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The Admissibility of Hearsay Evidence in New York State Sex Offender Civil Commitment Hearings After *State v. Floyd Y.*: Finding a Balance Between Promoting the General Welfare of Sexual Assault Victims and Providing Due Process of Law

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THE ADMISSIBILITY OF HEARSAY EVIDENCE IN NEW YORK STATE SEX OFFENDER CIVIL COMMITMENT HEARINGS AFTER *STATE V. FLOYD Y.*: FINDING A BALANCE BETWEEN PROMOTING THE GENERAL WELFARE OF SEXUAL ASSAULT VICTIMS AND PROVIDING DUE PROCESS OF LAW

*Brittany K. Dryer**

In twenty states throughout the country, the government may petition for the civil commitment of detained sex offenders after they are released from prison. Although processes differ among the states, the government must generally show at a court proceeding that a detained sex offender both suffers from a mental abnormality and is dangerous and that this combination makes a detained sex offender likely to reoffend. At such court proceedings, both the government and the respondent will present evidence to either the court or the jury on these issues. As in most court proceedings, hearsay evidence is inadmissible at sex offender civil commitment hearings unless it meets sufficient indicia of reliability or fits within an established exception to the general rule against hearsay.

On November 19, 2013, the New York State Court of Appeals determined that in sex offender civil commitment hearings, the best way to show that hearsay evidence regarding uncharged crimes and/or dropped charges meets sufficient indicia of reliability is to require live confrontation of the declarant. This Note argues, however, that neither the U.S. Constitution nor New York State's Civil Practice Law and Rules require live confrontation. In addition, live confrontation conflicts with the legislative intent of New York State's sex offender civil commitment statute and is detrimental to the psychological well-being of victims of sexual assault.

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INTRODUCTION

The year is 1998: a man named Floyd is sexually abusing Jane Smith's[1] eight-year-old daughter Mary and fifteen-year-old daughter Sarah.[2] Either because of denial or a lack of knowledge, Jane is unaware that Floyd has an extensive criminal history of sexual abuse. Only six years before, Floyd was convicted of sexual abuse for raping a twenty-three-year-old female neighbor.[3] Two years later, Floyd was accused of sexually abusing a fifteen-year-old girl. One year after that, Floyd pled guilty to harassing the girl's twin sister after inappropriately touching her while she was staying at Floyd's home. Floyd's rap sheet does not stop there.[4] Only two years later, Floyd was accused of sexually abusing an eight-year-old family friend and admitted to having inappropriate telephone conversations with his seventeen-year-old sister-in-law.[5]

One day in 1998, the abuse came to a screeching halt when Jane walked in on Floyd lying on top of Sarah, attempting to play a "tickle game" with her.[6] Although there was enough evidence to bring charges against Floyd—and charges were in fact brought—they were eventually dropped.[7] To spare Sarah the trauma of testifying at trial, Jane agreed that if Floyd signed a parole document agreeing to stay away from Sarah, she would drop the charges. Jane immediately broke up with Floyd, and soon thereafter, Mary accused Floyd of sexual abuse. The district attorney, however, determined that there was insufficient evidence and corroboration for these accusations, and no charges were brought against Floyd.[8]

Fast forward to the year 2007: Floyd has since been convicted of sexually abusing his nine-year-old stepson and eight-year-old stepdaughter from another relationship and served four years in prison.[9] Then, the telephone rings: it is the Attorney General's Office.[10] One of the assistant attorney generals asks to speak with Mary, who is now seventeen years old.[11] The assistant attorney general reluctantly explains that Floyd had finally been convicted of sexual abuse of yet two more youths and is

1. All names in this Introduction are fictitious as to maintain anonymity and are only used for clarity.
2. *See* State v. Floyd Y., 2 N.E.3d 204, 207 (N.Y. 2013).
3. *See id.*
4. *See id.*
5. *See id.*
6. *See* State v. Floyd Y., 953 N.Y.S.2d 566, 570 (App. Div. 2012), *rev'd*, 2 N.E.3d 204.
7. *See id.*
8. *See id.*
9. *See Floyd Y.*, 2 N.E.3d at 205–07.
10. The Attorney General's Office represents the state in cases pertaining to sex offenders requiring civil commitment or supervision. *See* N.Y. MENTAL HYG. LAW § 10.03 (McKinney 2011). Unlike in criminal proceedings, where the District Attorney represents the "people," the Attorney General represents the "state" in these cases. *Id.*
11. The assistant attorney general does not need to speak with Sarah because the agreement Floyd Y. signed to stay away from her was sufficient substantiating evidence. *See infra* notes 302–03 and accompanying text.

nearing his release date from prison. The only way to ensure he is not released is for the state to file a petition for civil commitment, and the only way the state will have enough evidence to show that Floyd requires civil commitment is for Mary to testify in open court—in front of her abuser—about what happened to her as a child nine years earlier.

The assistant attorney general does not make this call lightly. In most cases, a sex offender's prior victims play no role in sex offender civil commitment proceedings.[12] Because the district attorney did not have enough evidence to corroborate Mary's accusations in 1998, however, the assistant attorney general needs the victim to come in and testify. If she does not, then the state cannot introduce her accusations against Floyd at the civil commitment proceedings, and it will be as if the abuse never happened.

The scenario presented is drawn from the New York State Court of Appeals case, *State v. Floyd Y.*,[13] in which the court held that, without substantiating evidence, the introduction of statements about uncharged crimes and dropped charges would violate due process.[14] Consequently, the court held that the most credible way to ensure due process is to establish the statements' reliability by requiring the declarant to testify in open court about the events that occurred.[15]

The civil commitment of a U.S. citizen is extremely serious. It deprives citizens of one of their most basic rights: liberty.[16] Further, because most sex offender civil commitment statutes do not prescribe a term of years for civil commitment, sex offenders found to require civil commitment may be deprived of their liberty indefinitely.[17]

Further, some commentators argue that civil commitment statutes violate the Double Jeopardy Clause of the Constitution, which states, "nor shall any person be subject for the same offen[s]e to be twice put in jeopardy of life or limb."[18] Although the U.S. Supreme Court has held that the civil commitment of sex offenders does not violate the Fifth Amendment in any respect,[19] the debate about the constitutionality of civil commitment statutes survives today.[20]

Although the civil commitment of a U.S. citizen is of great consequence, the psychological well-being of victims of sexual assault is also gravely important. Sex offender civil commitment laws are not intended to apply to

12. *See infra* Part II.B.3.
13. 2 N.E.3d 204 (N.Y. 2013).
14. *See id.* at 205.
15. *Id.* at 214.
16. *See* U.S. CONST. amend. V.
17. *See, e.g.*, N.Y. MENTAL HYG. LAW § 10.09 (McKinney 2011) (explaining that sex offenders civilly committed under Article § 10 have the right to annual examinations for discharge; however, if the court finds by clear and convincing evidence that the respondent is still a dangerous sex offender requiring confinement, confinement will continue until the respondent's next examination).
18. U.S. CONST. amend. V.
19. *See* Kansas v. Hendricks, 521 U.S. 346, 371 (1997).
20. *See* Kevin G. Vanginderen, Kansas v. Hendricks*: Throwing Away the Key*, 20 T. JEFFERSON L. REV. 357, 371–75 (1998).

all sex offenders, but rather to only the most violent, dangerous, and recidivist ones.[21] While this ensures that only the "worst of the worst" will be considered for civil commitment, it may have severe implications for the well-being of victims.

For example, numerous psychological studies conclude that victims of sexual assault who testify in court may suffer irreparable harm such as stunted development, depression, anxiety, and uncontrollable fear.[22] This is because testifying in front of one's abuser may reexpose a victim to feelings of betrayal, helplessness, and powerlessness.[23] Furthermore, both state legislatures and courts have recognized the same sentiment.[24] Around the country, both state and federal courts implement alternatives that either reduce or eliminate the need for live confrontation, while still ensuring the accused due process.[25]

Nonetheless, the New York State Court of Appeals suggests that in sex offender civil commitment hearings, which often take place decades after victims have been sexually abused, the most reliable way to ensure due process is to require live confrontation.[26] While on the surface this solution may seem reasonable, this Note argues that there are various alternatives that satisfy due process without unnecessarily involving the live testimony of past victims of sexual assault.

Part I of this Note explores the history of civil commitment in the United States, the laws that govern civil commitment statutes, and New York State's Sex Offender Management and Treatment Act. Part II presents the events leading up to the holding in *State v. Floyd Y.* as well as how the decision relates to the laws governing civil commitment statutes. Part III examines the psychological impacts live confrontation may have on victims of sexual assault, and Part IV concludes that live confrontation can be, and should be, the last resort to substantiate hearsay evidence in sex offender civil commitment proceedings.

I. THE EVOLUTION OF SEX OFFENDER CIVIL COMMITMENT LAW IN THE UNITED STATES, THE GOVERNING RULES, AND NEW YORK STATE'S SEX OFFENDER MANAGEMENT AND TREATMENT ACT

Part I first explores the history of civil commitment law in the United States. This part then presents the laws governing civil commitment statutes and concludes with an examination of New York State's Sex Offender Management and Treatment Act.

21. *See* S. 3318, 230th Leg., Reg. Sess., at 59–63 (N.Y. 2007) (stating that "those referred for civil commitment should be repeat, chronic felony sex offenders who have committed predatory crimes involving violence, stranger victims or young children").

22. *See infra* Part III.B.

23. *See infra* Part III.B.

24. *See infra* Part II.B.

25. *See infra* Part II.B.

26. *See* State v. Floyd Y., 2 N.E.3d 204, 214 (N.Y. 2013).

A. The History of Civil Commitment Law in the United States

Part I.A first explores how the civil commitment of the mentally ill came to fruition in the United States. It then explores the history of civil commitment, focusing on the civil commitment of sex offenders in the United States in general and New York State specifically.

1. The Origins of Civil Commitment Law

In order to understand how and why states began to civilly commit dangerous sex offenders suffering from mental abnormalities, it is useful to acknowledge the justifications and origins of civil commitment of the mentally ill generally.

There are two main justifications state governments cite in implementing their power to civilly commit the mentally ill.[27] First, state governments cite the doctrine of *parens patriae*.[28] *Parens patriae* is a Latin phrase that translates to "parent of the country."[29] The idea behind *parens patriae* is that the government has the responsibility to act in the best interest of its citizens when such citizens cannot do so for themselves.[30] The second, and perhaps stronger, justification for civil commitment is rooted in the states' police powers. The states' police powers are derived from the Tenth Amendment, which states that all powers not delegated to the federal government are reserved to the states.[31] It follows from the Tenth Amendment that states therefore have the power to promote the health, safety, morals, and general welfare of their citizens, including enacting statutes that may impede on the liberty of some citizens.[32]

The origins of civil commitment in the United States date back to fifteenth-century London.[33] In 1403, London's Bedlam Hospital opened the first inpatient asylum dedicated to individuals suffering from mental illnesses.[34] Some centuries later, the first inpatient asylum emerged in the United States.[35]

Before the development of inpatient asylums in the United States, however, individuals suffering from mental illnesses were often confined to

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27. *See* Megan Testa & Sara G. West, *Civil Commitment in the United States*, 7 PSYCHIATRY 30, 31 (2010).

28. *See id.*

29. *Id.*

30. *Id.*

31. U.S. CONST. amend. X.

32. *See* Brown v. Maryland, 25 U.S. 419, 457 (1827).

33. *See* Testa & West, *supra* note 27, at 31–32.

34. *See id.* The National Alliance on Mental Illness defines a mental illness as "a condition that impacts a person's thinking, feeling or mood [and] may affect . . . his or her ability to relate to others and function on a daily basis." Nat'l All. on Mental Illness, *What Is Mental Illness?*, MENTAL ILLNESSES, http://www.nami.org/Template.cfm?Section=By_Illness (last visited Sept. 27, 2015) [http://perma.cc/8C48-583L].

35. *See* Testa & West, *supra* note 27, at 32; *see also* Stuart A. Anfang & Paul S. Appelbaum, *Civil Commitment—The American Experience*, 43 ISR. J. PSYCHIATRY & RELATED SCI. 209, 210 (2006) (noting that the first psychiatric admission to occur in the colonies was in 1752 in Philadelphia, Pennsylvania).

prisons and homeless shelters.[36] While in these settings, mentally ill patients rarely received treatment and were subject to dangerous and unhealthy living conditions.[37] Further, the legal standard for civil commitment during this time was exceptionally archaic because there were no procedural safeguards in place to determine whether an individual actually required treatment.[38] For example, in 1860, a clergyman confined his wife to an asylum for having an "unclean spirit," as she was interested in exploring religious traditions outside the Presbyterian Church.[39]

Nonetheless, by the nineteenth century, the first inpatient asylums were established in the United States.[40] For example, between 1817 and 1824, Connecticut, New York, Massachusetts, and Pennsylvania opened four privately funded asylums.[41] Soon thereafter, many southern states opened public asylums, and the presence of state-run mental hospitals began to increase.[42]

Along with an increase in the existence of asylums in the twentieth century came an increase in due process rights for the mentally ill.[43] For example, numerous states implemented new legal safeguards, including the right to counsel and the right to be heard.[44] In addition, the power to civilly commit an individual was removed from psychiatric professionals and given to judges and magistrates.[45]

Although the implementation of legal safeguards had an impact, it was not until the 1960s that states began to establish rigid legal requirements for the civil commitment of the mentally ill.[46] The most famous case regarding such requirements, *O'Connor v. Donaldson*,[47] was decided in 1975. The U.S. Supreme Court held that an individual could not be civilly committed based solely on a psychiatric professional's finding that an individual suffers from a mental illness.[48] The Court explained that there was no constitutional foundation for civilly committing a mentally ill individual who is not dangerous and can live safely on his or her own.[49]

The Court in *O'Connor* ruled that in order for an individual to be involuntarily hospitalized against his or her will, it must be shown that (1) the individual suffers from a mental illness and (2) the individual poses a

36. *See* Testa & West, *supra* note 27, at 32; *see also* Anfang & Appelbaum, *supra* note 35, at 209.
37. *See* Testa & West, *supra* note 27, at 32.
38. *See id.*
39. *See id.*
40. *See id.*
41. *See id.*
42. *See id.*
43. *See id.*
44. *See id.*
45. *See id.*
46. *See id.* at 33; *see also* Philip Fennel & Robert Lloyd Goldstein, *The Application of Civil Commitment Law and Practices to a Case of Delusional Disorder: A Cross-National Comparison of Legal Approaches in the United States and the United Kingdom*, 24 BEHAV. SCI. & L. 385, 386–87 (2006).
47. 422 U.S. 563 (1975).
48. *See id.* at 575.
49. *See id.*

danger to himself or others.[50] The burden of proof for these criteria varies among the states; however, the Court ruled that requiring proof by "clear, unequivocal and convincing evidence" is constitutionally sound.[51]

2. The Civil Commitment of Sex Offenders

Throughout the twentieth century, the government became increasingly involved in the regulation of the civil commitment of the mentally ill.[52] As a result of this increased regulation, the government learned more about the mentally ill and the different populations that suffer from mental illness.[53] One specific subset of the mentally ill—sex offenders—stood out to the government, as they "f[e]ll at the intersection between psychiatry and law" and posed a unique problem to society.[54]

The earliest statutes calling for the civil commitment of sex offenders date back to the 1930s, when there was a surge in research on whether criminal conduct could be explained by medical conditions.[55] These statutes, however, were ultimately unsuccessful as they were overbroad and deprived the accused of basic individual liberties, such as the "right to a trial, with attorney representation, prior to psychiatric admission."[56]

A few decades later, in the 1960s, twenty-six states and the District of Columbia passed statutes permitting the civil commitment of an individual found to be a "sexual psychopath."[57] These statutes, however, called for civil commitment as an *alternative* to criminal sentences, not as a post-release condition.[58]

As a result of these statutes, new research emerged regarding sex offenders' responses to treatment.[59] By 1970, because a substantial amount of this research showed that sex offenders were not responding to the

50. *See id.*

51. *See* Addington v. Texas, 441 U.S. 418, 433 (1979).

52. *See* Anfang & Appelbaum, *supra* note 35, at 210–12; Fennel & Lloyd, *supra* note 46, at 386–88; Testa & West, *supra* note 27, at 32–34.

53. *See* Testa & West, *supra* note 27, at 35.

54. *Id.* The U.S. government defines a sex offender as "an individual who was convicted of a sex offense." 42 U.S.C. § 16911 (2012). The term "sex offense" is defined broadly, including "a criminal offense that has an element involving a sexual act or sexual contact with another" and "a criminal offense that is a specified offense against a minor." *Id.* The broadness of the definition of both "sex offender" and "sex offense" has caused substantial controversy among legal scholars, which, however, is beyond the scope of this Note. *See* Katherine Godin, *The New Scarlet Letter: Are We Taking the Sex Offender Label Too Far?*, 60 R.I. B.J. 17, 19–20 (2011); *see also* Marion Buckley & J. Michael True, *"Sex Offenders" but No Sex Crime? What SORA and VOYRA Could Mean for Your Clients*, 95 ILL. B.J. 482, 484–85 (2007).

55. *See* Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CALIF. L. REV. 2093, 2096 (2010).

56. *See* Testa & West, *supra* note 27, at 32.

57. *See* Miller, *supra* note 55, at 2096.

58. *See id.* at 2097.

59. *See id.*

treatment provided in civil commitment programs, such programs fell out of favor, and instead there was "a shift toward determinative sentencing."[60]

Two decades later, the first statute calling for the civil commitment of sex offenders nearing release from prison was enacted in the United States.[61] This statute was enacted in the state of Washington and permits the state to keep sex offenders in custody when it can be shown that they are likely to engage in sexually violent behavior.[62] Today, twenty states and the federal government have similar statutes.[63]

Although state law varies, most states require that an individual be (1) a convicted sex offender (2) suffering from a mental abnormality (3) that predisposes him or her to engage in sexual violence.[64] In *Kansas v. Hendricks*,[65] the Supreme Court held that such statutes are constitutional, despite numerous arguments regarding "due process, double jeopardy, and *ex post facto*" challenges.[66]

The *Hendricks* decision places great emphasis on the state's requirement that, in order for civil commitment proceedings to take place, a convicted sex offender must *suffer from a mental abnormality*.[67] A mental abnormality is generally defined as a "condition, disease or disorder . . . that predisposes [a sex offender] to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct."[68] Examples of mental abnormalities that qualify

60. *Id.* A determinative, or determinate, sentence is a fixed sentence set for a number of years in jail or prison, which can only be shortened by credit for time served, good time, and work time. ARTHUR W. CAMPBELL, LAW OF SENTENCING § 4:3 (3d ed. 2004). Determinate sentences are contrasted with indeterminate sentences, which, instead of consisting of a fixed number of years, set forth a minimum and maximum range a prisoner will serve. *Id.*

61. WASH. REV. CODE ANN. §§ 71.09.010–.903 (West 2008); *see also* Miller, *supra* note 55, at 2097.

62. §§ 71.09.010–.903.

63. *See* Miller, *supra* note 55, at 2098; *see also* 18 U.S.C. § 4248 (2012); ARIZ. REV. STAT. ANN. §§ 36-3701 to -3717 (2009); CAL. WELF. & INST. CODE §§ 6600–6609.3 (West 2010); FLA. STAT. ANN. §§ 394.910–.932 (West 2011); 725 ILL. COMP. STAT. ANN. 205/1.01–205/12 (West 2008); IOWA CODE ANN. §§ 229A.1–.16 (West 2006); KAN. STAT. ANN. §§ 59-29a01 to -29a22 (West 2008); MASS. ANN. LAWS ch. 123A, §§ 1–16 (LexisNexis 2003); MINN. STAT. ANN. §§ 253D.01–.36 (West Supp. 2014); MO. ANN. STAT. §§ 632.480–.513 (West 2006); NEB. REV. STAT. ANN. §§ 71-1201 to -1228 (LexisNexis 2008); N.H. REV. STAT. ANN. §§ 135-E:1–24 (LexisNexis 2012); N.J. STAT. ANN. §§ 30:4-27.24–.38 (West 2008); N.Y. MENTAL HYG. LAW §§ 10.01–.17 (McKinney 2011); N.D. CENT. CODE §§ 25-03.3-01 to -23 (2002); 42 PA. STAT. AND CONS. STAT. ANN. §§ 6401–6409 (West 2013); S.C. CODE ANN. §§ 44-48-10 to -170 (2002); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001–.150 (West 2010); VA. CODE ANN. §§ 37.2-900 to -921 (2011); WASH. REV. CODE ANN. §§ 71.09.010–.903; WIS. STAT. ANN. §§ 980.01–.14 (West 2007).

64. *See* Miller, *supra* note 55, at 2098. For the remainder of this Note, male pronouns will be used in the context of the civil commitment of dangerous sex offenders, as no female sex offender has ever been civilly committed in the state of New York.

65. 521 U.S. 346 (1997).

66. *See id.* at 350; *see also* John M. Fabian, Kansas v. Hendricks, Crane *and Beyond: "Mental Abnormality," and "Sexual Dangerousness": Volition Vs. Emotional Abnormality and the Debate Between Community Safety and Civil Liberties*, 29 WM. MITCHELL L. REV. 1367, 1373 (2003); Vanginderen, *supra* note 20, at 364–71.

67. *See Hendricks*, 521 U.S. at 357–59.

68. MENTAL HYG. § 10.03.

under many civil commitment statutes include pedophilia, bestiality, exhibitionism, bondage, and sadomasochism.[69]

Contrary to popular belief, not all sex offenders suffer from mental abnormalities.[70] In fact, various studies report low rates of mental illness in the sex offender population.[71] Nonetheless, experts have found that sex offenders who do suffer from mental abnormalities, such as the ones outlined above, are more likely to engage in violent crime.[72] They are also more likely to be involved in the criminal justice system as well as engaged in violent behavior,[73] and it is this type of behavior that *Hendricks* aims to reduce.[74]

3. New York State's Response to *Kansas v. Hendricks*

After the Court in *Kansas v. Hendricks* ruled that the civil commitment of sex offenders was constitutional, numerous states enacted legislation targeting dangerous sex offenders suffering from mental abnormalities.[75] For example, on April 13, 2007, New York State enacted Chapter 27, Title B, Article § 10 of the Mental Hygiene Law, also known as the Sex Offender Management and Treatment Act[76] ("Article § 10") Although prompted by the holding in *Kansas v. Hendricks*, Article § 10 was also enacted largely in response to the murder of Concetta Russo Carriero.[77]

On the morning of June 29, 2005, the New York State Police Department found a 56-year-old "petite blond woman" lying in a pool of blood near a popular mall.[78] Hours later, police confronted a shirtless homeless man soaked in blood, who thereafter admitted that, at the time Carriero was

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69. *See* State v. Peter Y., 952 N.Y.S.2d 651, 652–53 (App. Div. 2012); *see also* Sean Ahlmeyer et al., *Psychopathology of Incarcerated Sex Offenders*, 17 J. PERSONALITY DISORDERS 306, 307 (2003).

70. *See* Seena Fazel et al., *Severe Mental Illness and Risk of Sexual Offending in Men: A Case-Control Study Based on Swedish National Registers*, 68 J. CLINICAL PSYCHIATRY 588, 588 (2007).

71. *See, e.g.*, Ahlmeyer et al., *supra* note 69, at 315.

72. *See* Fazel et al., *supra* note 70, at 593.

73. *See* Andrew J. Harris et al., *Sex Offending and Serious Mental Illness: Directions for Policy and Research*, 37 CRIM. JUST. & BEHAV. 596, 603 (2010).

74. *See* Kansas v. Hendricks, 521 U.S. 346, 357 (1997).

75. *See* Miller, *supra* note 55, at 2100. This is not to say such statutes were never challenged on constitutional grounds. *See* State v. Nelson, 932 N.Y.S.2d 42, 43–44 (App. Div. 2011) (rejecting ex post facto, due process, and equal protection arguments); *see also* Pratt v. Hogan, 631 F. Supp. 2d 192, 198–99 (N.D.N.Y. 2009) (holding sex offender treatment program not in violation of First and Fifth Amendments); State v. Robert V., No. 251233, 2010 WL 4904400, at *2–6 (N.Y. Sup. Ct. Sept. 29, 2011) (finding, as in *Nelson*, ex post facto arguments against Article § 10 without merit).

76. N.Y. MENTAL HYG. LAW §§ 10.01–.17 (McKinney 2011); *see infra* Part I.C.

77. *See* N.Y. STATE OFFICE OF MENTAL HEALTH, 2008 ANNUAL REPORT ON THE IMPLEMENTATION OF MENTAL HYGIENE LAW ARTICLE 10: SEX OFFENDER MANAGEMENT AND TREATMENT ACT OF 2007 3 (2009), http://roc.democratandchronicle.com/assets/pdf/A21683261224.pdf [http://perma.cc/AAM5-NU5X].

78. Anahad O'Connor, *Homeless Man Goes on Trial in Hate-Crime Murder*, N.Y. TIMES (June 13, 2006), www.nytimes.com/2006/06/13/nyregion/13grant.html?_r=0 [http://perma.cc/9MPQ-A5D9].

killed, he was hiding in a mall stairwell, waiting to kill someone.[79] That someone was soon identified as Concetta Russo Carriero, a paralegal from White Plains, New York.[80]

The shirtless homeless man was later identified as Phillip Grant, a level-three[81] sex offender who was released from prison after serving a twenty-three year sentence for two rape convictions and an attempted assault conviction.[82] As a result of this highly publicized case, local officials and state legislators were prompted to reconsider New York State's civil confinement laws.[83]

The first piece of proposed legislation regarding the civil commitment of dangerous sex offenders, "Concetta's Law," was ultimately unsuccessful as the State Assembly and Senate were unable to reach a consensus on the proposed bill.[84] As a result, Governor Pataki ordered the Office of Mental Health and the Department of Corrections to utilize Article § 9[85] of the Mental Hygiene Law in order to civilly commit dangerous sex offenders.[86]

In November 2005, Mental Hygiene Legal Services (MHLS) challenged Governor Pataki's order to utilize Article § 9 of the Mental Hygiene Law to civilly commit dangerous sex offenders.[87] The issue reached the Court of Appeals one year later. In *State ex rel. Harkavy v. Consilvio*,[88] the court held that Article § 9 cannot control the civil commitment of sex offenders.[89] Instead, the state must file for the civil commitment of dangerous sex offenders under Correction Law § 402, which provides additional procedural requirements to ensure due process of law.[90]

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79. *Id.*

80. *Id.*

81. Level-three sex offenders are at the highest risk of all sex offenders to reoffend and are considered threats to public safety. *Risk Level & Designation Determination*, N.Y. STATE DIV. CRIM. JUST. SERVS., http://www.criminaljustice.ny.gov/nsor/risk_levels.htm (last visited Sept. 27, 2015) [http://perma.cc/U2MK-WFKU].

82. *See* N.Y. STATE OFFICE OF MENTAL HEALTH, *supra* note 77, at 3.

83. *See* O'Connor, *supra* note 78; *see also* N.Y. STATE OFFICE OF MENTAL HEALTH, *supra* note 77, at 3 (stating that after Carriero's murder, Governor Pataki issued a series of "gubernatorial directives" calling for a reassessment of the civil commitment of dangerous sex offenders nearing release from prison).

84. *See* N.Y. STATE OFFICE OF MENTAL HEALTH, *supra* note 77, at 3.

85. Article § 9 governs the hospitalization of the mentally ill, generally. N.Y. MENTAL HYG. LAW §§ 9.01–.63 (McKinney 2011). In order to civilly commit an individual under Article § 9, two of the individual's examining physicians must certify that the individual suffers from a mental illness and requires treatment and care. *Id.* § 9.27. Further, a person familiar with the individual must apply for the individual's admission, outlining the reasons he or she believes that the individual suffers from a mental illness and requires treatment and care. *Id.*

86. *See* N.Y. STATE OFFICE OF MENTAL HEALTH, *supra* note 77, at 3.

87. *See id.* at 4. Governor Pataki's order was unique and thus likely to be challenged because no other state had ever utilized an existing statute to address the civil commitment of sex offenders. *See id.* at 3. Further, no other statute permitted the civil commitment of sex offenders without judicial oversight. *See id.*

88. 859 N.E.2d 508 (N.Y. 2006).

89. *Id.* at 512.

90. *See id.*

Only one month after MHLS challenged Governor Pataki's order on procedural grounds, MHLS brought an action against the state arguing that the civil commitment of sex offenders violates an individual's right to liberty.[91] This case eventually made it up to the Court of Appeals; however, it was interrupted by New York State's enactment of the Sex Offender Management and Treatment Act.[92]

After *Harkavy*, it became clear to the legislature that, although it would not be easy, the state would have to enact legislation specifically addressing the civil commitment of dangerous sex offenders.[93] As a result, on April 13, 2007, Article § 10 of the New York State Mental Hygiene Law went into effect.[94]

Before examining Article § 10 and its requirements, an understanding of the laws that govern civil commitment statutes is necessary. The following section will address these laws generally, as well as specifically in New York State.

B. Governing Laws of Sex Offender Civil Commitment Statutes

Part I.B examines the laws that govern civil commitment statutes generally, first addressing the Constitution's Confrontation Clause. It then explores New York State's Civil Practice Law and Rules, specifically New York State's general rule against hearsay and its exceptions.

1. The Confrontation Clause

The Sixth Amendment to the U.S. Constitution states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[95] The Confrontation Clause is derived from this amendment.[96] The Confrontation Clause requires that individuals accused of criminal offenses be able to question and cross examine their accusers in open court.[97] Therefore, victims of crimes may be subpoenaed and forced to testify in order to comply with the Confrontation Clause.[98] The Supreme Court has interpreted the Confrontation Clause to apply to both federal and state criminal proceedings.[99]

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91. *See* N.Y. STATE OFFICE OF MENTAL HEALTH, *supra* note 77, at 4; *see also* State *ex rel.* Harkavy v. Consilvio, 870 N.E.2d 128, 131 (N.Y. 2007).

92. *See* N.Y. STATE OFFICE OF MENTAL HEALTH, *supra* note 77, at 4.

93. *See generally* Michael Cooper & Danny Hakim, *Accord on Bill to Detain Sex Offenders*, N.Y. TIMES (Mar. 1, 2007), www.nytimes.com/2007/03/01/nyregion/01civil.html?fta=y&_r=0 (explaining that it was not until Eliot Spitzer became governor that the democratic-led assembly agreed to enact such legislation) [http://perma.cc/6APE-43Y8]. The question of whether convicted sex offenders could be civilly committed after they serve their time was, and remains, an extremely controversial topic in American politics. *See id.*

94. N.Y. MENTAL HYG. LAW §§ 10.01–.17 (McKinney 2011).

95. U.S. CONST. amend. VI.

96. Crawford v. Washington, 541 U.S. 36, 42 (2004).

97. *Id.*; *see also* Martin A. Hewett, *A More Reliable Right to Present a Defense: The Compulsory Process Clause After* Crawford v. Washington, 96 GEO. L.J. 273, 274–75 (2007).

98. *See* Hewett, *supra* note 97, at 275.

99. Pointer v. Texas, 380 U.S. 400, 406 (1965).

The Court has also held, however, that the accused's right to confrontation is not absolute.[100] For example, in the landmark case of *Maryland v. Craig*,[101] the U.S. Supreme Court recognized that children who are victims of sexual abuse might suffer severe trauma from testifying in open court, which may justify implementing "special procedures" regarding live confrontation.[102] As discussed in Part III.B of this Note, children, by confronting their abusers, may be reexposed to feelings of betrayal, helplessness, and powerlessness as memories of the abuse are forced to the forefront of their minds.[103]

In October 1986, Sandra Ann Craig was charged with child abuse, first- and second-degree sexual offenses, perverted sexual practice, assault, and battery for sexually abusing a six-year-old girl who attended Craig's pre-kindergarten and kindergarten center.[104] In March 1987, the State asked the judge if, at trial, the child could testify per one-way closed circuit television (CCTV) to eliminate the need for the child to confront her abuser.[105]

One-way CCTV involves one camera and one monitor.[106] The judge, prosecutor, defense attorney, and witness sit in one room with the camera, and the jury and defendant sit in the courtroom with the monitor.[107] The witness is subject to direct and cross examination; however, because the witness is not present in the courtroom, the witness does not have to see his or her abuser.[108] The defendant must be able to communicate with his or her attorney at all times.[109]

In *Craig*, the trial court permitted the six-year-old girl to testify via one-way CCTV, and the Maryland Court of Special Appeals affirmed the trial court's decision.[110] The Court of Appeals of Maryland reversed and remanded, holding that permitting the child to testify via one-way CCTV violated the defendant's right to confrontation.[111] The Supreme Court granted certiorari.[112]

After hearing arguments from both the State and Craig, the Supreme Court held that, if the state adequately shows that it is necessary to implement "special procedures" (i.e., using one-way CCTV) in order to protect a child from the trauma of testifying in open court, there is no violation of a defendant's right to confrontation.[113] The Court reasoned that, in some cases, "a State's interest in the physical and psychological

100. *See infra* note 101 and accompanying text.
101. 497 U.S. 836 (1990).
102. *Id.* at 855.
103. *See infra* note 391 and accompanying text.
104. *Craig*, 497 U.S. at 840.
105. *Id.*
106. NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE & NAT'L DIST. ATT'YS ASS'N, CLOSED-CIRCUIT TELEVISION STATUTES 1 (2012).
107. *Id.*
108. *Id.*
109. *Id.*
110. *Craig*, 497 U.S. at 843.
111. *Id.*
112. *Id.*
113. *Id.* at 855.

well-being" of child victims of sexual assault outweighs the right to face-to-face confrontation.[114] The Court supported its decision by citing to the conclusions set forth in an amicus curiae brief[115] filed by the American Psychological Association.[116] The American Psychological Association urged the Court to adopt special procedures avoiding live confrontation because legal proceedings are particularly stressful for children who are victims of sexual assault, and such stress may negatively impact their "normal cognitive and emotional development."[117]

The Supreme Court's holding in *Craig* that the right to confrontation is not absolute has had a significant impact on the defendant's right to confrontation in child abuse cases.[118] *Craig*'s holding validated thirty-seven states' authorization of the use of videotaped testimony in child abuse cases,[119] twenty-four states' authorization of the use of one-way CCTV,[120] and eight states' authorization of the use of two-way CCTV.[121]

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114. *Id.* at 853; *see also* Spigarolo v. Meachum, 934 F.2d 19, 24–25 (2d Cir. 1991) (holding that because child victims would suffer trauma from testifying in front of their abusers, videotaped testimony could be used).

115. An amicus curiae brief is a brief submitted to the court by a nonparty with a particular interest in the case; the nonparty must get the court's permission to file. *Amicus Curiae*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/amicus%20curiae (last visited Sept. 27, 2015) [http://perma.cc/SDX6-XVYA].

116. *See* Brief for American Psychological Ass'n as Amicus Curiae Supporting Neither Party, Maryland v. Craig, 497 U.S. 836 (1990) (No. 89–478).

117. *Id.* at 7.

118. *See Craig*, 497 U.S. at 850; *see also* L. Christine Brannon, *The Trauma of Testifying in Court for Child Victims of Sexual Assault V. the Accused's Right to Confrontation*, 18 LAW & PSYCHOL. REV. 439, 446–48 (1994).

119. *Craig*, 497 U.S. at 853; *see also* ALA. CODE § 15-25-2 (LexisNexis 2011); ARIZ. REV. STAT. ANN. § 13-4253 (2010); ARK. CODE ANN. § 16-44-203 (1999); CAL. PENAL CODE § 1346 (West 2004); COLO. REV. STAT. §§ 18-3-413, 18-6-401.3 (2013); CONN. GEN. STAT. ANN. § 54-86g (West 2009); DEL. CODE ANN. tit. 11, § 3511 (2007); FLA. STAT. ANN. § 92.53 (West 2011); HAW. REV. STAT. ANN. § 626-1, Rule 616 (West 2008); 725 ILL. COMP. STAT. ANN. 5/106B-5 (West 2006); IND. CODE ANN. § 35-37-4-8 (LexisNexis 2012); IOWA CODE ANN. § 915.38 (West 2003); KAN. STAT. ANN. § 22-3434 (West 2008); KY. REV. STAT. ANN. § 421.350 (LexisNexis 2005); MASS. ANN. LAWS ch. 278, § 16D (LexisNexis 2002); MICH. COMP. LAWS ANN. § 600.2163a(5) (West 2010); MINN. STAT. ANN. § 595.02 (West 2010); MISS. CODE ANN. § 13-1-407 (West 2013); MO. ANN. STAT. §§ 491.675–.725 (West 2011); MONT. CODE ANN. § 46-15-402 (West 2009); NEB. REV. STAT. ANN. § 29-1926 (LexisNexis 2009); NEV. REV. STAT. ANN. §§ 174.227–.231 (LexisNexis 2011); N.H. REV. STAT. ANN. § 517:13-a (LexisNexis 2006); N.M. STAT. ANN. § 30-9-17 (West 2003); OHIO REV. CODE ANN. § 2945.481 (LexisNexis 2010); OKLA. STAT. ANN. tit. 12, §§ 2611.3–.11 (West 2009); OR. REV. STAT. ANN. § 40.460 (West 2003); 42 PA. STAT. AND CONS. STAT. ANN. § 5984.1 (West 2013); 11 R.I. GEN. LAWS § 11-37-13.2 (2002); S.C. CODE ANN. § 16-3-1550 (2003); S.D. CODIFIED LAWS § 23A-12-9 (1998); TENN. CODE ANN. §§ 24-7-117, -120 (2000); WIS. STAT. ANN. § 967.04 (West 2007); WYO. STAT. ANN. § 7-11-408 (2013); TEX. CODE CRIM. PROC. ANN. art. 38.071 (West 2005); UTAH R. CRIM. P. 15.5; VT. R. EVID. 807.

120. *Craig*, 497 U.S. at 853–54; *see also* ALA. CODE § 15-25-3 (LexisNexis 2011); ALASKA STAT. § 12.45.046 (2012); ARIZ. REV. STAT. ANN. § 13-4253 (2010); CONN. GEN. STAT. ANN. § 54-86g (West 2009); FLA. STAT. ANN. § 92.54 (West 2011); GA. CODE ANN. § 17-8-55 (2013); 725 ILL. COMP. STAT. ANN. 5/106B-5 (West 2006); IND. CODE ANN. § 35-37-4-8 (LexisNexis 2012); IOWA CODE ANN. § 915.38 (West 2003); KAN. STAT. ANN. § 22-3434 (West 2008); KY. REV. STAT. ANN. § 421.350 (LexisNexis 2005); LA. STAT. ANN. § 15:283 (2007); MASS. ANN. LAWS ch. 278, § 16D (LexisNexis 2002); MINN. STAT. ANN. § 595.02 (West 2010); MISS. CODE ANN. § 13-1-405 (West 2013); N.J. STAT. ANN.

Shortly after *Craig*, Congress enacted the Child Victims' and Child Witnesses' Rights Act.[122] The Child Victims' and Child Witnesses' Rights Act permits child victims to either testify via two-way CCTV[123] or by videotaped depositions.[124] In *United States v. Farley*,[125] the defendant challenged the constitutionality of this statute; however, the U.S. Court of Appeals for the Tenth Circuit upheld its constitutionality because the state could show, in that specific case, that the child victim would be emotionally incapable of testifying in front of her abuser.[126] The court held that, because a psychologist's testimony sufficiently established that the victim would be overcome with fear, and thus severely traumatized from confronting her abuser, there was no Sixth Amendment violation.[127]

2. New York State's Civil Practice Law and Rules: The General Rule Against Hearsay

In criminal proceedings, the accused are most often, but not always, guaranteed the right to confront their accusers.[128] The Confrontation Clause does not, however, apply to civil proceedings.[129] Rather, in New York State civil proceedings, the accused are afforded the protections outlined in the New York State Civil Practice Law and Rules (CPLR).[130] One of the most pertinent rules for civil commitment cases under the CPLR is New York State's general rule against hearsay.[131]

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§ 2A:84A-32.4 (West 2011); OKLA. STAT. ANN. tit. 12, §§ 2611.3–.11 (West 2009); OR. REV. STAT. ANN. § 40.460 (West 2003); 42 PA. STAT. AND CONS. STAT. ANN. § 5985 (West 2013); 11 R.I. GEN. LAWS § 11-37-13.2 (2002); MD. CODE ANN., CRIM. PROC. § 11-303 (LexisNexis 2008); TEX. CODE CRIM. PROC. ANN. art. 38.071 (West 2005); UTAH R. CRIM. P. 15.5; VT. R. EVID. 807.

121. *Craig*, 497 U.S. at 854; *see also* CAL. PENAL CODE § 1347 (West 2004); HAW. REV. STAT. ANN. § 626-1, Rule 616 (West 2008); IDAHO CODE ANN. §§ 9-1801 to -1808 (2010); MINN. STAT. ANN. § 595.02 (West 2010); OHIO REV. CODE ANN. § 2945.481 (LexisNexis 2010); VA. CODE ANN. § 18.2-67.9 (2009); N.Y. CRIM. PROC. LAW §§ 65.00–.30 (McKinney 2004); VT. R. EVID. 807.

122. 18 U.S.C. § 3509 (2012).

123. *Id.* § 3509(b)(1). When a child testifies via two-way CCTV, the child sits in a room with the prosecutor and the defense attorney. *See* Aaron Harmon, *Child Testimony via Two-Way Closed Circuit Television: A New Perspective on* Maryland v. Craig *in* United States v. Turning Bear *and* United States v. Bordeaux, 7 N.C. J.L. & TECH. 157, 157–58 (2005). The child's testimony is recorded and live streamed to the courtroom, where the defendant is also being recorded. *Id.* The child is able to view the defendant on a monitor, and the defendant is able to view the child on a monitor. *Id.*

124. 18 U.S.C. § 3509(b)(2).

125. 992 F.2d 1122 (10th Cir. 1993).

126. *Id.* at 1125.

127. *Id.* at 1124–25.

128. Maryland v. Craig, 497 U.S. 836, 850 (1990).

129. DEBORAH J. MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 701 (2d ed. 2011); *see also* David Alan Sklansky, *Confrontation and Fairness*, 45 TEX. TECH L. REV. 103, 110 (2012) (explaining that even in high-stakes civil cases, such as cases involving *civil commitment*, the Confrontation Clause is inapplicable).

130. *See* N.Y. C.P.L.R. 101 (MCKINNEY 2003).

131. *See* People v. Edwards, 392 N.E.2d 1229, 1230–31 (N.Y. 1979).

Hearsay evidence is defined as "(1) an out-of-court assertion that is (2) offered to prove its truth."[132] The Federal Rules of Evidence expand on this definition, defining hearsay as "a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and [that] (2) a party offers in evidence to prove the truth of the matter asserted in the statement."[133]

In general, statements about whether something is true that are not made in court and subject to cross examination are considered hearsay evidence.[134] Thus, such statements are inadmissible in court.[135] Hearsay evidence is generally inadmissible because it is thought to be untrustworthy—it is not made under oath, in the presence of the trier of fact, or subject to cross examination.[136] New York State, however, has carved out certain exceptions to the general rule against hearsay.[137]

3. New York State's Exceptions to the General Rule Against Hearsay

Part I.B.3 presents four exceptions to New York State's general rule against hearsay: (1) the professional reliability exception, (2) the exception for excited utterances, (3) the exception for statements made for purposes of medical treatment or diagnosis, and (4) the exception for when the defendant causes the declarant's unavailability.

a. The Professional Reliability Exception

The professional reliability exception states that a "psychiatrist may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion" or if it "comes from a witness subject to full cross examination on the trial."[138] Under the professional reliability exception, hearsay evidence may only be used in forming an expert's opinion and may not be introduced to establish the validity of the evidence.[139]

There are two ways to satisfy the professional reliability exception.[140] The first way provides that, in forming their opinions, psychiatric examiners may rely on documents that are traditionally relied upon by experts in the field.[141] It is up to the court to determine whether such documents are traditionally relied upon,[142] and the jury is explicitly

132. DAVID F. BINDER, HEARSAY HANDBOOK § 1:1 (4th ed. 2001).
133. FED. R. EVID. 801(c).
134. *See Edwards*, 392 N.E.2d at 1230–31.
135. *See id.*
136. *See* BINDER, *supra* note 132, § 3:2.
137. *See infra* Part I.B.3.
138. People v. Sugden, 323 N.E.2d 169, 173 (N.Y. 1974) (establishing the professional reliability exception).
139. *See id.*
140. *See id.*
141. *See id.*
142. *See* Hambsch v. N.Y.C. Transit Auth., 469 N.E.2d 516, 517–18 (N.Y. 1984).

instructed that a psychiatric examiner's reliance on a document does not establish its validity.[143]

The second way to satisfy the professional reliability exception pertains to witnesses subject to "full cross-examination on the trial."[144] The rationale behind this exception is that testimony about statements made outside of court can be verified and/or challenged during cross examination.[145]

b. The Exception for Excited Utterances

New York State also recognizes an exception to the general rule against hearsay for excited utterances.[146] An excited utterance is an out-of-court statement made when an individual is in a stressful, startling situation.[147] The justification for admitting excited utterances into evidence is that, due to the nature of a stressful, startling situation, the individual making the statement is incapable of altering the truth.[148]

In determining whether the excited utterance exception applies, the main focus is the mental state of the declarant.[149] Other considerations include the time between the startling event and the declaration, whether the declarant was questioned, and whether the declarant was, at the time of the declaration, suffering from a serious injury.[150] Although these factors should be considered in making the determination of whether an excited utterance is admissible, no one factor alone is dispositive.[151] The critical question remains: "whether the declarant is capable of studied reflection and therefore incapable of fabrication."[152]

For example, in *People v. Powell*,[153] the New York State Appellate Division affirmed the trial court's decision to admit hearsay evidence pursuant to the excited utterance exception.[154] On November 2, 1998, the

143. *See* State v. Wilkes, 908 N.Y.S.2d 495, 497 (App. Div. 2010); People v. Campbell, 602 N.Y.S.2d 282, 284 (App. Div. 1993) (holding that "hearsay testimony given by experts is admissible for the limited purpose of informing the jury of the basis of the expert's opinion and not for the truth of the matters related").

144. *See Sugden*, 323 N.E.2d at 173.

145. *See* Elliott Scheinberg, *Hearsay Testimony Through the Expert Witness*, 86 N.Y. ST. B.J. 35, 36 (2014). In general, the professional reliability exception is highly debated among legal scholars; however, such debates are beyond the scope of this Note. *See id.* at 36–42; *see also* John M. Curran, *The "Professional Reliability" Basis for Expert Opinion Testimony*, 85 N.Y. ST. B.J. 22, 24–25 (2013); Colleen D. Duffy, *The Admissibility of Expert Opinion and the Bases of Expert Opinion in Sex Offender Civil Management Trials in New York*, 75 ALB. L. REV. 763, 773 (2012).

146. People v. Johnson, 804 N.E.2d 402, 405 (N.Y. 2003); *see also* 5A ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS § 8:31 (2d ed. 2011).

147. *Johnson*, 804 N.E.2d at 405.

148. *Id.*

149. *Id.*

150. *Id.* at 405–06.

151. *See id.* at 406.

152. *Id.*

153. 732 N.Y.S.2d 216 (App. Div. 2001).

154. *Id.* at 216.

defendant, Bobby Powell, was convicted of first-degree rape for raping his neighbor at knifepoint.[155] Almost immediately after being raped, the complainant made four statements that the defendant argued were inadmissible hearsay.[156] The complainant's first statement was to her roommate, telling her that she had been raped.[157] The second statement was to the building's supervisor, identifying Bobby Powell as her rapist.[158] The third and fourth statements were made to police officers, telling them that she had been raped and identifying Bobby Powell as her rapist.[159]

The Supreme Court admitted all four statements into evidence under the hearsay exception for excited utterances, and the Appellate Division affirmed.[160] The Appellate Division reasoned that because the complainant spoke under extreme stress from a forcible rape, the complainant was incapable of reflection and distorting the truth.[161] The Appellate Division elaborated that, because the amount of time between the rape and the statements was relatively short, the witnesses agreed on the timing of the statements, and the complainant was "still crying, shaking and very upset," the complainant's statements were admissible hearsay under the exception for excited utterances.[162]

The court in *Powell* not only admitted into evidence statements about whether a rape occurred, but also statements *identifying* the complainant's rapist.[163] This holding suggests that under certain conditions, courts will extend great latitude in determining whether the excited utterance exception applies.[164]

c. The Exception for Statements Made for Purposes of Medical Treatment or Diagnosis

Another exception to the general rule against hearsay is the exception for statements made for the purposes of medical treatment or diagnosis.[165] Although New York State's recognition of this exception is relatively new, New York State courts have admitted statements made for the purposes of medical treatment or diagnosis pertaining to the *way* in which an individual was injured[166] as well as the *cause* of an individual's injury.[167]

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155. *See* Powell v. Greiner, No. 02 Civ. 7352(LBS), 2003 WL 359466, at *1 (S.D.N.Y. Feb. 18, 2003).
156. *See id.*
157. *See id.*
158. *See id.*
159. *See id.*
160. People v. Powell, 732 N.Y.S.2d 216, 216 (App. Div. 2001).
161. *See id.*
162. *Id.*
163. *Id.*
164. *See id.*
165. *See* BARKER & ALEXANDER, *supra* note 146, § 8:33.
166. *See* People v. Dennee, 738 N.Y.S.2d 146, 147 (App. Div. 2002) (holding that the physician's testimony regarding the declarant's description of the manner in which the declarant was injured was admissible under the hearsay exception for statements made for purposes of medical treatment or diagnosis); Scott v. Mason, 547 N.Y.S.2d 889, 891 (App.

In most cases, the name of an individual who has injured or harmed a declarant has not been admitted under the exception for statements made for the purposes of medical treatment or diagnosis.[168] In domestic violence and child abuse cases, however, courts have been more lenient.[169]

For example, in *People v. Ortega*,[170] the Court of Appeals admitted into evidence statements explicitly identifying the defendant as the abuser because such statements were made during the complainant's treatment for domestic violence.[171] The court went a step further in holding that another complainant's statements identifying the defendant as the person who forced the complainant to "smoke a white, powdery substance" was also admissible as it was relevant to the complainant's treatment at the hospital.[172]

In two additional cases, *People v. Spicola*[173] and *People v. Duhs*,[174] the Court of Appeals permitted statements identifying two child abusers because the statements made identifying the defendants were "germane" to diagnosis and treatment.[175] These rulings suggest a shift in the Court of Appeals toward a more liberal interpretation of the hearsay exception for statements made for purposes of medical treatment and diagnosis.[176]

d. The Exception for When a Party Causes the Declarant's Unavailability

One last exception to the general rule against hearsay evidence is the admissibility of hearsay evidence when the accused causes the declarant's unavailability.[177] The New York State Court of Appeals defines "causing the declarant's unavailability" as being "responsible for or [acquiescing] in the conduct" that made the witness unavailable for trial.[178] Most commonly, such "conduct" consists of intimidation or violence,[179] but it may also take the form of threats, chicanery, or bribery.[180]

In specific circumstances, courts have interpreted the exception for the admissibility of hearsay when the defendant causes the declarant's unavailability more broadly.[181] For example, in *People v. Byrd*,[182] the Appellate Division concluded that, although the defendant did not explicitly

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Div. 1989) (holding that the physician's testimony regarding the declarant's description that his van was hit by some sort of motor vehicle was admissible under the hearsay exception).

167. *See* People v. Thomas, 725 N.Y.S.2d 102, 104 (App. Div. 2001).
168. *See* BARKER & ALEXANDER, *supra* note 146, § 8:33.
169. *See id.*
170. 942 N.E.2d 210 (N.Y. 2010).
171. *Id.* at 215.
172. *Id.* at 216.
173. 947 N.E.2d 620 (N.Y. 2011).
174. 947 N.E.2d 617 (N.Y. 2011).
175. *Id.* at 618; *Spicola*, 947 N.E.2d at 625.
176. *See* BARKER & ALEXANDER, *supra* note 146, § 8:33.
177. *See* People v. Geraci, 649 N.E.2d 817, 824 (N.Y. 1995).
178. *Id.*
179. *Id.* at 820.
180. *See* BARKER & ALEXANDER, *supra* note 146, § 8:97.
181. *See infra* notes 184, 186 and accompanying text.
182. 855 N.Y.S.2d 505 (App. Div. 2008).

coerce the complainant into refusing to testify, hearsay evidence was nonetheless admissible.[183] Because the complainant suffered from battered person syndrome stemming from years of physical and emotional abuse, the court determined that the defendant caused the complainant's unavailability and admitted the hearsay evidence.[184]

Similarly, in *People v. Jernigan*,[185] the Appellate Division concluded that it was unnecessary to show that the defendant made threats against the declarant in order for the hearsay exception to apply.[186] Instead, if the declarant would feel *pressured* not to testify because of a prior abusive relationship, the hearsay exception would apply.[187]

In both *Byrd* and *Jernigan*, the complainants endured serious abuse by the defendants.[188] The facts of these cases suggest that, in the absence of explicit threats, violence, or intimidation, the admissibility of hearsay when a defendant causes a declarant's unavailability should be determined on a case-by-case basis with regard for the severity of the underlying facts.[189] This is particularly relevant in sex offender civil commitment cases, which involve repeat, chronic sex offenders who commit serious crimes against their victims.[190]

After fully understanding the laws and rules that apply to civil commitment proceedings, it is then possible to explore the substance of New York State's Sex Offender Management and Treatment Act. In the following section, each part of this statute is thoroughly examined.

C. New York State's Sex Offender Management and Treatment Act

The New York State legislature cites numerous reasons for the enactment of Article § 10.[191] First and foremost, the legislature explains that certain sex offenders pose a threat to society that should be addressed by sex offender programs and treatment.[192] The legislature goes on to explain that, because the civil and criminal systems have different goals, both systems should be used in tandem in order to "respond to current needs of individual offenders," "provide meaningful treatment," and "protect the public."[193]

The legislature is careful to note that Article § 10 addresses *sex offenders with mental abnormalities that make them more likely to commit repeated sex offenses*.[194] Further, because some sex offenders suffering from certain mental abnormalities require specific, elongated treatment, such treatment

183. *See id.* at 507, 510.
184. *Id.*
185. 838 N.Y.S.2d 81 (App. Div. 2007).
186. *Id.* at 82.
187. *Id.*
188. *Byrd*, 855 N.Y.S.2d at 507; *Jernigan*, 838 N.Y.S.2d at 82.
189. *See* BARKER & ALEXANDER, *supra* note 146, § 8:97.
190. *See* S. 3318, 230th Leg., Reg. Sess., at 61 (N.Y. 2007).
191. N.Y. MENTAL HYG. LAW § 10.01 (McKinney 2011).
192. *Id.* § 10.01(a).
193. *Id.*
194. *Id.* § 10.01(b).

may only be accomplished through the civil process after a sex offender's release from prison.[195]

Civil commitment is not the only solution the legislature proposes under Article § 10.[196] In fact, the legislature recognizes that some sex offenders may be monitored in the community under strict and intensive supervision and treatment.[197] Further, appropriate criminal sentences may be a way to address the problem of dangerous sex offenders.[198] The determination of whether a sex offender should be civilly committed, released on community supervision, or given a longer sentence should be made with a consideration for "protect[ing] the public, reduc[ing] recidivism, and ensur[ing] offenders have access to proper treatment."[199]

All Article § 10 proceedings are prompted by a recommendation from the Office of Mental Health that a sex offender nearing release from prison is likely to suffer from a mental abnormality, which would make him likely to pose a danger to society.[200] The Office of Mental Health receives notice that a detained sex offender is anticipating release[201] from prison from any "agency with jurisdiction," which is most often the Department of Corrections and Community Supervision.[202] Once the Office of Mental Health is provided with notice that a detained sex offender is nearing release from prison, the commissioner of mental health is permitted to authorize an initial evaluation of that individual.[203] If a preliminary review does take place, the initial evaluator is permitted to review all of the sex offender's prior records.[204] "If the case review team determines that the respondent is not a sex offender requiring civil management," no petition will be filed, and the respondent will be released on his anticipated release

195. *See id.*

196. *See id.* § 10.01(c).

197. *Id.* On June 17, 2015, the New York State Assembly introduced a bill that would eliminate the alternative of strict and intensive supervision and treatment. N.Y. Assemb. 8275, 238th Leg., Reg. Sess. (N.Y. 2015). Upon publication of this Note, the bill has yet to be voted on.

198. MENTAL HYG. § 10.01(d).

199. *Id.* § 10.01(c).

200. *See id.* § 10.05.

201. Various courts have had to interpret the meaning of "anticipating release" in various contexts. *See* State v. D.J., 873 N.Y.S.2d 482, 486 (Sup. Ct. 2009) (holding that because respondent was a voluntary patient who could seek release at any time, the State was not premature in its petition); State v. Swartz, 852 N.Y.S.2d 689, 692 (Sup. Ct. 2007) (ruling that Article § 10 does not set forth the earliest date the state can petition for the civil commitment of a dangerous sex offender).

202. MENTAL HYG. § 10.05(b).

203. *Id.* § 10.05(d). A respondent is not entitled to counsel at a preliminary evaluation. *See* State v. John P., 982 N.E.2d 587, 588 (N.Y. 2012); State v. Timothy BB., 975 N.Y.S.2d 237, 240–41 (App. Div. 2013) (holding that respondent "was not deprived of the effective assistance of counsel"); State v. Robert F., 958 N.Y.S.2d 156, 159 (App. Div. 2012); State v. Pierce, 914 N.Y.S.2d 547, 549 (App. Div. 2010).

204. MENTAL HYG. § 10.05(d). Records include "relevant medical, clinical, criminal, and institutional records, actuarial risk assessment instruments and other records and reports, including records of parole release interviews . . . and records and reports provided by the district attorney of the county where the person was convicted, or . . . the county where the person was charged." *Id.*

date.[205] If the case review team does find that the respondent is a sex offender requiring civil management, the respondent and the attorney general will be notified,[206] and the state may then file a petition for the civil commitment of the respondent.[207]

Unlike during the preliminary evaluation conducted by the Office of Mental Health, a respondent is entitled to counsel as soon as the state files a petition against him.[208] If a respondent cannot afford to hire his own counsel, counsel must be appointed to him.[209] In most cases, an attorney from MHLS is appointed to a respondent.[210] In the rare occasion that MHLS cannot take a case, a respondent will be appointed an 18-B lawyer.[211]

After a respondent is appointed counsel, the state may request that a psychiatric professional, chosen by the state, evaluate the respondent.[212] Once the respondent has met with a state-chosen psychiatric professional, but no later than thirty days after the initial petition is filed, the court must conduct a probable cause hearing.[213] Generally, a probable cause hearing consists primarily of expert witness testimony.[214] A state-appointed psychiatric examiner, most often from the Office of Mental Health, will testify regarding whether she believes the respondent is more likely than not to suffer from a mental abnormality.[215] The respondent may also call an

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205. *Id.* § 10.05(f). *But see* State v. Frederick P., No. 2009-17437, at *2 (N.Y. Sup. Ct. Apr. 20, 2010) (holding that a finding that a respondent does not suffer from a mental abnormality does not preclude the finding that the same respondent suffers from a mental abnormality at a subsequent point in time).

206. MENTAL HYG. § 10.05(g).

207. *Id.* § 10.06(a).

208. *Id.* § 10.06(c).

209. *Id.*

210. *Id.*; *see also id.* § 47.01.

211. *Id.* § 10.06(c). An 18-B lawyer is a private attorney appointed by the court to represent indigent clients. *See* Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 128 n.62 (1997). 18-B lawyers are compensated by the government. *Id.* at 128.

212. MENTAL HYG. § 10.06(d). Requiring a respondent to be evaluated by a state-chosen psychiatric examiner has caused many problems in court. *See, e.g.*, State v. Charles G., No. 10322/08 (N.Y. Sup. Ct. Oct. 17, 2008) (arguing that a second evaluation of the respondent take place). For example, in *State v. C.B.*, the respondent refused an evaluation with a state-chosen psychiatric examiner, arguing that, because he was evaluated twice before under Article § 9, there was no good cause to be evaluated again. No. 341104, 2008 WL 483750, at *2 (N.Y. Sup. Ct. Feb. 22, 2008). The court ruled against the respondent, holding that Article § 9 evaluations served a different purpose than Article § 10 evaluations. *Id.* at *3. The court has also held that under certain circumstances, a respondent may be subject to more than one evaluation. *See* State v. Richard Z., No. 2007-2605 (N.Y. Sup. Ct. June 1, 2010); State v. Brian J., No. 2009-61 (N.Y. Sup. Ct. Feb. 18, 2010). Further, the court has held that the state may not videotape evaluations conducted by psychiatric examiners. *See* State v. Bernard D., 877 N.Y.S.2d 84, 84–85 (App. Div. 2009); *In re* Charles S., 875 N.Y.S.2d 263, 263–64 (App. Div. 2009); State v. R.H., No. 002826, 2008 WL 4837632, at *1–4 (N.Y. Sup. Ct. Nov. 5, 2008); State v. Hall, No. 2424/07, 2007 WL 3306944, at *1–2 (N.Y. Sup. Ct. Nov. 7, 2007).

213. MENTAL HYG. § 10.06(g).

214. *See id.* §§ 10.06, 10.08.

215. *See id.*

expert witness to testify on this issue.[216] It is this expert testimony, based on an evaluation of the respondent, as well as any other relevant documents,[217] that the court will use in making its determination.[218] At the conclusion of the hearing, the court will either dismiss the petition and release the respondent in accordance with the law or order the respondent to a secure treatment facility, set a date for trial, and order the respondent not be released until the completion of trial.[219]

Article § 10.07(a) states that, within sixty days after a probable cause hearing, the court must conduct a jury trial to determine whether the respondent is a detained sex offender suffering from a mental abnormality.[220] Article § 10.07(b) sets forth the rules that govern the jury trial,[221] and as in probable cause hearings, Article § 10.08(g) outlines the types of evidence admissible at trial.[222] Further, also as in probable cause hearings, the jury will generally hear one expert witness on behalf of the state and one expert witness on behalf of the respondent.[223] After both sides are fully heard by the jury, the jury will determine "by clear and convincing evidence whether the respondent is a detained sex offender who suffers from a mental abnormality."[224]

If the jury determines that the state has not met its burden, the respondent should be released in full accordance with the law.[225] If the jury unanimously finds that the state has met its burden in showing that the

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216. *See id.*

217. *See id.* There have been a number of cases challenging the admissibility of evidence at civil commitment hearings. *See* State v. Little Luke KK., 894 N.Y.S.2d 605, 609–10 (App. Div. 2010) (holding that the state properly limited the respondent's expert witness from testifying to the appropriateness of his placement in a secure treatment facility); State v. Dove, 846 N.Y.S.2d 863, 865–66 (Sup. Ct. 2007) (precluding hearsay evidence in respondent's presentence and parole reports because they did not fall into any hearsay exception, but denying respondent's request that the court not consider actuarial test results).

218. There have also been a number of cases challenging whether the evidence provided at the hearing was sufficient to establish probable cause. *See* State v. P.H., 874 N.Y.S.2d 733, 749–50 (Sup. Ct. 2008) (holding that the state's expert witness's opinion was based on more than just unspecified studies and that the respondent's apparent inability to control voyeurism and exhibitionism was enough to establish that there was probable cause that the respondent suffered from a mental abnormality); State v. Stanfield, No. 250519, 2008 WL 2184891, at *3 (N.Y. Sup. Ct. May 27, 2008) (holding that the expert testimony of the psychiatric examiner, the scores on two actuarial tools, the respondent's criminal history, and the commission of crimes while on parole were enough to establish probable cause).

219. MENTAL HYG. § 10.06(k).

220. *Id.* § 10.07(a). Although § 10.07(a) sets forth a sixty-day requirement, courts have been lenient with enforcing it. *See* State v. Trombley, 951 N.Y.S.2d 782, 784 (App. Div. 2012) (holding that a delay in trial did not violate the respondent's due process because the delay was caused by the respondent's consistent requests for adjournments).

221. MENTAL HYG. § 10.07(b). "[A]rticle forty-one of the civil practice law and rules shall apply" except that, when article forty-one is inconsistent with the rules of criminal procedure, "sections 270.05, 270.10, 270.15, 270.20, subdivision one of section 270.25, and subdivision one of section 270.35" of the rules of criminal procedure shall apply. *Id.*

222. *Id.* §§ 10.07(c), 10.08(g); *see also infra* Part II.A.

223. MENTAL HYG. § 10.06(d)–(e).

224. *Id.* § 10.07(d).

225. *Id.* § 10.07(f).

respondent is a detained sex offender suffering from a mental abnormality, the court must then hold a dispositional hearing.[226]

If the jury determines that the respondent is a detained sex offender suffering from a mental abnormality, the court must determine whether the respondent is so dangerous that he requires inpatient treatment or whether he is suited to be released on strict and intensive supervision and treatment.[227] At a dispositional hearing, both the state and the respondent are permitted to offer additional evidence pertaining to the issue of dangerousness.[228] As during the trial phase, the standard of proof is clear and convincing evidence.[229]

Article § 10.07(f) explains that, if the court finds by clear and convincing evidence that the respondent is so dangerous as to require confinement, the respondent will be sent to a secure facility for treatment until he no longer requires confinement.[230] If a respondent is determined to require confinement, Article § 10.09 and Article § 10.10 govern his right to annual examinations and petitions for discharge,[231] as well as for treatment and confinement, respectively.[232]

If the court, however, does not find that a respondent is so dangerous as to require confinement, the court will order a respondent to be subject to "strict and intensive supervision" and treatment[233] (SIST). Article § 10.11 governs the "regimen" of SIST.[234] Generally, a respondent on strict and intensive supervision and treatment must abide by a list of roughly seventy conditions and, if found to be in violation of one or more conditions, risks being civilly committed to a secure treatment facility.[235]

II. AN EXAMINATION OF PERMISSIBLE HEARSAY EVIDENCE AFTER *STATE V. FLOYD Y.* VERSUS THE REQUIREMENTS OF ARTICLE § 10

Part I of this Note explored the history of civil commitment in the United States, the laws that govern civil commitment statutes, and New York State's Sex Offender Management and Treatment Act. Part II begins with a thorough examination of the admissibility of hearsay evidence in New York State civil commitment hearings under the Sex Offender Management and Treatment Act both before and after the New York State Court of Appeals decision in *State v. Floyd Y.* It then explores the *Floyd Y.* decision as it relates to the Confrontation Clause, New York State's Civil Practice Law and Rules, and Article § 10's legislative intent.

226. *Id.*; *see also infra* note 235 and accompanying text.
227. MENTAL HYG. § 10.07(f).
228. *Id.*
229. *Id.*
230. *Id.*
231. *See id.* § 10.09.
232. *See id.* § 10.10.
233. *Id.* § 10.07(f).
234. *Id.* § 10.11.
235. *See id.*

A. The Admissibility of Hearsay Evidence in Article § 10 Cases and State v. Floyd Y.

Part II.A first outlines what types of evidence Article § 10 permits at civil commitment proceedings. It then explores the events leading up to the *Floyd Y.* decision as well as the court's holding.

1. Evidence Admissible Under Article § 10

The most important piece of evidence in an Article § 10 proceeding is a psychiatric examiner's report.[236] A psychiatric examiner's report outlines, in the examiner's expert opinion, whether the respondent suffers from a mental abnormality and the evidence utilized to come to that determination.[237] Article § 10.08(g) of the New York State Mental Hygiene Law, for both probable cause hearings and trials, mandates that, in three specific circumstances, any psychiatric examiner's report, if relevant, is permissible regardless of whether the psychiatric examiner is available to testify.[238] These three circumstances include (1) when the report is certified or authenticated by the "head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician,"[239] (2) when the report is presented at a probable cause hearing,[240] and (3) when the report is presented at a hearing regarding a respondent's SIST.[241] In all other cases, however, the psychiatric examiner must be able to testify or must be able to show good cause as to why she is not able to testify.[242]

Article § 10.08(g) also states that any relevant documents and testimony regarding the respondent's underlying criminal offenses are admissible.[243] While the types of evidence Article § 10.08(g) deems admissible may seem to encompass everything the attorney general would need to make a case, Article § 10.08(g) does not address the admissibility of *hearsay* evidence in Article § 10 cases.[244]

As discussed in Part I.B.2 of this Note, hearsay evidence is defined as "(1) an out-of-court assertion that is (2) offered to prove its truth."[245] In civil cases, if a declarant of a statement is unable or unwilling to testify in court, the court must either find an exception to the hearsay rule for which

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236. *See* Duffy, *supra* note 145, at 772.
237. *See id.*
238. MENTAL HYG. § 10.08(g).
239. *See* N.Y. C.P.L.R. 4518(c) (McKinney 2007) (stating that "[a]ll records, writings and other things referred to in sections 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician").
240. *See* MENTAL HYG. § 10.06(g)–(h).
241. *See id.* § 10.11(a)(2), (d)(4), (e), (g)–(h).
242. *Id.* § 10.08(g).
243. *Id.*
244. *See id.*
245. *See* BINDER, *supra* note 132, § 1:1.

the statement applies or forego using such hearsay evidence.[246] In the Article § 10 setting, the most pertinent exception to the general rule against hearsay is the professional reliability exception.[247]

2. Article § 10 and the Professional Reliability Exception

Article § 10.08(g) describes which types of evidence are admissible at Article § 10 proceedings but fails to explicitly state whether *hearsay* evidence is admissible.[248] This is a particularly important issue in Article § 10 proceedings as psychiatric examiners, in forming their opinions about whether a respondent suffers from a mental abnormality, base their decisions not only on evaluations of respondents but also on respondents' records.[249] A respondent's records may include materials from the Department of Corrections, medical records, pre-sentence reports, rap sheets, parole reports, police reports, Office of Mental Health records, court transcripts, and reports made by other psychiatric professionals.[250]

Because many of these documents contain hearsay evidence and because Article § 10 does not explicitly contemplate the admissibility of hearsay evidence, courts have been charged with interpreting the admissibility of hearsay evidence in Article § 10 proceedings.[251] Although Article § 10 does not explicitly outline the admissibility of hearsay evidence,[252] Article § 10.07(c) states that Article § 10.08(g) and Article § 45 of the Civil Practice Law and Rules are applicable in Article § 10 proceedings.[253] Utilizing the guidance set forth in § 10.07(c), the court has determined that "[t]he inclusion of Article 45 as the evidentiary standard suggests that at an Article 10 trial, as a civil trial generally, hearsay should not generally be admissible."[254]

Nonetheless, the court has carved out certain exceptions for when hearsay evidence should be permitted.[255] The most pertinent hearsay exception to Article § 10 cases is the "professional reliability exception."[256] The professional reliability exception, which is defined in Part I.B.3.a of this Note, states that a "psychiatrist may rely on material, albeit of out-of-court origin, if it is of a kind accepted in the profession as reliable in forming a professional opinion" or if it "comes from a witness subject to full cross-examination on the trial."[257]

246. *See supra* Part I.B.3.
247. *See supra* Part I.B.3.a.
248. MENTAL HYG. § 10.08(g).
249. *See* Duffy, *supra* note 145, at 765–66.
250. *See id.*
251. *See infra* note 252 and accompanying text.
252. State v. J.A., 868 N.Y.S.2d 841, 845 (Sup. Ct. 2008).
253. MENTAL HYG. § 10.07(c).
254. *J.A.*, 868 N.Y.S.2d at 845.
255. *See supra* Part I.B.3.
256. *See* People v. Sugden, 323 N.E.2d 169, 173 (N.Y. 1974).
257. *Id.*

3. Events Leading Up to the *Floyd Y.* Decision

Almost immediately after the enactment of Article § 10, the professional reliability exception began to play an integral role in admitting hearsay evidence in Article § 10 proceedings.[258] At trial, the state would generally contend that such hearsay was admissible, arguing it is consistent with the professional reliability exception to the hearsay rule.[259] Conversely, the respondent would attempt to preclude such evidence, arguing that the state witness's expert opinion was based on inadmissible hearsay evidence.[260]

After a number of similar Article § 10 cases were decided, the court seemed to have outlined a bright-line rule regarding the admissibility of hearsay evidence.[261] In *State v. Pierce*,[262] the court held that because "parole board documents, pre-sentence reports, accusatory instruments, certificates of conviction, police reports and respondent's criminal records" were of the kind normally relied upon by experts in forming their opinions, such records were admissible under the professional reliability exception.[263] Various New York State Supreme Courts have upheld *Pierce*'s ruling in subsequent Article § 10 proceedings.[264]

One issue that the *Pierce* decision did not address, however, was whether hearsay evidence regarding charges that are eventually dropped or crimes with which an individual is never charged is admissible in court.[265] This issue was first addressed in *State v. Shawn X.*,[266] when the court held that

258. *See* State v. Wilkes, 908 N.Y.S.2d 495, 496–97 (App. Div. 2010) (holding that parole documents and conversations with defendant's father were sufficiently reliable hearsay to form basis of expert psychological opinion as the record contained testimony of psychologist that such documents are accepted in the psychological profession as a basis upon which to form an opinion); State v. Joseph B., No. 4730-08, at *4–5 (N.Y. Sup. Ct. June 24, 2009) (holding that because records documenting prior convictions are traditionally relied upon by psychiatric examiners in forming their opinions about mental abnormality, such records are admissible under the professional reliability exception); *J.A.*, 868 N.Y.S.2d at 849–50 (finding some hearsay reliable and falling under professional reliability exception where respondent pled guilty to crime and where evidence supported by trial transcripts).

259. *See* Duffy, *supra* note 145, at 766.

260. *See id.* at 767.

261. *See infra* note 263 and accompanying text.

262. 914 N.Y.S.2d 547 (App. Div. 2010).

263. *Id.* at 548–49.

264. *See* State v. Anonymous, 920 N.Y.S.2d 195, 197 (App. Div. 2011) (holding that the appellant established the reliability of hearsay evidence by pleading guilty to the sex offenses and relaying the details of the sex offenses to experts that examined him); State v. Mark S., 924 N.Y.S.2d 661, 663–64 (App. Div. 2011) (holding that under the professional reliability exception to the hearsay rule, an expert witness could rely on presentence reports, SORA records, and parole revocation records because the expert testified that those records are of the type commonly relied upon in the Article § 10 setting); State v. Fox, 914 N.Y.S.2d 550, 551 (App. Div. 2010) (holding that, because petitioner's expert testified that he relied on documents specifically deemed reliable by Mental Hygiene Law § 10.08, there was no need for petitioner's expert to state that such documents were traditionally relied upon by experts in the field).

265. *See Pierce*, 914 N.Y.S.2d at 548–50.

266. 887 N.Y.S.2d 692 (App. Div. 2009).

hearsay evidence regarding uncharged crimes is admissible as long as it is relevant and not "unduly prejudicial."[267]

In May 1992, Shawn X. was convicted of sodomy in the first degree, rape in the first degree, and endangering the welfare of a child.[268] Shawn X. was sentenced to five to fifteen years in prison and was released on parole after serving ten years.[269] As part of Shawn X.'s parole conditions, he was not permitted to have any contact with individuals under eighteen years old without written permission from his parole officer.[270] Nonetheless, Shawn X. repeatedly came into contact with a three-year-old boy, and his parole was eventually revoked.[271]

After Shawn X.'s parole was revoked, the state brought a petition against Shawn X., arguing Shawn X. was a detained sex offender requiring civil management.[272] At Shawn X.'s trial, the respondent argued that his contact with the three-year-old boy was inadmissible hearsay evidence as the family of the three-year-old boy never brought charges against him.[273] The court, however, disagreed and established the "unduly prejudicial" test to determine whether certain types of hearsay evidence are admissible.[274]

After *Shawn X.*, the question of whether the professional reliability exception applies requires an analysis of the "unduly prejudicial" test.[275] First, the court must ask whether experts in the relevant field traditionally rely upon the type of evidence in question.[276] Second, the court must ask whether such evidence is more prejudicial than probative.[277] In 2013, the court carefully analyzed this two-fold test in a decision that would significantly impact the types of evidence permissible at Article § 10 proceedings.[278]

4. The Court's Holding: *State v. Floyd Y.*

Although the *Floyd Y.* decision came down in 2013, the facts of the case date back approximately twenty years.[279] In January 2001, Floyd Y. was convicted of four counts of first-degree sexual abuse and four counts of endangering the welfare of a child for abusing his two stepchildren.[280] Almost five years later, when Floyd Y. was nearing release from prison, the Department of Correctional Services "invoked Mental Hygiene Law § 9.27

267. *Id.* at 697.
268. *Id.* at 694.
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *See id.* at 697.
274. *See id.*; *see also* State v. Cerrick FF., 952 N.Y.S.2d 653, 655–56 (App. Div. 2012); State v. Mark S., 924 N.Y.S.2d 661, 665 (App. Div. 2011).
275. *See Shawn X.*, 887 N.Y.S.2d at 696–98.
276. *See id.* at 697.
277. *See id.* at 696–98.
278. *See* State v. Floyd Y., 2 N.E.3d 204 (N.Y. 2013).
279. *Id.* at 207.
280. *Id.* at 205–06.

and transferred Floyd Y. to Kirby Psychiatric Center."[281] At the time, Article § 9 was used to civilly commit dangerous sex offenders because Article § 10 had not yet been enacted.[282]

On April 13, 2007—a year and four months after the Department of Correctional Services transferred Floyd Y. to Kirby—Article § 10 was enacted, and the state petitioned to have Floyd Y. civilly committed.[283] At trial, the State's expert witness, Dr. Mortiere, explained that she believed Floyd Y. suffered from pedophilia, antisocial personality disorder, and polysubstance dependence and that the combination of these mental illnesses made it likely Floyd Y. would reoffend.[284] In addition to interviewing Floyd Y., Dr. Mortiere based her opinion on victim affidavits, police reports, court records, and other psychiatric professionals' evaluations.[285] Dr. Mortiere discussed Floyd Y.'s sexual abuse of his two stepchildren, for which he was convicted, as well as seven other similar crimes.[286]

Dr. Mortiere explained that, in total, Floyd Y. had sexually abused nine individuals.[287] In 1992, Floyd Y. was convicted of sexual assault for abusing his first victim, a twenty-three-year-old woman.[288] In 1994, Floyd Y. was accused of sexually abusing a teenage girl[289] and, in 1995, pled guilty to harassing the girl's twin sister.[290] In 1996, Floyd Y. was accused, yet acquitted, of abusing an eight-year-old family friend[291] and, during that same year, admitted to having inappropriate telephone conversations with his seventeen-year-old sister-in-law.[292] In 1998, Floyd Y. was accused but never charged with abusing his then-girlfriend's eight-year-old daughter, and charges were brought, but eventually dropped, for abusing the same woman's fifteen-year-old daughter.[293] Finally, in 2001, Floyd Y. was convicted of abusing his two stepchildren.[294] Dr. Mortiere's testimony about Floyd Y.'s criminal history was made without any personal knowledge of these events, which eventually led to Floyd Y.'s appeal.[295]

The New York State Court of Appeals analyzed Floyd Y.'s appeal by applying the two-part test for the admissibility of hearsay evidence under the professional reliability exception.[296] All of the evidence passed the first part of the test because it was the type of evidence traditionally relied on by

281. *Id.* at 206.
282. *See id.*
283. *Id.*
284. *Id.*
285. *Id.*
286. *Id.* at 207.
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* at 213.

experts in the field.[297] As to the second part of the test, the court concluded that out of nine alleged sexual abuse victims, hearsay evidence regarding four victims was admissible.[298] The court reasoned that the hearsay evidence was reliable because it was accompanied by adjudications of guilt, and the hearsay evidence was therefore more probative than prejudicial.[299]

Hearsay evidence regarding Floyd Y.'s inappropriate telephone calls with his seventeen-year-old sister-in-law was also admissible because the respondent admitted to the abuse.[300] The court held that a respondent's admission is indicative of reliability and is therefore also more probative than prejudicial.[301]

Hearsay evidence regarding Floyd Y.'s fifteen-year-old victim, the daughter of his ex-girlfriend, was found to be admissible because Floyd Y. signed a parole agreement to stay away from her.[302] The court clarified its decision by noting that, although the signed parole agreement was enough to deem it more probative than prejudicial, it did not "conclusively prove the allegations" against Floyd Y.[303]

The hearsay evidence regarding the three remaining allegations, however, was not admissible in court.[304] The court held that, unlike convictions or admissions, acquittals and uncharged crimes are "more prejudicial than probative."[305] Thus, the 1994 accusation against Floyd Y. of abusing a teenage girl, the 1996 accusation of abusing an eight-year-old girl, and the 1998 accusation of abusing his ex-girlfriend's eight-year-old daughter were inadmissible hearsay evidence.[306] The court did opine, however, that, if the State could substantiate these allegations with extrinsic evidence, they might be found reliable and thus more probative than prejudicial.[307]

In determining which types of extrinsic evidence would substantiate such hearsay evidence, the court suggested that the State require live confrontation of the victims to determine the victims' reliability.[308] Although the *Floyd Y.* court recognized that Article § 10 proceedings are civil in nature and therefore the respondent is not guaranteed the right to confront his accusers,[309] the court concluded that the Due Process Clauses of the Fifth and Fourteenth Amendments supported its suggestion.[310] The court reasoned that, because Floyd Y.'s liberty interest, protected by the

297. *See id.* at 214. These offenses include Floyd Y.'s conviction of sexual assault against a twenty-three-year-old woman in 1992, Floyd Y.'s guilty plea to harassing a teenage girl in 1994, and Floyd Y.'s convictions for abusing his two stepchildren in 2001. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at 209; *see also supra* Part I.B.1–2.
310. *Floyd Y.*, 2 N.E.3d at 209.

Fifth and Fourteenth Amendments, is in direct conflict with the possibility of being civilly committed, hearsay evidence must meet a minimum threshold of reliability.[311]

In addition, the *Floyd Y.* court cited to the *Mathews v. Eldridge*[312] balancing test, which weighs "(1) the private interest of the litigant; (2) the risk of erroneous deprivation in the absence of substitute procedures; and (3) the State's interest in avoiding additional procedures."[313] It is from this test that the court concluded that the most reliable way to substantiate hearsay evidence regarding "[c]riminal charges that resulted in neither acquittal nor conviction" is to "require live confrontation of the declarant to ensure the statement's reliability."[314]

B. The Floyd Y. *Decision and the Requirements of the Law*

Part II.B first examines whether the Constitution requires live confrontation in Article § 10 proceedings. This section then explores whether New York State's Civil Practice Law and Rules require live confrontation in Article § 10 proceedings. Finally, it explores whether the legislative intent of Article § 10 supports a live confrontation requirement.

1. The Confrontation Clause and Article § 10 Proceedings

As defined in Part I.B.1 of this Note, the Confrontation Clause requires that individuals accused of *criminal* offenses be able to question and cross examine their accusers in open court.[315] The Confrontation Clause, however, is not applicable in civil proceedings.[316] Therefore, the Confrontation Clause plays no role in Article § 10 proceedings as Article § 10 cases are civil, not criminal.[317] Even if Article § 10 cases were criminal, however, both recent statutes and court cases suggest that live confrontation still would not be required.[318]

As discussed in Part I.B.1 of this Note, the Supreme Court ruled in *Maryland v. Craig* that in cases involving child victims, the accused's right to confrontation is not absolute.[319] State legislatures have been relatively silent when it comes to whether the accused's right to confrontation is absolute in cases involving *adult* victims of sexual assault, with the exception of Hawaii.[320] In Hawaii, a broad statute offers victims and witnesses "the right to testify at trial by televised two-way CCTV to be viewed by the court, the accused, and the trier of fact."[321] The justification

311. *Id.* at 212–13.
312. 424 U.S. 319 (1976).
313. *Floyd Y.*, 2 N.E.3d at 210; *see also Mathews*, 424 U.S. at 335.
314. *See Floyd Y.*, 2 N.E.3d at 214.
315. Crawford v. Washington, 541 U.S. 36, 42 (2004).
316. *See id.* at 42–43.
317. N.Y. MENTAL HYG. LAW § 10.01 (McKinney 2011).
318. *See infra* notes 320, 325–27 and accompanying text.
319. Maryland v. Craig, 497 U.S. 836, 849–50 (1990).
320. *See* HAW. REV. STAT. ANN. § 801D-7 (West 2008).
321. *Id.*

for this statute is that it promotes cooperation between victims and law enforcement and "ensure[s] that all victims and witnesses of crimes are treated with [the] dignity, respect, courtesy, and sensitivity" that they deserve.[322] Whether such alternatives will be available to an adult victim is decided on a case-by-case basis.[323]

Although state and federal courts have also been relatively silent on the issue of whether *Craig* can be extended to adult victims, some courts have formed an opinion.[324] For example, in *People v. Wrotten*,[325] the New York State Court of Appeals held that "[n]owhere does *Craig* suggest that it is limited to child witnesses."[326] In a federal case heard by the U.S. Court of Appeals for the Fifth Circuit, the court held that *Craig* "suggest[s] a general rule *not* limited to protecting child victims."[327] In fact, it is possible to read *Craig* "as allowing a necessity-based exception for face-to-face, in-courtroom confrontation where the witness's inability to testify invokes the state's interest in protecting the witness—from trauma in child sexual abuse cases or, as here, from physical danger or suffering" from the defendant.[328]

Although courts' willingness to address the breadth of *Craig* is sparse, the Fifth Circuit and the New York State Court of Appeals suggest *Craig* should not be limited to cases involving child victims of sexual abuse.[329] Therefore, even if Article § 10 proceedings were subject to the Confrontation Clause, it is possible that live confrontation *still* would not be required.

2. New York State's Civil Practice Law and Rules: The General Rule Against Hearsay

Whereas the Confrontation Clause applies only to criminal cases, Article § 45 of the New York State Civil Practice Law and Rules applies to *all* New York State civil proceedings.[330] Therefore, in all civil cases, hearsay evidence is inadmissible unless it falls within one of New York State's hearsay exceptions.[331] As held in *Floyd Y.*, hearsay evidence regarding uncharged crimes and/or dropped charges, even if it meets the first part of

322. *Id.* § 801D-1.
323. *See id.*
324. *See infra* notes 325–27 and accompanying text.
325. 923 N.E.2d 1099 (N.Y. 2009).
326. *Id.* at 1103; People v. Adams, 23 Cal. Rptr. 2d 512, 530 (Ct. App. 1993) (holding that, although the court has not seen a case recognizing a legitimate state interest in protecting adult victims of sexual assault, "revolutionary change" is taking place in society); *see also* People v. Murphy, 132 Cal. Rptr. 2d 688, 693–94 (Ct. App. 2003) (holding that, in an appropriate case, the court may permit an adult victim to testify via a one-way screen, but because the trial court did not show that the victim would suffer irreparable harm from live confrontation, the defendant's right to confrontation was violated).
327. Horn v. Quarterman, 508 F.3d 306, 319–20 (5th Cir. 2007) (emphasis added).
328. *Id.* at 320.
329. *See id.*; *Wrotten*, 923 N.E.2d at 1103; *see also* Nat'l Crime Victim Law Inst., *Allowing Adult Sexual Assault Victims to Testify at Trial via Live Video Technology*, VIOLENCE AGAINST WOMEN BULL., Sept. 2011, at 1–15.
330. *See* N.Y. C.P.L.R. 101 (MCKINNEY 2003).
331. *See supra* Part I.B.3.

the professional reliability exception, is still inadmissible under the second part of the professional reliability exception if it is more prejudicial than probative.[332]

The *Floyd Y.* court suggested that, in order to establish the reliability of hearsay evidence pertaining to uncharged and acquitted crimes, courts should require live confrontation of the declarant to ensure the statements' reliability.[333] In no jurisdiction in the United States, however, is live confrontation required in civil cases.[334] Nonetheless, introducing such hearsay that is more prejudicial than probative would violate due process and thus require substantiation.[335]

As described in Part I.A.2 of this Note, twenty states and the federal government have statutes pertaining to the civil commitment of dangerous sex offenders.[336] Most of these states not only have similar sex offender civil commitment statutes[337] but also have substantially similar rules against hearsay.[338] Further, many of these states also have similar professional reliability exceptions,[339] and all of these states are required to abide by the due process requirements of the U.S. Constitution.[340]

In Massachusetts, however, the Supreme Judicial Court ruled that a respondent suffered no prejudice when hearsay evidence regarding an uncharged crime was introduced as evidence because the jury was presented with such strong evidence pertaining to the respondent's dangerousness.[341] The jury was presented with the respondent's adult and juvenile records, which indicated that the respondent had been found guilty of two counts of rape of a child, two counts of aggravated rape of a child, and five counts of assault and battery of a child under fourteen years old.[342] Therefore, in cases where there is sufficient nonhearsay evidence and/or sufficiently reliable hearsay evidence, there is no due process violation in introducing hearsay evidence pertaining to uncharged crimes.[343]

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332. *See* State v. Floyd Y., 2 N.E.3d 204, 214 (N.Y. 2013).
333. *See id.*
334. *See* MERRITT & SIMMONS, *supra* note 129, at 701.
335. *See Floyd Y.*, 2 N.E.3d at 214.
336. *See supra* note 63 and accompanying text.
337. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 205/1.01–205/12 (West 2008); MASS. ANN. LAWS ch. 123A, §§ 1–16 (LexisNexis 2003); TEX. HEALTH & SAFETY CODE ANN. §§ 841.001–.007 (West 2010).
338. *See, e.g.*, ILL. R. EVID. 802; TEX. R. EVID. 802; SUPREME JUDICIAL COURT ADVISORY COMM. ON MASS. EVIDENCE LAW, MASSACHUSETTS GUIDE TO EVIDENCE § 802 (2014 ed.).
339. *See, e.g.*, ILL. R. EVID. 703 (stating "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence"); TEX. R. EVID. 703 (same); SUPREME JUDICIAL COURT ADVISORY COMM. ON MASS. EVIDENCE LAW, *supra* note 338, § 703 (stating "[t]he facts or data in the particular case upon which an expert witness bases an opinion or inference may be those [that] are a permissible basis for an expert to consider in formulating an opinion").
340. U.S. CONST. amends. V, XIV.
341. Commonwealth v. Connors, 850 N.E.2d 1038, 1044 (Mass. 2006).
342. *Id.*
343. *See id.*

In *In re Detention of Isbell*,[344] the Appellate Court of Illinois held that the respondent suffered no prejudice when the trial court permitted an expert witness to rely on hearsay testimony about an allegation of sexual assault a janitor made against the respondent.[345] The court held that, as long as the expert testified that the information was used for the sole purpose of forming his or her opinion and not for the truth of the underlying facts, the evidence presented was more probative than prejudicial.[346]

Similarly, in *In re Commitment of Tesson*,[347] the Texas Court of Appeals permitted experts to testify about various alleged uncharged crimes against the respondent.[348] The court held that, so long as the jury was instructed that the experts used the underlying evidence only to form their opinions and that it was up to the jury to determine the credibility of the underlying facts, there was no due process violation.[349]

The *Floyd Y.* court explicitly acknowledged in its decision that, in civil cases, substantiating hearsay evidence can be accomplished in a variety of ways.[350] However, the court's holding suggesting live confrontation failed to acknowledge any other alternative.[351] As evidenced by Massachusetts, Illinois, and Texas, however, there are ways in which to introduce hearsay evidence regarding uncharged crimes and/or dropped charges without violating due process and also without unnecessarily involving the testimony of past victims of sexual assault.[352]

3. Article § 10's Legislative Intent

Floyd Y. was a novel case. The court suggested a way to substantiate hearsay evidence deemed more prejudicial than probative: live confrontation.[353] The laws governing civil commitment cases do not require live confrontation.[354] There is also evidence in Article § 10's legislative history that the legislature did not intend for victims to play a role in such proceedings.[355]

For example, in the bill to enact Article § 10, the Senate proposed to amend Criminal Procedure Law §§ 380.50(4) and (5), which set forth the notification system available to victims of sexual assault.[356] By amending Criminal Procedure Law §§ 380.50(4) and (5), the state would be required, if requested, to notify victims of sexual offenses, as defined under Article

344. 777 N.E.2d 994 (Ill. App. Ct. 2002).
345. *Id.* at 1000.
346. *See id.*
347. 413 S.W.3d 514 (Tex. App. 2013).
348. *Id.* at 519.
349. *See id.* at 519–20.
350. State v. Floyd Y., 2 N.E.3d 204, 212 (N.Y. 2013).
351. *See supra* notes 341, 345, 348 and accompanying text.
352. *See supra* notes 341, 345, 348 and accompanying text.
353. *Floyd Y.*, 2 N.E.3d at 214.
354. *See infra* notes 356, 362, 366 and accompanying text.
355. *See infra* notes 356, 362, 366 and accompanying text.
356. S. 3318, 230th Leg., Reg. Sess., at 7 (N.Y. 2007).

§ 10.03(p), of a change in their abusers' statuses.[357] Such changes in status include if/when an abuser escapes, absconds, or is released from custody.[358] Further, the amendment also requires the state to notify victims of sexual assault if/when their abusers are transferred to the custody of the Office of Mental Health or are released from civil confinement.[359]

The purpose of amending this section of the Criminal Procedure Law is to ensure that a victim is notified if there is a change in his or her abuser's status.[360] This information might help victims implement any precautions they feel are necessary if their abusers are released and, at minimum, inform victims that their abusers may be out in public.[361]

The tendency of convicted sex offenders to secure early release dates and/or short sentences is addressed in a letter to Governor Spitzer regarding Article § 10.[362] The New York State Psychiatric Association (NYSPA) explains that individuals accused of sexual assault are often able to secure short prison sentences by pleabargaining.[363] The District Attorney's Office often engages in pleabargaining "to avoid the need for their victims, often children, to testify in court regarding the crimes committed against them."[364] This is the first piece of evidence in the legislative history of Article § 10 that addresses how live confrontation affects sexual assault victims.[365] The New York City Bar expands on this piece of evidence, explaining that Article § 10 is a response "to the public's feeling that sex offenses are *so damaging to victims*, and *so frightening to potential victims*, that offenders should be sternly punished and closely watched for many years."[366]

Both the NYSPA and the New York City Bar suggest that victims of sexual assault are not only damaged by the crimes committed against them but might be further damaged if forced to testify in open court.[367] Article § 10 supports this sentiment, in that psychiatric examiners are not permitted to gain access to any identifying information of a victim without a court order or good cause[368] to ensure a victim's privacy.[369] Further, Article § 10 also ensures that a respondent will not be capable of contacting one of his victims.[370]

In addition to live confrontation not being required by the laws governing civil commitment statutes and being against the legislative intent of Article § 10, live confrontation is also arguably against public policy. The

357. *See id.*
358. *See id.* at 23.
359. *See id.*
360. *See id.*
361. *See id.*
362. *Id.* at 64–65.
363. *Id.*
364. *Id.*
365. *See id.*
366. *Id.* at 98 (emphasis added).
367. *See id.* at 64–65, 98.
368. N.Y. MENTAL HYG. LAW § 10.08(b) (McKinney 2011).
369. *See id.*
370. *See id.*

following part will explore the psychological impacts, both positive and negative, that live confrontation has on victims of sexual assault.

III. THE PSYCHOLOGICAL EFFECTS OF LIVE CONFRONTATION ON VICTIMS OF SEXUAL ASSAULT

Part III begins by presenting the argument that victims may benefit by confronting their abusers. It then presents the argument that live confrontation is detrimental to victims of sexual assault.

A. Live Confrontation Is Psychologically Beneficial for Victims of Sexual Assault

The court in *Floyd Y.* suggested that a reliable way to substantiate hearsay evidence regarding acquittals and/or dropped charges is to "require live confrontation of the declarant to ensure the statement's reliability."[371] Although the *Floyd Y.* court did not address any arguments about the effects of live confrontation on sexual assault victims, there are psychological studies that suggest that, in a limited number of situations, live confrontation may not be as harmful as expected.[372]

For example, in an article about the effects of disclosure and intervention on sexually abused children, Dr. Berliner and Dr. Conte explain that live confrontation does not always lead to more symptoms in victims of sexual assault.[373] In a study conducted on children who testified in juvenile court, those children who testified actually showed *more* improvement than those who did not.[374] Only those children who had to testify more than once or those children who were subject to long and harsh cross examination were less likely to show improvement.[375] Thus, Dr. Berliner and Dr. Conte concluded that, in cases where a child is only required to testify once under relatively moderate conditions, testifying in open court may not lead to more symptoms in child victims of sexual assault.[376]

Dr. Berliner and Dr. Conte describe their conclusions of a case study of two groups of child victims of sexual assault: one group who did testify in criminal court and one group who did not.[377] Many children who testified felt that it was not as bad as they thought it would be.[378] Further, some of the children who did not testify regretted their decisions.[379]

Dr. Berliner and Dr. Conte's findings are supported by an earlier study conducted by Dr. Runyan, who concluded that, in cases which terminated quickly in either a conviction or plea bargain, children who testified

371. State v. Floyd Y., 2 N.E.3d 204, 214 (N.Y. 2013).
372. *See infra* notes 373, 380, 382 and accompanying text.
373. Lucy Berliner & Jon R. Conte, *The Effects of Disclosure and Intervention on Sexually Abused Children*, 19 CHILD ABUSE & NEGLECT 371, 372 (1995).
374. *Id.*
375. *See id.* at 372–73.
376. *See id.*
377. *See id.* at 381.
378. *See id.*
379. *See id.* at 381–82.

recovered just as fast as children who did not.[380] In fact, Dr. Runyan claims that, in such cases, children who testified recovered *even faster* than those who did not testify.[381]

In both case studies, children who testified under moderate conditions, in cases that were resolved relatively quickly with either a conviction or a plea bargain, recovered just as fast as or even faster than those children who did not testify.[382] In more complicated cases, however, both studies concluded that the psychological impact on child victims of sexual assault was very different.[383]

B. Live Confrontation Is Psychologically Detrimental for Victims of Sexual Assault

The *Floyd Y.* court's suggestion to use live confrontation to substantiate hearsay evidence was novel in Article § 10 cases; however, live confrontation has been—and still is—used to substantiate hearsay evidence in criminal proceedings.[384] Live confrontation is often present during a criminal proceeding because the Sixth Amendment guarantees the accused the right to confront their accusers.[385] Consequently, numerous psychiatric professionals have published articles on the psychological effects of live confrontation on victims of crimes.[386]

Psychiatric professionals have predominantly focused on the impact of live confrontation on sexually abused children.[387] This is particularly relevant in Article § 10 cases. As the legislative history of Article § 10 explains, "those referred for civil commitment should be repeat, chronic felony sex offenders who have committed predatory crimes involving violence, stranger victims or *young children*."[388]

The majority of studies regarding the psychological effects of live confrontation on sexually abused children conclude that, overall, testifying

380. *See* Desmond K. Runyan et al., *Impact of Legal Intervention on Sexually Abused Children*, 113 J. PEDIATRICS 647, 650 (1988).

381. *See id.* at 651; *see also* Debra Whitcomb, *Legal Interventions for Child Victims*, 16 J. TRAUMATIC STRESS 149, 155 (2003) ("Importantly, the research has failed to demonstrate lasting negative effects of involvement in the justice system for most children. With time, some children reflect positively on the experience, even while acknowledging the fears and anxieties associated with having to testify.").

382. *See* Berliner & Conte, *supra* note 373, at 372–82; Runyan et al., *supra* note 380, at 651; *see also* David Finkelhor & Angela Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, 55 AM. J. ORTHOPSYCHIATRY 530, 539 (1985) ("[I]f the child has a sense of having been able to end the abuse and obtain support and protection, this may greatly mitigate any sense of powerlessness that resulted from the experience itself.").

383. *See* Berliner & Conte, *supra* note 373, at 373; Runyan et al., *supra* note 380, at 651; *see also* Finkelhor & Browne, *supra* note 382, at 539 (stating that if "a great many authorities become involved in the experience and the child is forced to testify, forced to leave home, forced to tell the story on repeated occasions, and subjected to a great deal of unwanted attention, this can also greatly increase the child's sense of powerlessness").

384. *See* Brannon, *supra* note 118, at 445–46.

385. U.S. CONST. amend. VI; *see also* Pointer v. Texas, 380 U.S. 400, 406 (1965).

386. *See, e.g.*, Brannon, *supra* note 118, at 446–48.

387. *See id.*; *see also infra* notes 395–96 and accompanying text.

388. *See* S. 3318, 230th Leg., Reg. Sess., at 61 (N.Y. 2007) (emphasis added).

does more harm than good for victims of sexual assault.[389] Not only can testifying be stressful in court, it can also lead to numerous emotional consequences.[390] For example, children may be re exposed to feelings of betrayal, helplessness, and powerlessness, and confronting their abusers may bring the memories of abuse to the forefront of their minds.[391]

Another consequence of live confrontation is that the emotional impact of testifying in court may stay with the child into adulthood.[392] Studies suggest that a child might develop at a slower rate "than his or her peers because trauma during childhood can delay normal cognitive and emotional development."[393] Testifying before one's abuser can also lead to "depression, anxiety, and some psychosomatic symptoms."[394]

In addition to causing problems into adulthood, testifying in court may also lead to immediate negative results.[395] In a controlled study regarding the emotional effects on child sexual assault victims, numerous psychiatric professionals concluded that children who testified in open court experienced more symptoms than children who did not, especially those children who had to testify more than once.[396]

Although a substantial number of articles focus on the impact live confrontation has on child victims, there are also articles addressing adult victims.[397] In her published article, Dr. Moriarty explains that, by requiring a victim to retell his or her experience, a victim is forced to relive the abuse.[398] Reliving experiences of abuse can be extremely painful, and "much of the criminal justice literature supports this position."[399] Dr. Moriarty concludes that, by retelling their stories of abuse, victims in general may suffer irreparable emotional harm.[400]

Dr. Moriarty's conclusions are further supported by a study that tracked fear reactions in rape victims for one year after the assaults.[401] Dr. Calhoun's study aimed to determine what types of situations evoked fear in rape victims and to what degree such fear was evoked.[402] After further investigation about how live confrontation affected rape victims, the study concluded that victims who were required to testify in open court felt it was

389. *See* Brannon, *supra* note 118, at 439.
390. *See id.* at 442.
391. *See id.* at 442–43.
392. *Id.* at 445.
393. *Id.*
394. *Id.*
395. *See* Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 MONOGRAPHS SOC'Y FOR RES. CHILD DEV. 1, 62 (1992).
396. *See id.*; *see also* Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULL. 164, 172–73 (1993).
397. *See, e.g.*, Laura J. Moriarty, *Victim Participation at Parole Hearings: Balancing Victim, Offender, and Public Interest*, 4 CRIMINOLOGY & PUB. POL'Y 385, 386 (2005).
398. *See id.*
399. *Id.*
400. *See id.*
401. *See* Karen S. Calhoun et al., *A Longitudinal Examination of Fear Reactions in Victims of Rape*, 29 J. COUNSELING PSYCHOL. 655, 656 (1982).
402. *See id.* at 659.

"highly traumatic" not only because they were forced to relive their abuse but also because their credibility and integrity were questioned and attacked.[403] Because live confrontation has the potential to evoke debilitating fear in rape victims, the study suggests that, if a victim is forced to testify, he or she will require extensive support from psychiatric professionals.[404]

One final article regarding the impact of judicial involvement, specifically the impact of live confrontation on victims of sexual assault, sums up psychiatric professionals' fears by drawing distinctions between what a victim needs and what the court requires:

> Victims need social acknowledgment and support; the court requires them to endure a public challenge to their credibility. Victims need to establish a sense of power and control over their lives; the court requires them to submit to a complex set of rules and procedures that they may not understand, and over which they have no control. Victims need an opportunity to tell their stories in their own way, in a setting of their choice; the court requires them to respond to a set of yes-or-no questions that break down any personal attempt to construct a coherent and meaningful narrative. Victims often need to control or limit their exposure to specific reminders of the trauma; the court requires them to relive the experience by directly confronting the perpetrator.[405]

By drawing distinctions between what courts offer to victims and the psychological needs of victims, Dr. Herman attempts to show that judicial involvement may be harmful for victims of sex crimes, further supporting the notion that live confrontation should not be required at civil commitment proceedings.[406]

IV. FINDING A BALANCE BETWEEN THE GENERAL WELFARE OF VICTIMS OF SEXUAL ASSAULT AND DUE PROCESS OF THE LAW

Part IV concludes that live confrontation can be, and should be, the last resort to substantiate hearsay evidence in the Article § 10 setting. This part first explains that by applying already established hearsay exceptions in New York State, live confrontation is unnecessary in Article § 10 cases. It then suggests that, if New York State continues to require live confrontation, it should implement video technology to reduce the psychological impact of live confrontation on victims of sexual assault. Finally, it concludes with suggesting various reforms in the criminal justice system that have the ability to drastically reduce and eventually eliminate the need for live confrontation in Article § 10 proceedings.

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403. *See id.*

404. *See id.* at 661; *see also* Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. TRAUMATIC STRESS 182, 183 (2010).

405. Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159–60 (2003).

406. *See id.*; *see also* Mary P. Koss, *Blame, Shame, and Community: Justice Responses to Violence Against Women*, 55 AM. PSYCHOLOGIST 1332, 1335 (2000) (finding that "[t]estifying is one of four significant predictors of posttraumatic stress disorder symptoms among adult survivors of child rape").

A. New York State's Hearsay Exceptions

In suggesting live confrontation as the way to substantiate hearsay evidence pertaining to uncharged crimes and/or dropped charges, the New York State Court of Appeals failed to address alternatives that do not require the presence of victims of sexual assault.[407] The *Floyd Y.* court opined that due process required live confrontation to establish the statements' reliability; however, states such as Massachusetts, Illinois, and Texas, which all have substantially similar hearsay rules and exceptions, have, in similar cases, ensured due process without victim involvement.[408]

New York State should consider revising its present holding by incorporating the holdings of one or more of these other states.[409] In cases where there is sufficient nonhearsay evidence and/or sufficient reliable hearsay evidence, New York State could permit hearsay evidence regarding uncharged and/or dropped crimes in Article § 10 proceedings as it is not a violation of due process to introduce such statements when a prima facie case has already been established.[410] This would have been especially significant in *State v. Floyd Y.*, as the court had already introduced admissible evidence pertaining to *seven* of Floyd Y.'s past crimes.[411]

As an alternative, New York State should consider whether an expert's testimony or a jury instruction that hearsay is being used for the sole purpose of forming an expert opinion and not for the truth of the underlying facts ensures due process.[412] If these alternatives have been held to satisfy the requirements of the Fifth and Fourteenth Amendments in other states, there is no reason why they would not ensure due process in New York.[413]

If New York refuses to adopt such holdings, courts should investigate whether hearsay statements regarding uncharged crimes and/or dropped charges fall within one of New York State's hearsay exceptions before requiring live confrontation.[414] For example, the court should look to see if any statements fall under the exception for excited utterances.[415] As most Article § 10 cases involve sexual assault, rape, and/or child abuse, there is the possibility that a victim told someone about the abuse.[416] If the court is still concerned with the statements' reliability, they should require the outcry witness,[417] not the victim, to come in and testify in order to ensure the statements' reliability.

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407. *See supra* Part II.B.2.
408. *See supra* notes 341, 345, 348 and accompanying text.
409. *See supra* notes 341, 345, 348 and accompanying text.
410. *See supra* note 341 and accompanying text.
411. State v. Floyd Y., 2 N.E.3d 204, 214 (N.Y. 2013).
412. *See supra* notes 345, 348 and accompanying text.
413. *See supra* notes 345, 348 and accompanying text.
414. *See supra* Part I.B.3.
415. *See supra* Part I.B.3.b.
416. *See supra* Part I.B.3.b.
417. An outcry witness is the first person who is told of an accusation of sexual assault or abuse by a child or adult victim. *Outcry Witness*, USLEGAL.COM, http://definitions.uslegal.com/o/outcry-witness/ (last visited Sept. 27, 2015) [http://perma.cc/J2EM-VTM7].

Similarly, because most Article § 10 cases involve sexual assault, rape, and/or child abuse, there is the possibility that a victim sought professional help.[418] In such cases, statements regarding uncharged crimes and/or dropped charges discussed during treatment should be admitted under the hearsay exception for statements made for medical treatment or diagnosis.[419] If the court wishes to evaluate the statements' reliability, they have the option of subpoenaing the treating physician and sparing a victim of sexual assault the hardship of testifying in open court.[420]

Lastly, the court should consider interpreting the hearsay exception for when a party causes the declarant's unavailability more broadly in the Article § 10 setting.[421] Various criminal courts have held that, when a victim feels pressure not to testify in front of his or her abuser, hearsay evidence may be admitted under this exception.[422] For example, in *People v. Byrd*, the court held that a victim's out-of-court statements were permissible under the hearsay exception for when a party causes the declarant's unavailability because the victim suffered from battered person syndrome resulting from years of physical and emotional abuse.[423] Further, in *People v. Jernigan*, the court held that a victim's out-of-court statements were permissible under the same exception because the victim would feel pressure not to testify as a result of being in a prior abusive relationship.[424]

It can be plausibly argued that a victim of sexual assault would feel tremendous pressure not to testify in front of his or her abuser.[425] Because most civil commitment proceedings take place decades after the abuse, requiring a victim to testify may bring back memories that the victim has done his or her best to put out of his or her mind.[426] Such revictimization may be too much to bear for a victim of sexual assault and can easily be attributed to the abuser's actions.[427]

B. Implementation of Video Technology

If New York State continues to require live confrontation to substantiate hearsay evidence regarding uncharged crimes and/or dropped charges, the court should consider utilizing video technology to reduce the detrimental effects of live confrontation on victims of sexual assault.[428] As held constitutional by *Maryland v. Craig*, courts are permitted to implement alternative procedures if the state can adequately show that such procedures would protect a child from the trauma of testifying in open court.[429] There

418. *See supra* Part I.B.3.c.
419. *See supra* Part I.B.3.c.
420. *See supra* Part I.B.3.c.
421. *See supra* Part I.B.3.d.
422. *See supra* Part I.B.3.d.
423. People v. Byrd, 855 N.Y.S.2d 505, 507, 510 (App. Div. 2008).
424. People v. Jernigan, 838 N.Y.S.2d 81, 82–83 (App. Div. 2007).
425. *See id.*
426. *See supra* Part III.B.
427. *See supra* Part III.B.
428. *See supra* Parts I.B.1, II.B.1.
429. Maryland v. Craig, 497 U.S. 836, 855 (1990).

is no reason why the same rule should not apply to sex offender civil commitment proceedings, regardless of the victim's age.[430]

Article § 10 proceedings are unique in that they often occur decades after crimes take place and target repeat, chronic sex offenders who prey on child victims.[431] Therefore, although many victims were children at the time of the abuse, they are grown by the time civil commitment proceedings begin and are therefore not afforded the "special procedure[s]" upheld by *Craig*.[432]

By expanding *Craig*'s holding to sex offender civil commitment proceedings, the court would spare victims of sexual assault unnecessary trauma from testifying in court.[433] As explained in Part III.B of this Note, testifying in court can force a victim to relive the abuse by recalling horrific details of rape and/or sexual assault.[434] Testifying in court may also lead to irreparable harm such as depression, anxiety, and uncontrollable fear.[435]

There is nothing in the *Craig* decision that implies it should be limited to children.[436] Further, as Article § 10 decisions are civil, not criminal, there is no constitutional argument that a respondent in a civil commitment proceeding has the right to confront his accuser.[437] The only evidentiary concern in an Article § 10 proceeding would be the admissibility of unreliable hearsay evidence, which, through one-way CCTV, two-way CCTV, or videotaped depositions, could be evaluated by the court.

C. Changes in the Criminal Justice System

Finding a way to introduce hearsay evidence through an exception to the hearsay rule, or permitting victims to testify through video technology are two alternatives aimed to reduce the need for live confrontation in civil commitment proceedings. There are reforms, however, within the criminal justice system, which may one day *eliminate* the need for live confrontation in civil commitment hearings.

One option the legislature should consider is reforming sentencing guidelines for violent sex offenders. Instead of presenting evidence that a sex offender suffers from a mental abnormality at a civil commitment hearing, such evidence could be presented at the criminal trial. Evidence pertaining to mental abnormality and dangerousness could then be considered at the sentencing phase of the trial, thus eliminating the need for civil commitment proceedings entirely.

The most important change that could—and should—be implemented in the criminal justice system pertains to the documentation of accusations of sexual assault. It is vital that the District Attorney's Office takes all

430. *See* Nat'l Crime Victim Law Inst., *supra* note 329, at 1–2.
431. *See* S. 3318, 230th Leg., Reg. Sess., at 61 (N.Y. 2007).
432. *See Craig*, 497 U.S. at 855.
433. *See* Nat'l Crime Victim Law Inst., *supra* note 329, at 1–2.
434. *See supra* Part III.B; *see also* Nat'l Crime Victim Law Inst., *supra* note 329, at 1–2.
435. *See supra* Part III.B.
436. *See supra* Part II.B.1.
437. *See* Crawford v. Washington, 541 U.S. 36, 43 (2004).

accusations of sexual assault seriously, documenting all testimony and evidence in thorough detail. Even if the District Attorney does not believe that a case can move forward because of a lack of corroborating evidence, he or she still should take whatever steps necessary to document the declarant's accusations.

The District Attorney may choose to depose the declarant on video, so that if the accused is one day petitioned for civil commitment, such video testimony can be admitted at trial. The same course of action could be implemented in a case where charges are brought but the accused is acquitted. Although implementing these measures may seem unnecessary at the time, the small effort and cost it would require is well worth the spared suffering down the road.

CONCLUSION

In New York State civil commitment hearings, hearsay evidence regarding uncharged crimes and/or dropped charges is inadmissible in court. In *State v. Floyd Y.*, the New York State Court of Appeals held that hearsay evidence regarding uncharged crimes and/or dropped charges could be found to be reliable if the declarant testifies in open court. The court's suggestion to require live confrontation in these cases subjects victims of sexual assault to unnecessary, irreparable harm. The court may implement various alternatives, such as utilizing the widely recognized exceptions to the general rule against hearsay, utilizing video technology, and promoting significant changes in the criminal justice system, to reduce and eventually eliminate the need for live confrontation. Each of these alternatives would satisfy due process while sparing victims of violent sexual assaults the trauma of testifying in open court.