wishes to have a prospective juror excused, he or she will let me know privately. If you are excused, you will not be told why or which of the attorneys requested that you be excused. Please do not take it personally. It does not mean that the lawyers believe you are not a good or fair person. Nor should the remaining jurors speculate as to the reasons why a particular juror has been excused. The lawyers are doing the best they can to select a jury which together can fairly and reasonably hear and decide this case.

You are now about to be asked questions related to your ability to serve. What the lawyers and I say in questioning you is not evidence. I ask you to be frank and honest in your answers to the questions. In the course of my questioning, I will explore certain areas that you may not

want to discuss in public. If answering these questions may embarrass you or make you uncomfortable, I would ask you to discuss them with me privately, with the lawyers present. When the clerk calls your name, please approach the bench and bring all of your personal belongings.

1. Suggested Questions for Entire Panel

CPL 270.15(b), which is applicable in MHL Article 10 proceedings, see § 10.07(b), requires the court to ask the prospective jurors who have been sworn "questions affecting [their] qualifications to serve as jurors in the [proceeding]." Thus, when the panel of prospective jurors has been seated, the court must pose preliminary questions aimed at identifying individuals who are clearly unable or unqualified to serve. Judges presiding at MHL Article 10 trials have a degree of flexibility in the methods they use to seat and question prospective jurors. Additionally, there is a wide variety of local practices that may affect the manner in which jury selection is conducted. Such practices may provide helpful guidance in MHL Article 10 trials, provided that they conform to the requirements of the applicable provisions of the Criminal Procedure Law and are designed to ensure that the necessary information regarding juror qualifications is elicited. In some instances, additional questions suggested by the attorneys may be helpful. In all cases, the court should read to the panel of prospective jurors a list of the witnesses to be called, as well as the names of the attorneys and the respondent.

The following questions should be posed to the seated panel as a whole. The prospective jurors should be directed to raise their hands if the answer to any question is "yes." The should also be told that they may approach the bench if there are questions that they wish to discuss in private. Jurors who respond affirmatively to the court's general questions should be questioned in greater detail:

1. Do any of you suffer from any physical ailment or disability that may prevent you from serving in this case, such as a problem hearing, seeing or being able to tolerate confinement in a small room?

2. Have any of you been arrested for a crime?

3. Do any of you have a member of your immediate family who has been arrested for a crime?

4. Can you accept and follow the law as I give it to you.

5. Do any of you feel that he or she cannot evaluate witnesses' credibility based on the same tests you use in your everyday affairs to judge the reliability of statements people make to you?

6. Do any of you feel that you cannot fairly judge credibility of police officers, correction officers or mental health professionals such as psychiatrists, psychologists and social workers?

7. Do any of you know or think you might know respondent, any of the attorneys or any of the witnesses whose names I read to you?

8. Do any of you feel that you cannot be fair in evaluating the respondent's mental condition even though you know he committed the crime of [*state sex offense set forth in the petition]*?

2. Suggested Questions for Individual Jurors

The following is a nonexclusive list of suggested question to be posed to each prospective juror once sixteen jurors have been seated in the jury box. The purpose of these questions is to elicit information that may raise questions about the individual juror's qualifications and ability to be fair in light of the facts of the case. The questions may be adapted in the court's discretion and augmented where required by the facts and issues that the case may involve. Suggestions by the attorneys for additional questions may also be entertained. Jurors who respond affirmatively to the court's general questions should be questioned in greater detail. As previously noted, the prospective jurors should be advised that they may approach the bench for private discussion if they wish.

1. Have you or any member of your immediate family worked in law enforcement? Law enforcement includes the police, the prisons, the District Attorney's office, the Attorney General's Office and the parole and probation departments.

2. Have you or any member of your immediate family worked in a law office?

3. Have you or any member of your immediate family worked in the office of a psychiatrist, psychologist, therapist, social worker or other mental health care professional?

4. Have you or any member of your immediate family worked in a private or public psychiatric institution?

5. Have you or any member of your immediate family had any conflict with the law?

6. Have you or any member of your immediate family been a victim of a crime, whether or not the crime was reported?

7. Where do you live? How long have you lived at your present address?

8. Are you currently married?

9. Do you have children?

10. Are you employed? What kind of work do you do?

11. Do you belong to any groups or organizations of any kind?

12. What do you do with your leisure time?

13. What newspapers or magazines do you read and what televison programs and websites do you regularly view?

14. Have you even been in the military? If so, have you ever had any connection with court martial proceedings?

15. What is your educational background?

16. Have you ever taken any law courses?

17. Have you ever taken any psychology courses?

18. Have you even been in court for any reason other than as a prospective juror or spectator?

19. Have you ever served as a juror in a civil or criminal case before?

20. Do you understand the principles of law that I discussed earlier? Can you accept and follow them in this case?

22. Can you be fair and impartial? Do you have any beliefs about sex offenders that would prevent you from deciding the case before you on the evidence alone?

23. Is there any other reason that you can think of that would prevent you from serving as a juror in this case?

3. Parties' Participation in Jury Selection

CPL 270.15 requires the court to permit both parties to examine the prospective jurors, individually or collectively, regarding their qualifications to serve as jurors. Each party is to be afforded a fair opportunity to question the prospective jurors as to any unexplored matter affecting their qualifications, but the court may curtail questioning that is repetitious or irrelevant or that concerns a juror's knowledge of rules of law. The scope of such examination is within the discretion of the court, but the court should generally give the parties broad latitude, at least in the absence of serious repetition or abusive questioning. In exercising its discretion, the court should be mindful that, because of the subject matter of the proceeding, the attorneys may find it necessary to inquire about highly personal subject matters, including the prospective jurors' history of mental illness, hospitalizations, family history, exposure to sexual abuse and other reported and/or unreported crimes. Where such questioning is undertaken, the court should consider taking measures to protect the jurors' privacy, including conducting individual questioning at the bench out of the hearing of the other prospective jurors. After the parties have concluded their examinations of the prospective jurors, the court may ask such additional questions as it deems proper to ascertain the jurors' qualifications.

B. Pretrial Discovery

A psychiatric examiner chosen by the Attorney General is to have "reasonable access" to the respondent for the purpose of conducting an examination, MHL § 10.08(b). Additionally, both the Attorney General's psychiatric examiner and a psychiatric examiner chosen by (or on behalf of) the respondent is to have access to the respondent's medical, clinical and criminal records, § 10.08(b); see also § 10.08(c). However, the respondent's psychiatric examiner cannot obtain information identifying the victim absent a court order issued "for good cause shown," id, § 10.08(b). The respondent's attorney is entitled to inspect and copy any relevant records in the Attorney General's possession except to the extent that they provide identifying information about the victim or constitute investigative material beyond the scope of the proceeding that are confidential or privileged from disclosure, § 10.08(d). Disclosure of records and reports

under MHL Article 10 are governed by MHL Article 33.16, see § 10.08(e-1).

C. Preliminary Instructions

Because of the unusual nature of trials under MHL Article 10, the preliminary instructions that are ordinarily given to juries in civil cases, see PJI 1:1 to 1:14, must be modified. The following preliminary charge, which is tailored for MHL Article 10 proceedings, is suggested:

PJI 8:8.4

Members of the jury, we are about to start the trial of this case, about which you have heard some details during jury selection. Before the trial begins, however, there are certain instructions you should have in order to understand what you will hear and see and how you should conduct yourself during the trial.

As you have heard, CD has previously been convicted of a sex offense [*substitute where appropriate:* **has been convicted of a crime that the Attorney General claims was sexually motivated; has previously been confined in a psychiatric facility because he was found incapable of going to trial on the sex offense with which (he, she) was charged]. The Attorney General has brought this proceeding to have CD confined or supervised for an additional time on the ground that (he, she) is a sex offender who suffers from a mental abnormality that predisposes (him, her) to commit sex offenses and that results in (his, her) having serious difficulty controlling (his, her) conduct. Later in the trial, I will [***state where the respondent contests the claim that (he, she) committed or was charged with committing a sex offense:* **explain exactly what a "sex offense" is and I will] give you the legal definitions of any other phrases that you need to decide this case.**

You will hear evidence and ultimately be asked to decide based on that evidence whether [*state where appropriate:* **the crime of which CD was convicted was sexually motivated; whether CD committed the offense of (***state offense Attorney General claims the respondent committed before being confined as a result of a finding of incapacitation pursuant to CPLR Article 730*) **and whether] CD does or does not now suffer from a**

mental abnormality that predisposes (him, her) to commit sex offenses [*where the Attorney General claims that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***] and that results in (his, her) having serious difficulty controlling (his, her) conduct. The legal and practical consequences of your decision will then be up to me. You should not speculate about those consequences. If you find that [***state where appropriate**:* **the crime of which CD was convicted was sexually motivated; CD committed the offense of (***state offense Attorney General claims the respondent committed before being confined as a result of a finding of incapacitation pursuant to CPLR Article 730* **and that] CD now suffers from a mental abnormality that predisposes (him, her) to commit sex offenses [***where the Attorney General claims that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***] and that results in (his, her) having serious difficulty controlling (his, her) conduct, it will be my responsibility to decide the extent to which CD will be confined or subjected to further supervision.**

At this point, I have a few specific instructions for you to use in evaluating what you are about to see and hear. First, the Attorney General has the burden of proof in this case and must convince you by clear and convincing evidence that CD is a sex offender with a mental abnormality that predisposes (him, her) to commit sex offenses [*where the Attorney General claims that the respondent is predisposed to commit a particular sex offense or particular sex offenses, state the offense or offenses***] and that results in (his, her) having serious difficulty in controlling (his, her) conduct. Clear and convincing evidence is evidence that satisfies you that there is a high degree of probability that CD is a sex offender who suffers from a mental abnormality. It is not enough to find that it is more likely than not that CD is a sex offender suffering from a mental abnormality.**

Second, you may not infer from the fact that CD has previously (been convicted of, been held in custody for) a sex offense that CD now suffers from a mental abnormality that predisposes (him, her) to commit such offenses and has serious difficulty in controlling (his, her) conduct. [*Where the respondent was convicted of a designated felony committed before April 13, 2007, substitute:* **Second, if the Attorney General introduces evidence to prove that CD's crime of (***state*

designated offense(s) specified in petition) **was sexually motivated, you may not infer from that evidence that CD now suffers from a mental abnormality that predisposes (him, her) to commit sex offenses and that results in serious difficulty in controlling (his, her) conduct.]** [*Where the respondent was charged with a sex offense but was confined as a result of a finding of incapacitation without having been tried, substitute:* **Second, you may not infer from the fact that CD was previously found to be incapacitated and was committed to a psychiatric facility that CD now suffers from a mental abnormality that predisposes (him, her) to commit such offenses and that results in serious difficulty in controlling (his, her) conduct.]**

[Insert where appropriate: PJI 1:3, 1:4, 1:5, 1:6, 1:7, 1:8, 1:9, 1:10, 1:11, 1:12, 1:13]

Only twelve jurors will deliberate on this case when it is submitted for consideration. We have also selected additional jurors, called "alternates." Alternate jurors are selected to serve because a regular juror may be prevented from continuing to serve by some emergency such as a serious illness or death. Although this seldom happens during a trial, there are cases where we do call on the services of alternates. Alternates are required to pay the same careful attention to the trial as the regular jurors so that if needed they will be fully familiar with the case.

The fact that there are alternate jurors does not mean that any regular juror is free to excuse himself or herself from the case. As a duly chosen juror it is your obligation to be available throughout the trial.

[Insert PJI 1:14]

C. Evidentiary and Procedural Considerations

The provisions of CPLR Article 45 are applicable to trials conducted pursuant to MHL Article 10, see § 10.07(c). Additionally, the statute contains its own evidentiary prescriptions, including an explicit authorization to use the results of a psychiatric examination conducted pursuant to the Article, even though those results are otherwise required to be kept confidential, § 10.08(a); see § 33.13. The jury may also hear evidence

of the degree to which the respondent cooperated with the psychiatric examination, and, upon request, the court may instruct the jury that the respondent refused to cooperate where the court so finds, § 10.07(c). A respondent is entitled to testify and call witnesses. However, the respondent may not subpoena the alleged victim except for good cause shown, id. Either party may request closure of the courtroom or sealing of papers for good cause shown, id.

Unless authorized to give unsworn testimony, all witnesses must testify under oath and all are subject to cross-examination, § 10.08(g). All plea minutes and prior trial testimony from "the underlying criminal proceeding," as well as records from previous proceedings conducted under MHL Article 10, "shall be admissible," see § 10.08(g). Relevant reports written by psychiatric examiners are admissible in probable cause hearings, see § 10.06(g), and in certain other enumerated proceedings regardless of whether the author is called to testify, as long as the reports are certified pursuant to CPLR 4518(c), see § 10.08(g). However, a showing of the author's unavailability to testify or of some other "good cause" must be made before such reports are admitted at trial without the presence of the author, § 10.08(g).

In light of the subject matter of MHL Article 10 proceedings, evidentiary questions may arise concerning the admissibility of hearsay evidence, the Fifth Amendment right against self-incrimination, evidence of prior crimes of the respondent, as well as other issues. The experience of other jurisdictions may be helpful should these and other such questions arise. Statutes similar to MHL Article 10 have been enacted in a number of other states, see Breer, Beyond Hendricks; The United States Supreme Court Decision in Kansas v. Crane and Other Issues Concerning Kansas' Sexually Violent Predator Act, 71-April J Kan BA 13 (2002). The unifying principle of many of the cases seems to be that the constitutional precepts normally applicable under the criminal law do not apply because the statutes and the proceedings under them are civil in nature. Thus, hearsay testimony of victims of the underlying crimes were held admissible in People v Howard, 70 Cal App 4th 136, 82 Cal Rptr 2d 481. Similarly, the Fifth Amendment privilege against self incrimination did not prevent the admission in evidence of statements that were made by the respondent during a mandatory psychiatric evaluation, Allen v. Illinois, 478 US 364, 106 S Ct 2988. By the same reasoning, the respondent may also be compelled to testify at a civil commitment hearing, People v. Leonard, 93 Cal Rptr 2d 180 [Cal App]. Furthermore, evidence of prior crimes has been held admissible as relevant to respondent's propensity to commit future sex crimes, In re Bailey, 317 Ill 3d 1072, 740 NE2d 1146; In re Hay, 263 Kan 822, 953 P2d 666; In re Young, 857 P2d 989 [Wash]; see Hubbart v Superior Court, 19 Cal 4th 1138, 969 P2d 584 (respondent's due-process rights not violated by admission of prior crimes evidence

where statute precluded finding of dangerousness based on prior crimes alone). Other jurisdictions have also held that a respondent cannot avoid the admission of the more prejudicial aspects of his or her prior criminal history by stipulating to his or her past convictions, In re Williams, 628 NW2d 447 [Iowa]; In re Crane, 269 Kan 578, 7 P3d 285, vacated on other grds 534 US 407, 122 S Ct 867; In re Turay, 139 Wash 2d 379, 986 P2d 790, cert denied 531 US 1125, 121 S Ct 880. While the cited cases, with the exception of Allen v. Illinois, supra, are not binding in this state, their unifying principle – that the trial is civil, not criminal in nature – certainly must be considered.

D. Burden of Proof and Issues for the Trier of Fact

The jury (or the court in a nonjury trial) must determine whether the respondent is a "detained sex offender who suffers from a mental abnormality," MHL § 10.07(d); see § 10.03(g), (i). Where a showing is made that the respondent was convicted of a "sex offense," see § 10.03(p), or was found not guilty by reason of mental disease or defect for acts constituting such an offense, the respondent's commission of such an offense is to be deemed established and the issue cannot be relitigated, § 10.07(c).

The burden of proof rests with the Attorney General, who must prove that the respondent is "a detained sex offender who suffers from a mental abnormality" by clear and convincing evidence, § 10.07(d). Where the respondent has been charged with a "sex offense" and has been committed pursuant to CPL Article 730, the Attorney General also has the burden of proving by clear and convincing evidence that the respondent "did engage in the conduct constituting such offense," § 10.07(d). Where the petition alleges the respondent's commission of a "designated felony" before April 13, 2007, the jury must determine whether the offense was "sexually motivated" as defined in section 10.03(s), see § 10.07(c). A finding that the respondent is a "detained sex offender who suffers from a mental abnormality" may not be made solely on the basis of the respondent's commission of a sex offense, and the jury must be so admonished, § 10.07(d).

E. Verdict and Postverdict Procedures

A jury determination made in a trial conducted pursuant to MHL § 10.07 must be unanimous, § 10.07(d). If the jury determines unanimously (or the court in a nonjury trial determines) that the Attorney General has not met the burden of proving by clear and convincing evidence that the respondent is a "detained sex offender who suffers from a mental abnormality," the petition must be dismissed and the respondent released, § 10.07(e). If the jury is unable to reach a unanimous verdict, the court must continue any

existing commitment order and schedule a second trial to be held within 60 days, id. If the jury is unable to reach a unanimous verdict in the second trial, the petition must be dismissed, id.

Under MHL § 10.07(f), where the jury unanimously determines (or the court in a nonjury trial determines) that the respondent is a "detained sex offender who suffers from a mental abnormality," the court must proceed to determine whether the respondent is a "dangerous sex offender requiring confinement," see § 10.03(e), or is instead a "sex offender requiring strict and intensive supervision," see § 10.03(r). The former status must be assigned 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," § 10.07(f). The statute specifically provides that the parties may offer additional evidence and arguments bearing on whether the respondent is a "dangerous sex offender requiring confinement," id. In the event that the court determines that the respondent is a "dangerous sex offender requiring confinement," the respondent must be "committed to a secure treatment facility for care, treatment, and control until such time as he or she no longer requires confinement," id.

Where the court does not find by clear and convincing evidence that the respondent is a "dangerous sex offender requiring confinement," it "shall make a finding of disposition" that the respondent is a "sex offender requiring strict and intensive supervision," and the respondent must be directed to submit to a regimen of such supervision pursuant to MHL § 10.11, see § 10.07(f). In making such a finding, the court must consider the conditions that would be imposed on the respondent if subject to a regimen of strict and intensive supervision, as well as "all available information about the prospects for the respondent's possible re-entry into the community," § 10.07(f).

V. Treatment and Confinement

A respondent found to be a "dangerous sex offender requiring confinement" must be committed to a secure treatment facility, see MHL § 10.03(o), and provided with such care, treatment and control as is prescribed by § 10.10.

Where the court determines pursuant to § 10.07(f) or 10.09(h) (pertaining to post-confinement release) that the respondent should be released to a regimen of "strict and intense supervision," it must first order the Division of Parole to recommend supervision requirements, § 10.11(a)(1). Such requirements are to be developed in consultation with

the Commissioner of Mental Health or the Commissioner of Retardation and Developmental Disabilities and may include such measures as electronic monitoring, polygraph monitoring, specification of residence and prohibitions against contact with past or potential victims, § 10.11(a)(1). Additionally, the Commissioner of Mental Health or the Commissioner of Retardation and Developmental Disabilities must recommend a specific course of treatment after consultation with the respondent's treating psychiatrist or psychologist, id. Both the respondent and the Attorney General must be given copies of the recommended plan for treatment and supervision and both sides must be given an opportunity to be heard and make submissions of their own before the court issues its order specifying the conditions of supervision and treatment, § 10.11(a)(1), (2).

MHL § 10.11(b) prescribes certain minimum requirements for supervision and reporting when a respondent has been released into the community under a regimen of "strict and intense supervision." MHL § 10.11(d) delineates the procedures to be followed when a respondent has violated a condition of that regimen. The statute provides for the Division of Parole to take the respondent into custody immediately when it has "reasonable cause" to believe that the respondent has committed a violation or when a treating professional has reported that the respondent may be a "dangerous sex offender requiring confinement," § 10.11(d)(1). Such an action must be followed by a detailed set of prescribed procedures, including an Attorney General's petition for confinement or modification of the terms of supervision and a judicial hearing on the petition, § 10.11(d)-(h).

VI. Post-commitment Review

An individual who has been retained in custody pursuant to MHL Article 10 is entitled to annual notice of the right to petition for discharge, MHL § 10.09(a). Annual psychiatric examinations of the respondent are also required, § 10.09(b). The Commissioner of Mental Health or the Commissioner of Mental Retardation and Developmental Disabilities is required to review the respondent's records and recent psychiatric reports and to make a written determination as to whether the respondent is currently a "dangerous sex offender requiring confinement," id. The Commissioner's determination must then be forwarded to the court, along with the notice of rights that was previously sent to the respondent, any waiver of those rights by the respondent, and the records, reports and psychiatric findings underlying the Commissioner's decision, § 10.09(c).

If it appears from the material forwarded to the court that the respondent has petitioned for discharge or has not waived his or her right to petition, the court must hold an

evidentiary hearing, § 10.09(d). An evidentiary hearing also must be held if the court determines from the submitted material that there is a "substantial question as to whether the respondent remains a dangerous sex offender requiring confinement," id. The Attorney General has the burden of proof in such a hearing, id.

An evidentiary hearing must be held if the Commissioner of Mental Health or the Commissioner of Mental Retardation and Developmental Disabilities determines that the respondent is no longer a "dangerous sex offender requiring confinement" and petitions for either the respondent's discharge or the respondent's release under a regimen of "strict and intensive supervision," § 10.09(e). Where the respondent has petitioned for discharge and/or supervised release (other than in connection with a mandated annual review), the court may order an evidentiary hearing, but is also authorized to deny such relief if it finds the respondent's request to be frivolous or lacking in sufficient basis, § 10.09(f). If the court decides to hold an evidentiary hearing, the Attorney General has the burden of proving by clear and convincing evidence that the respondent is currently "a dangerous sex offender requiring confinement," § 10.09(f), (h). If the court finds that the Attorney General has not met this burden, it must order the respondent's discharge to a regimen of strict and intensive supervision pursuant to § 10.11(b), unless it determines that the respondent no longer suffers from a "mental abnormality," § 10.09(h).